Upholding the Australian Constitution Volume Twenty-two

Proceedings of the Twenty-second Conference of The Samuel Griffith Society

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Foreword

J. R. Nethercote

For its Twenty-Second Conference The Samuel Griffith Society returned to Western Australia for the fourth occasion in its history. It was, for several reasons, a singularly appropriate location for a gathering devoted to keeping the flame of federalism alight in a nation where, so often, the inclination is to yield to the temptations of centralization and a "national approach." A wide-ranging and stimulating program provided manifold opportunities to ponder (and often lament) the direction of federalism in Australia in the context of both present debates and the historical record.

Bryan Pape, hero of the recent case in the High Court concerning the tax bonus, delivered the third in a distinguished series of addresses in memory of the Society's foundation President, the eminent jurist, Sir Harry Gibbs, eighth Chief Justice of the High Court of Australia. Mr Pape not only provided an original *tour d'horizon* of the principal means – the cards of entry – whereby the Commonwealth has interposed itself into State responsibilities, he also furnished a disturbing alert about the extent to which the federal executive government has succeeded in reducing the role of the Parliament itself in scrutinizing federal payments to the States. Not surprisingly, he concluded by asking who now oversees these Commonwealth interventions, taking inspiration from Sir Harry's motto as a Knight Grand Cross of the Distinguished Order of St Michael and St George: *Tenan Propositi* – "Hold to your principles."

Mr Pape's opening lecture was fittingly complemented by the closing address by the Premier of Western Australia, the Honourable Colin Barnett. Mr Barnett gave grim insights into how the federation had actually been working in 2010 with reference to health, and the proposed enlarged role for the Commonwealth, the mining tax controversy, and distribution of revenues from the Goods and Services Tax. Like other speakers he was not impervious to the advantages of commonality but rightly warned against a presumption in favour of "national" approaches.

A major highlight of the Conference – important on personal as well as intellectual grounds – were addresses by Des Moore and Justice Dyson Heydon recognizing the achievements of the Society's founders, John and Nancy Stone, in the evolution of Australia's federation and society. These addresses contain a wealth of material about two significant, shared Australian lives, especially since the middle of the last century, and the diversity of public matters to which they have contributed. There was an added poignancy in having Perth, their home town, as the location for this notable event.

The Conference itself started with instructive papers on a current topic, responsibility for provision of health services in Australia. Andrew Podger, a former secretary of the Commonwealth Health Department, put the case for a larger Commonwealth role, "based in part on Australia's history, but primarily on external factors including changing demands on the health system, changing expectations, and the need for cost controls which promote efficiency and effectiveness and do not undermine equity or quality."

Dr Dan Norton, a former secretary of the Premier's Department in Tasmania, by contrast, strongly urged an approach based on subsidiarity and competitive federalism. "We must," he told the Conference, "harness the power of competition, innovation and entrepreneurship in dealing with problems requiring government intervention and service delivery . . . If we are going to be biased, we should be biased against centralism – the wind usually blows in that direction, and therefore needs to be consistently fought against."

Lorraine Finlay of Murdoch University delivered a comprehensive paper about property rights. This included the workings of the "just terms" provision of the Constitution (section 51 (xxxi)) and extended to the Wild Rivers legislation in Queensland, impact of native vegetation legislation, allocation of water entitlements, environmental regulation, and acquisition of property for purposes of urban redevelopment and heritage listings. Having established in her introduction that there is a close, indeed, intimate connection between property rights and liberty, she warned that unless the public, politicians and bureaucrats are encouraged to respect and value property rights, "we will continue to see the gradual erosion of property rights regardless of any changes that may be made to the surrounding legal framework."

These themes were followed up in depth by Grant Donaldson and Richard Douglas in their paper about the National Broadband Network and the acquisition of property. After traversing the history of various battles occasioned by the NBN, they wryly conclude: "The confinements upon power adopted by the Australian people in the referenda held during 1898 and 1900 retain their capacity to surprise the executive, the legislature and ourselves. It is not beyond the 26 plain words of s. 51 (xxxi) to do so again."

The former Treasurer of Queensland, Keith De Lacy, now chairman of Macarthur Coal, provided an important critique of the failings of public policy-making as revealed in the 2010 attempt by the Rudd Government to introduce a Resource Super Benefits Tax. He combined doubts about the usefulness of focus groups with questions about the role played by the federal Treasury: "As the architect of the review, Ken Henry became its chief advocate, seriously compromising his and the Treasury's independence. Who was left to provide the independent advice – apart from the enlightened adolescents in ministerial offices?"

Professor J. J. Pincus rather laid down the gauntlet to several fixtures of federalism as practiced in Australia in the course of having another look at proposals for a State income tax. His fantasy, as he described it, was a situation where each government funded its own spending, all its own spending, and nothing but its own spending. Special purpose payments under section 96 of the Constitution were a particular target, but he did not exclude fiscal equalization nor the role, methodologies and calculations of the Commonwealth Grants Commission which, he advocated, "should be abolished or reformed." Whilst acknowledging that it may not be immediately practicable, he advanced as a preferred reform that "any grants to the States and territories [should] be made as equal *per capita* payments."

Justice John Gilmour of the Federal Court explored various implications and consequences of the recent *Kirk* case including its impact on the judicial structure of each State: "*Kirk* establishes that State parliaments cannot strip the supreme courts of the power to review for jurisdictional error." Significantly, His Honour observed: "At its core, the question for the[High] Court in *Kirk* was whether the Federal Constitution requires that there be, in each of the States, judicial control of executive decision-making. . . the answer to the question, given in *Kirk*, is yes."

The vexed and growing question of the activities of quasi-judicial international bodies in relation to courts in Australia formed the subject of the address by Christian Porter, Attorney-General of Western Australia. He offered several illustrations of interventions by international bodies, not only affecting Australia, which essentially substituted a different opinion for one arrived at by proper democratic and legislative process in specific local (State) jurisdictions. He went further with questions about the quality and processes of law characterizing these bodies. He had a particular and well-justified concern about whether so-called "non-binding" decisions are really non-binding. His argument was as compelling as it was simple and straightforward: while Australian legislative outcomes or executive and administrative decisions should be the subject of robust judicial review, "this review should be conducted by Australian courts pursuant to Australian precedent and Australian legal standards."

The Society's President, Sir David Smith, AO, brought the Conference to a close with reflections on what he rightly described as "thoughtful and thought-provoking papers." It was, unhappily, the

last occasion on which he will shoulder this responsibility as, after five years, he has stood down as President. His considerable contribution to the Society, especially in the form of a range of erudite papers, long predates his term as President. Fortunately, he plans to remain an active member of the Society and will undoubtedly continue to enhance discussion and debate at conferences.

It is the Society's good fortune that the new President is the Honourable Ian Callinan, AC, a notable justice of the High Court of Australia from 1998 until his retirement in 2007. In addition to his many accomplishments in the law, His Honour has also among other things made his mark in the arts and literature.

This is the first occasion that I have edited the proceedings of a conference of The Samuel Griffith Society. As in all matters, John Stone, in the 21 volumes published under his stewardship, set exacting editorial and publishing standards which I have struggled to emulate. These 21 volumes, as Justice Heydon remarked in his address, constitute a standing and enduring achievement. John said, in his valedictory foreword, that the Society was founded to promote debate about the Australian Constitution from a federalist (that is, anti-centrist) viewpoint. Without the Society, and its published proceedings, it is doubtful that, in Australia, there would be much debate – informed debate, anyway – from a federal perspective. As with the previous 21 volumes, the papers in this volume illustrate not only the need for the Society but the range, diversity and depth of its contributions.

Introductory Remarks

Julian Leeser

Ladies and gentlemen, welcome to this, the 22nd Conference of The Samuel Griffith Society, the fourth to be held in Western Australia.

We meet seven days after a federal election during which both sides of politics continued their assault on the federation. The view among federal politicians seems to be that there is almost no area of activity into which the Commonwealth's tentacles cannot reach: school education, town planning and crime prevention to name but three.

Despite the High Court's observations in *the Pape case* the expansion of Commonwealth power continues unabated. Bryan Pape, in the Sir Harry Gibbs Memorial Oration, has alerted us to the new development of executive federalism – using intergovernmental agreements to justify new areas of Commonwealth activity. It is a reflection of the high esteem in which Bryan is held that he was asked to follow Justice Dyson Heydon and the Hon Ian Callinan in delivering the Oration. As Ian Callinan said last year, Bryan Pape is a hero to members of this Society.

Last year I remarked that The Samuel Griffith Society is in transition. This conference brings that transition into greater focus. Sadly, in the past twelve months some of our members – Francis Dennis, the Hon Peter Howson and the Hon Peter Connolly – have passed away. Happily, new members are joining the Society. In welcoming the 2010 Mannkal Scholars to our Society, I should also mention that one of last year's Mannkal Scholars, Claire Vinton, has returned this year under her own steam. We hope that this year's Mannkal Scholars and the other people who are attending our conference for the first time will also become members and remain involved in the work of the Society.

On the theme of transition, our President, Sir David Smith, has recently informed the Board that he will be stepping down as the second President of the Society. Sir David is first and foremost a democrat and did not want to declare himself President for life.

Although I was not a member of the Board when he was elected President, I think the Board chose very well in inviting Sir David to become President. If I may say, he has been a worthy successor to Sir Harry Gibbs. He has been a welcoming and approachable President. His Australia Day messages and concluding remarks have been thoughtful and insightful. Through this Society and other activities he has made an extremely important contribution to our understanding of the events leading to the dismissal of the Whitlam Government, the reserve powers of the Crown – which are again the subject of public discussion – the role of Vice-Regal office holders and the republic debate more generally. His scholarship and his first hand insights have added a degree of authenticity which those issues needed. Like others in this room, in different contexts, he has suffered the slings and arrows for doing his duty. That he has neither lost his perspective nor his sense of humour makes him all the more remarkable. On a personal level he has been a great support and sounding board to me in organising the last two conferences and I have been proud to call him a friend for more than a decade. While stepping down as President I am delighted that Sir David will maintain an active involvement in the Society.

As part of our return to Western Australia, this year, a portion of this conference also pays tribute to the public life of John and Nancy Stone. We will hear from Des More and Justice Dyson Heydon about aspects of their contribution. I am too young to remember John's career in the public service or the Parliament but I remember first seeing him on television in the early 1990s on a program called *The Last Shout* hosted by Barrie Cassidy where John would do battle with *la gauche du jour* – usually

Anne Summers, Ros Kelly or Malcolm McGregor. John put his point forcefully, logically and with all the facts at his fingertips. Here was a true example of a lion in debate. John's persuasive skills must have been very good because Malcolm McGregor has recently become a member of this Society.

All of us owe John and Nancy Stone an enormous debt in founding and sustaining this Society with conferences we look forward to, friendships we treasure and intellectual nourishment we devour.

It is important to think back to 1992 when the Society was founded. At that time our system of government was being attacked on three fronts: first by the High Court through its implied rights and native title jurisprudence; secondly by the Keating Government who wanted to engage in rewriting our Constitution; and thirdly by successive Commonwealth governments from both sides which had sought greater central power at the expense of the States. The easy thing to do in such circumstances would have been to do nothing.

In 1770, in his *Thoughts on the Cause of the Present Discontents*, Edmund Burke observed: "When bad men combine, the good must associate; else they will fall one by one, an unpitied sacrifice in a contemptible struggle." This is often paraphrased and misattributed to Burke as: "All that is necessary for evil to triumph is for good men to do nothing." John, Nancy and Sir Harry Gibbs wanted to ensure that the good did associate and form this Society to foster some feeling in the defence of our Constitution. Undoubtedly the quality of our proceedings and the intellectual output of this Society has had an impact on the public debate in this country.

Anyone can stage an event once but to hold now 22 conferences in different cities all over the country for almost two decades is a remarkable achievement. John and Nancy Stone have turned an idea into an institution. For me, and many others here, The Samuel Griffith Society Conferences are always a highlight of the year. I am deeply honoured by the confidence John and Nancy have shown in me by entrusting me to carry on their important work with this Society. On a personal level I have always appreciated their encouragement, support and friendship across a range of endeavours over a long period of time. I am richer for all of our exchanges. As people of genuine merit I know they are embarrassed by the tributes being made this weekend. But I hope that they take it as a token of the affection in which they are held by all members of the Society.

Let me also record, at this time, my thanks to our Western Australian Board member, Bevan Lawrence, and our Secretary, Bob Day and his Personal Assistant, Joy Montgomery, for all they have done to bring about this Conference. Bob in particular has managed to do this while contesting election to the Senate.

Now to our program. While there has been some debate in recent years about a bill of rights there has been too little focus on property rights. Most bill of rights advocates are often opponents of property rights. Today these rights seem to be under attack from both Commonwealth and State governments through environmental, mining and telecommunications legislation issues which will be covered by various speakers.

We are particularly delighted that Justice John Gilmour is addressing our Conference this weekend. While many State and High Court judges have addressed our Society over the years, Justice Gilmour is the first Federal Court Judge to honour our Society in this way. He will speak about the *Kirk case* – one of the High Court's important decisions on Chapter III of the Constitution.

The theme of Federalism appears throughout our program this year. One of the many lost opportunities of the Henry Review was a chance to examine State taxation and in particular the now risible imbalance between the services the States are expected to provide and the revenues they are able to collect. The most important taxation reform Australia could engage in would be to hand significant taxing powers back to the States. Jonathan Pincus will have something to say on this.

The Conference program was framed around the time the National Health and Hospitals Reform Commission reported. It seemed to me that Australia was likely to confront a future referendum on the Commonwealth takeover of health care. In the interests of preparing for such a debate it is worthwhile hearing from two former senior public servants who had thought about these issues,

making the case for and against greater Commonwealth involvement in health. I also wanted to test the broader assumption which seems to underlie this debate about whether the Commonwealth really can deliver services better than the States.

The Conference will conclude with an address by the Premier of Western Australia who will hopefully provide some insights into dealing with the Rudd/Gillard COAG processes and the state of federalism regardless of who eventually forms government in Canberra.

After the success of last year's post-conference tour of Sir John Downer's house by former South Australian Premier John Bannon we are pleased to be offering another tour this year of the Western Australian Constitutional Centre by its chairman, the renowned lawyer Malcolm McCusker, QC. But we have much to get through before this tour.

The Third Sir Harry Gibbs Memorial Oration

Stopping Stimulus Spending, or Is the Sorcerer's Apprentice Controlling the Executive?

Bryan Pape

> *Those who would stay free must stand eternal watch against the excessive concentration of power in government.*[1]

It is both a privilege and an honour to have been invited by the Board of Management to give the third Sir Harry Gibbs Memorial Oration. Lord Denning, the renowned Master of the Rolls, said of Sir Harry Gibbs: "His work as Chief Justice was of the first quality and I would rank him as one of the greatest of your Chief Justices rivalling my good friend Sir Owen Dixon".[2]

When it dawned upon me that Justice Dyson Heydon of the High Court had given the inaugural Oration in 2006, I became quite daunted. It did not abate, but intensified, when I found that the then recently retired Justice of the High Court, the Honourable Ian Callinan, had followed him in 2008. Presumably, the reason for my invitation was that I might be more easily followed.

Until the 1970s the Commonwealth Parliament's only "card of entry," so described by Sir Robert Menzies, into State responsibilities like education was the use of the grants power with conditions attached – the so-called section 96 "tied grants" power.[3] The Whitlam Government went a step further and created a gold card of entry. This relied upon the use of the appropriation section which was misconceived to confer a power of spending – later corrected in the *Tax Bonus case* – to bypass the States to make grants directly to bodies such as regional councils. When that action was unsuccessfully challenged by the State of Victoria in 1975, the High Court handed down its majority decision, four to three, in the then leading, but now misleading, *Australian Assistance Plan case.*[4] It concerned the Parliament's use of a few lines in an Appropriation Act to spend about $6 million in financing 35 regional councils for social development. In separate judgments, both Chief Justice Barwick and Justice Gibbs strongly dissented. Importantly, Gibbs J (as he then was) reminded us that:

> The legislative power that is said to be incidental to the exercise by the Commonwealth of functions of a national government does not enable the Parliament to legislate with respect to anything that it regards as of national interest and concern; the growth of the Commonwealth to nationhood did not have the effect of destroying the distribution of powers carefully effected by the Constitution.[5]

He illustrated this when considering the issue of the Commonwealth's responsibility for managing the economy. His remarks in 1975 were prescient with respect to the 2009 *Tax Bonus case* when he said:

> There is but one economy of the country, not six: it could not be denied that the economy of the nation is of national concern. But no specific power over the economy is given to the Commonwealth. Such control as it exercises on that behalf must be effected by indirection through taxation, including customs and excise, banking including the

> activities of the Reserve Bank and the budget whether it be in surplus or deficit. The national nature of the subject matter, the national economy, cannot bring it as a subject matter within Commonwealth power.[6]

A good illustration of the Commonwealth stimulating the economy was in the aftermath of the 1961 credit squeeze. There, the Menzies Government moved the Parliament to give a 5 per cent rebate of tax to all individual taxpayers from end of March 1962 until 30 June 1964 (see Annexure A). It was delivered by the employer reducing group tax deductions under the Pay As You Earn (PAYE) system. Its effect was an immediate increase in the size of the employee's weekly pay packet and it was sustained for a little over two years.

Constitutionally it was an impeccable plan to stimulate the economy. The contrast with the Rudd Government's tax bonus of $900 is extreme. The latter was upheld by the thin majority of four High Court justices to three and by resort to the combination of the executive and incidental powers in the *Tax Bonus case*.[7] This is the platinum card of entry, which is kept in a drawer and is only to be used in emergencies. The arbiter of when and how this card is to be used is vested in the Executive Government.

I propose to take you on a journey which focuses on four so-called Commonwealth cards of entry. First, the standard s. 96 grants power card; secondly, the appropriation gold card; thirdly, the executive power platinum card; and, fourthly, the new executive federalism oyster card. The latter is named after the London oyster card, which allows you to travel anywhere on the underground tube or bus.

Finally, I turn to suggest a way to discipline the sorcerer's apprentice, that is, the Executive Government, in the way it contrives both for itself and the Parliament to overreach their respective powers.

The standard card of entry

This card works through legislation which relies upon the grants power under s. 96 of the Constitution, under which "the **Parliament** may grant financial assistance to any State on such terms and conditions as the **Parliament** thinks fit'. [emphasis added]

Chief Justice Sir Owen Dixon, in the *Second Uniform Tax case*, said: "It must be borne in mind that the power conferred by s. 96 is confined to granting money to **governments. It is not a power to make laws with respect to a general subject matter**".[8] [emphasis added]

As Dixon CJ noted, the money is given to the State government, that is, the Executive of a State. The making of the grant does not provide an opportunity to make laws with respect to a general subject matter, for example, education. For good measure, too, there is no authority to make coercive or policing laws.

The appropriation gold card of entry

The Commonwealth has for many years abandoned the practice of using the "tied grants" contrivance under s. 96 supposedly to authorize the funding of universities. Instead, under s. 30-1 of the *Higher Education Support Act* 2003 (Cth), universities (as higher education providers) receive grants, through funding agreements to finance their activities. For example, the maximum grants payable under the s. 30-25 funding agreements for 2011 is $4.7 billion. If the Commonwealth has relied on what it misconceived as a spending power under s. 81 of the Constitution, then these payments would be unlawful. As French CJ said: "Substantive power to spend the public moneys of the Commonwealth is not to be found in s. 81 or s. 83, but elsewhere in the Constitution or statutes made under it".[9]

Since the *Tax Bonus case* reasons were published on 7 July 2009, the Commonwealth and the universities have continued to disregard the unanimous reasoning of the High Court in quashing the

improper use of the appropriation section.

A further example among many is provided by the *Regional and Local Community Infrastructure Program (RLCIP)*. It was initially funded in 2008 to $300 million, comprising a local council component of $250 million and $50 million for strategic projects. This last component was later further increased by $500 million to $550 million. No specific legislation, or legislation under the incidental power, was passed with respect to this program. If a s. 81 appropriation is incapable of supporting it, so, too, is the s. 61 executive power and the s. 51(xxxix) incidental power. This leads to the next card of entry.

The executive power platinum card of entry

This card is characterized by the tandem use of the s. 61 executive power and s. 51(xxxix) incidental power. As Gibbs J said in the *Australian Assistance Plan case*:

> According to s. 61 of the Constitution, the executive power of the Commonwealth "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth". These words limit the power of the Executive and, in my opinion, make it clear that **the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth**.[10] [emphasis added]

In 2009, Banjo Paterson's line of *T'was Mulga Bill from Eaglehawk that caught the cycling craze*[11] seems to have infected the Honourable Anthony Albanese, MP, the Minister for Infrastructure, Transport, Regional Development and Local Government. Like "Mulga Bill", Mr Albanese took to the cycling craze and decided to stimulate the economy by making direct grants to local councils to build bicycle paths.

The *AusLink (National Land Transport) Act* 2005 (Cth) was cosmetically renamed as the *Nation Building Program (National Land Transport) Act* 2009 (Cth).[12] The commencement date for ss. 8-91 was 28 July 2005, with the remainder commencing on 6 July 2005. The Act was rebranded to give the misleading appearance of being a new initiative of the Rudd Government by an amending Act commencing on 27 June 2009. Into the renamed Act was inserted the definition of a ***Nation Building Program Roads to Recovery funding period*** to mean the period starting on 1 July 2009 and ending on 30 June 2014. Also inserted into the Act was a new definition of "road" to include "a path for the use of persons riding bicycles".

When the amending Act commenced, the reasons for decision in the *Tax Bonus case* had not been published. So it is likely that the Commonwealth was still relying upon the appropriation section, s. 81, and its misconception that it was a spending power, to authorize its planned expenditure on bicycle paths to run for the 2009-10 financial year. After 7 July 2009 it could no longer rely on s. 81. (Strictly speaking, it could never have relied on s. 81 to support making direct payments to local councils.) Undaunted, the cycling craze began after the need for any further economic stimulus had ceased. For example, on 20 October 2009, Minister Albanese announced that the Tamworth Regional Council was to receive $135,000 to construct a 13.5 km bicycle path ($10,000 per km).

In case you were unaware of this project, it is part of the $40 million National Bike Path Project,[13] (also including 10.138 km for the Town of Kwinana at a cost of $611,659 – an average cost of $60,333 per km). The great disparity in the price per km might lead one to deduce that the Commonwealth was making an inflated grant to the Town of Kwinana – some six times the price per kilometre for Tamworth.

In Goethe's poem, *The Sorcerer's Apprentice*, the old sorcerer departs his workshop leaving his apprentice with chores to do. Tired of fetching water by pail, the apprentice enchants a broom to do the work for him – using magic he is not fully trained in. The floor is soon awash with water and the

apprentice realizes that he cannot stop the broom because he does not know how.

Not knowing how to control the enchanted broom, the apprentice splits it in two with an axe, but each of the pieces becomes a new broom and takes up a pail and continues fetching water, now at twice the speed. When all seems lost, the old sorcerer returns, quickly breaks the spell and saves the day. The poem ends with the old sorcerer's statement that powerful spirits should only be called by the master himself.[14]

Having called in aid such a far reaching power, when and how is it to end? Is it merely to be exercised at the whim of Executive Government? Or does it find itself in a similar position to the sorcerer's apprentice of not knowing the magic word to stop the flood of money gushing into the economy.[15] The High Court has given Executive Government a magic genie, but no criteria as to how it is to be used, let alone stopped.

By July 2009, when the program was to start, the criteria for stimulating the economy through the use of the executive power and the incidental power simply did not exist. Yet the Commonwealth embarked on a five-year Nation Building Program of Roads to Recovery to 2014. One could be excused for thinking that the Executive's enthusiasm for the economic stimulus package was an example of Justice Heydon's observation of the great maxim of governments seeking to widen their constitutional powers: "Never allow a crisis to go to waste".

The need, if there was any need, for stimulating the economy through government spending, had passed. On 7 October 2009 the Reserve Bank lifted the cash rate (that is, the overnight rate) from 3.0 per cent to 3.25 per cent. Since then, there have been five successive increases culminating on 5 May 2010 in the present 4.5 per cent rate.[16]

The executive federalism oyster card of entry

I turn to the *Executive Federalism Revolution* (EFR) – my words, not the Rudd or Gillard governments' description. Its use is relevant to the $14.7 bn expenditure for the so-called *Building the Education Revolution* (BER) (later increased to $16.2 bn). More particularly, it comprises three elements as shown by the table below.[17]

BER Element	**2009**	**2010**	**2011**	**Total**
	$bn	$bn	$bn	$bn
NSP	0.4	0.9	-	1.3
P21	0.6	6.6	5.2	12.4
SLC	-	1.0	-	1.0
	1.0	8.5	5.2	14.7

NSP	National School Pride
P21	Primary Schools for the 21st century (multi-purpose halls, libraries and classrooms)
SLC	Science and Language Centres for 21st century schools
DEEWR	Department of Education, Employment and Workplace Relations

As can be seen, *Building the Education Revolution* had little to do with stimulating the economy at the time of its introduction, with only $1.0 bn allocated to be spent for 2009.

This program was delivered through the so-called *National Partnership Agreement on the Nation Building and Jobs Plan* agreed to by the Council of Australian Governments (COAG) on 5 February 2009. The origin of this so-called National Partnership Agreement is to be found in the *Intergovernmental Agreement on Federal Financial Relations* between the Commonwealth, the States and the territories. It came into being and operates indefinitely from 1 January 2009.

The BER is and has been delivered under this National Partnership Agreement to State educational authorities and so-called "block grant" authorities, that is, non-government authorities.

> The devolved delivery of the program by Education Authorities has been governed by the establishment of bilateral agreements with state and territory governments and funding agreements with non-government Education Authorities.[18]

Intergovernmental agreements and National Partnership Agreements are political agreements (see Annexure B). They are unenforceable domestic treaties made between the States' executives and the Commonwealth executive. They are not laws of any State, territory or of the Commonwealth[19]

Mason J, as he then was, in *R v. Duncan; Ex parte Australian Iron and Steel Pty Ltd*, said:

> The scope of the executive power is to be ascertained, as I indicated in the AAP Case (1975) 134 CLR, at pp 396-397, from the distribution of the legislative powers effected by the Constitution and the character and status of the Commonwealth as a national government. Of necessity the scope of the power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constitutent elements in the federation. It is beyond question that it extends to entry into governmental agreements between Commonwealth and State on matters of joint interest, including matters which require for their implementation **joint legislative action**, **so long at any rate as the end to be achieved and the means by which it is to be achieved are consistent with and do not contravene the Constitution**. A federal constitution which divides legislative powers between the central legislature and the constitutent legislatures necessarily contemplates that there will be joint co-operative legislative action to deal with matters that lie beyond the powers of any single legislature.[20] [emphasis added]

There, Mason J seems to be contemplating legislative action by the Parliament, for example, under s. 51 (xxxvii) where the State parliaments are able to refer their powers to the Commonwealth Parliament. This was the situation with the enactment of the *Corporations Act* 2001 (Cth) and the *Water Act* 2007 (Cth), (see ss 9, 9A for the Constitutional Basis). In the case of the BER there was no such referral of legislative power.

We have had co-operative federalism and now, through a process of metamorphosis, we have collaborative or executive federalism, which substitutes funding agreements between Commonwealth, State and non-government bodies for s. 96 parliamentary grants.

> Cooperative federalism has been described as marble-cake federalism. Like a marble cake with its two distinct flavours, cooperative federalism was based predominantly on interaction between two layers of government – the national and State governments. Like a marble cake with its four to five swirls where the two flavours are mixed together; cooperative federalism had the national and State governments sharing responsibility in only four or five major policy areas. Lyndon B. Johnson's creative federalism so modified cooperative federalism that the marble-cake metaphor gave way to one based on fruitcake. In a fruitcake, no distinct levels or flavours are distinguishable. The different spices, nuts, fruits and candies are mixed all together. Similarly, fruitcake federalism implies a mixing of governmental functions and responsibilities. Complexity is one of its main traits.[21]

It is instructive to refer to the recent Auditor-General's report on the BER at paras 3.4 and 3.5:

> **3.4** The BER is established under executive authority: it is not specifically legislated. That is, there is no law or regulation setting out which schools are to benefit, by how much and under what conditions. Rather, the fundamental program rules are set by government decisions with greater elaboration prepared by the administering agency, DEEWR, in the form of program guidelines and other supporting material.
>
> **3.5** The Commonwealth Ombudsman recently set out the advantages of this approach to managing a program:
>
> > The main advantage of executive schemes is their flexibility. Because there is no need to wait until legislation is drafted, considered and passed by Parliament, such schemes can be quickly established when the need arises, adjusted easily as circumstances change and closed down when the need for them no longer exists.

According to the Auditor-General, national partnership payments are not treated as grants as provided by r.3A(2)(h)(iv) of the *Financial Management and Accountability Regulations* 1997 (Cth).

> **3.14** However, National Partnership payments (such as payments under BER P21), as payments to a state or territory made for the purposes of the Federal Financial Relations Act 2009, are taken not to be grants for the purposes of the Financial Management and Accountability Act 1997 (FMA Act). Therefore the Commonwealth Grant Guidelines and the requirement to provide the program guidelines to ERC do not apply to the BER program.
>
> **3.15** It would have been prudent, nevertheless, for DEEWR to have consulted Finance and the Treasury on the BER guidelines. This was especially so, given that DEEWR had concerns about the adequacy of program funding from early in the program's inception.[22]

Professor Cheryl Saunders has observed:

> If there is a corresponding head of legislative power, executive power exists on any view, and may be augmented by an incidental executive power, implied to effectuate the purpose of the main grant.[P. Lane, Commentaries on the Australian Constitution, (1986) 258] If there is no parallel legislative power, the second question that arises is whether the agreement represents an exercise of the nationhood power, "deduced from the existence and character of the Commonwealth as a national government", conferring a "capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which **cannot be otherwise carried out for the benefit of the nation**" [AAP case at 397-398] . . . . The case for the nationhood power as a source of support for intergovernmental agreements is strengthened by the consensual nature of such agreements.[23] [emphasis added]

Is the BER National Partnership Agreement one which is within the power of the executive of the Commonwealth to make? Because there is no legislative power under the Constitution to make laws with respect to education, the short answer would seem to be "No". As Gibbs J said in the *Australian Assistance Plan case*, "the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth". There are forty paragraphs covering the powers of the legislature in s. 51 of the Constitution and none deals with the topic of education. It is a topic which lies within the exclusive jurisdiction of the States. What Mason J said in *R v. Duncan; Ex parte*

Australian Iron and Steel Pty Ltd does not require joint legislative action. Nor does there seem to be any warrant for the Commonwealth and State executives to enter into consensual agreements for the Commonwealth to assume obligations which are outside its legislative competence on the grounds that it supposedly falls within the nationhood power. That is an attempt to do something indirectly which is unable to be done directly.

On the other hand, if it be assumed for present purposes that the BER is a valid executive agreement, then how is the Commonwealth to draw down funds from the Consolidated Revenue Fund to make lawful payments to satisfy its obligations under the agreement?

Relevantly, s.16 of the *Federal Financial Relations Act* 2009 (Cth) which commenced on 1 April 2009 provides with respect to National partnership payments:

> (1) The Minister may determine that an amount specified in the determination is to be paid to a State specified in the determination for the purpose of making a grant of financial assistance to:
>
> (a) support the delivery by the State of specified outputs or projects; or
> (b) facilitate reforms by the State; or
> (c) reward the State for nationally significant reforms.
>
> (2) If the Minister determines an amount under subsection (1):
>
> (a) that amount must be credited to the COAG Reform Fund; and
> (b) the Minister must ensure that, as soon as practicable after the amount is credited, the COAG Reform Fund is debited for the purposes of making the grant.
>
> (3)-(4) . . . . . .
>
> (5) A determination under subsection (1) is a legislative instrument, but section 42 (disallowance) of the Legislative Instruments Act 2003 does not apply to the determination.

Section 5 of the *COAG Reform Fund Act* 2008 (Cth) establishes and designates the COAG Reform Fund as a special account under s. 21 of the *Financial Management and Accountability Act* 1997 (Cth) (FMA). Relevantly, section 21 (1) provides as follows:

> If another Act establishes a Special Account and identifies the purposes of the Special Account, then the CRF is hereby **appropriated for expenditure for those purposes, up to the balance for the time being of the Special Account**. [emphasis added] [see Annexure C]

This special account is an account within the Consolidated Revenue Fund.[24] The source of its funding is apparently from a maze of special accounts including the Build Australia Fund.

Section 6 of the *COAG Reform Fund Act* 2008 (Cth) provides that the purpose of the fund *is the making of grants of financial assistance to the States and territories*. Importantly, section 7(2) *provides that the terms and conditions on which that financial assistance is granted are to be set out in a written agreement between the Commonwealth and the State or territory*.

The question here is whether ss. 81 and 83 of the Constitution are satisfied ? Relevantly they provide as follows:

> 81. All revenues or moneys raised or received by the Executive Government of the

> Commonwealth shall form one Consolidated Revenue Fund to be appropriated **for the purposes of the Commonwealth** in the manner and subject to the charges and liabilities imposed by this Constitution. [emphasis added]
>
> 83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

An amount credited to the COAG Reform Fund for the purpose of National partnership payments is done by executive determination under s. 16 of the *Federal Financial Relations Act* 2009 (Cth). It is a legislative instrument, but is not a disallowable one. In doing so, Parliament has abdicated its legislative responsibilities to the Executive Government. If the amount so credited is not "for the purposes of the Commonwealth" in accordance with s. 81 of the Constitution – and education is not such a purpose – or not "drawn from the Treasury except under appropriation by law" in accordance with s. 83 of the Constitution, then the crediting of the COAG Reform Fund with the amount would seem to be unlawful. As, indeed, would be the debiting of the COAG Reform Account for an appropriation to cover a payment with respect to Building the Education Revolution.

Policing the bright line: the problem of standing

An inherent difficulty in all federal unions is the policing of the boundaries between the functions assigned to the central government and those assigned to the sub-national governments, namely States, provinces, etc. There are two questions requiring to be answered. First, who is to adjudicate on the demarcation between federal and State responsibilities; secondly, who has the right to initiate demarcation proceedings? In Australia, the answer to the first question is to be found in s. 76 (i) of the Constitution and s. 30(a) of the *Judiciary Act* 1903 (Cth).

Sir John Downer saw *the* "High Court as the only guarantee that the Constitution could not be arbitrarily flouted by any government, however popular".[25] Such a guarantee is an arid one if there is no right to bring proceedings to have the claimed guarantee enforced. The responsibility for ensuring that there is compliance with the Constitution is vested with the Attorney-General. But, as Gibbs CJ shrewdly observed:

> (I)t is somewhat visionary to suppose that the citizens of the State could confidently rely upon the Commonwealth to protect them against unconstitutional action for which the Commonwealth itself was responsible.[26]

This difficulty was recognized as early as 1910, when Part XII *Reference of Constitutional Questions; ss 88-93* was inserted into the *Judiciary Act* 1903 (Cth). It allowed the High Court to give advisory opinions to the Governor-General. Relevantly, s. 88 provided that:

> Whenever the Governor-General refers to the High Court for hearing and determination any question of law as to the validity of any Act or enactment of the Parliament, the High Court shall have jurisdiction to hear and determine the matter.[27]

Because such opinions did not constitute a matter which affected legal rights, the High Court struck that provision down by a five to one majority on 16 May 1921.[28]

It is useful to trace the history of the reasons for the introduction of the now repealed Part XII. A century ago, on 22 November 1910, in Melbourne, the then Acting Prime Minister and Attorney-General, William Morris Hughes, a centralist, in moving the second reading of a Bill to insert Part XII, said *inter alia*:[29]

> I admit at once that it is inevitable that there must be such a body to determine the respective limitations of the States and the Commonwealth, and **that it will never do for us to contemplate for a moment a condition of things in which the States and the Commonwealth may make what laws they please irrespective of the extent to which either may trespass upon the other's sphere**. [emphasis added][A fuller extract is set out at Annexure D]

Frankly, advisory opinions are not the answer. At first blush it is an attractive solution, but it is defective because there is no dispute. It is to ask the High Court to confirm what the legislature has done. It can only decide on the validity of a law from the evidence adduced before it by the Commonwealth. Here there would not even be a special case based on agreed facts. It smacks of the High Court condoning or rubber stamping the wishes of the legislature.

An alternative solution is to provide for the States' attorneys-general to be subject to a show cause action (an order *nisi*) as to why they should not bring a relator action in the High Court to impugn legislation if requested by a citizen or group of citizens. No longer would the States have the capacity to condone the Commonwealth Parliament's regular violation of the Constitution. Such a right would need to be granted to the citizen by the Constitution. An amendment like this would plug the gap so as to stop the Constitution from "being arbitrarily flouted by any government, however popular", to use the words of Sir John Downer.

Failing such an amendment being passed at a referendum, one can only hope that a member of the House of Representatives or, indeed, a Senator, might assume the role of a constitutional censor. An overdue task would be to carry out a constitutional audit of the statute book. From there the Parliament should be moved to repeal Acts which had exceeded its power. A defeated bill would then be the trigger to bring proceedings in the High Court to quash the impugned Acts.

Conclusion

The present dysfunctional state of the federal union is characterized by the way in which the Commonwealth has usurped many of the functions of State governments. Co-operative federalism has given way to collaborative federalism and now to executive federalism. All this has been accomplished by the Commonwealth's cards of entry – standard, gold, platinum and the oyster card.

The COAG Reform Act 2008 (Cth), the *Federal Financial Relations Act* 2009 (Cth) together with the *Intergovernmental Agreement on Federal Financial Relations* and the suite of *National Partnership Agreements* (see Annexure B) ushered in a new era of Executive Federalism. They are properly characterized as domestic treaties, most of which would be incapable of being ratified by the Parliament because they involve an overreaching of power. *They are not laws, but political agreements.* Yet the Parliament has seen fit to appropriate monies to the COAG Reform Fund to pay monies to the States in accordance with an invalid intergovernmental agreement or National Partnership Agreement. Here, Parliament has effectively abdicated its legislative responsibility to the Executive, allowing it to make agreements on topics for which the Parliament has no power to make laws. These executive agreements are tantamount to a scheme or contrivance resulting in a disregard of the Constitution. The end result is an impermissible amendment or abdication by Parliament with respect to s. 96 by substituting the word "Executive" for "Parliament" for the third last word of the section, so that it would read: "the Parliament may grant financial assistance to any State on such terms and conditions as the **Executive** (sic)(Parliament) thinks fit".

Yet again our watchdog, the Auditor-General, the so-called ally of the people, has refused to bark. We may ask: who guards the guards?

The Canberra political playpen must focus on its constitutional responsibilities and stop usurping the functions of the States. The policing of these boundaries could be achieved by altering the Constitution to require the Attorney-General of a State to bring a relator action at the request of a

citizen, unless there are good grounds to the contrary.

When Sir Harry Gibbs hung his heraldic banner as a Knight Grand Cross of the Order of St Michael and St George in St Paul's Cathedral in London, his motto of *Tenan Propositi*[30] was unfurled for all to see: "Hold to your principles". His life was spent in doing so. We, too, must live up to his example.

Annexure A
Income Tax Rebates and Surcharges

Year of Income	Rebate	Surcharge
30 Jun.	%	%
1962	5	
1963	5	
1964	5	
1965	-	
1966		2.5
1967		2.5
1968		2.5
1969		2.5
1970		2.5
1971		2.5
1972		5.0

Statutes

(i) *Income Tax and Social Services Contribution (Rebate) Act* 1962 (Cth) (Act No 14 of 1962), S 3 (5 per cent Rebate).
(ii) *Income Tax and Social Services Contribution Act* 1962 (Cth) (Act No 63 of 1962), S 8 (5 per cent Rebate).
(iii) *Income Tax and Social Services Contribution Act* 1963 (Cth) (Act No 70 of 1963), S 8 (5 per cent Rebate).
(iv) *Income Tax Act* 1965 (Cth) (Act No 104 of 1965), S 9 (2.5 per cent Surcharge).
(v) *Income Tax Act* 1966 (Cth) (Act No 51 of 1966), S 9 (2.5 per cent Surcharge).
(vi) *Income Tax Act* 1967 (Cth) (Act No 77 of 1967), S 9 (2.5 per cent Surcharge)
(vii) *Income Tax Act* 1968 (Cth) (Act No 72 of 1968), S 9 (2.5 per cent Surcharge).
(viii) *Income Tax Act* 1969 (Cth) (Act No 73 of 1969), S 8 (2.5 per cent Surcharge).
(ix) *Income Tax Act* 1970 (Cth) (Act No 80 of 1970), S 8 (2.5 per cent Surcharge).
(x) *Income Tax Act* 1971 (Cth) (Act No 92 of 1971), S 9 (5 per cent Surcharge).

Annexure B
National Health and Hospitals Network Agreement

On 20 April 2010, COAG agreed, with the exception of Western Australia, to sign the following National Health and Hospitals Network Agreement.

National Health and Hospitals Network Agreement
National Partnership Agreement
Nation Building and Jobs National Partnership Agreement

Current Intergovernmental Agreements
Intergovernmental Agreement on Federal Financial Relations

Personal Property Securities
Management of Security Risks Associated with Chemicals
Food Regulation Agreement
Food Regulation Agreement - Annex A
Food Regulation Agreement - Annex B
Gene Technology Agreement
Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety
Murray-Darling Basin Intergovernmental Agreement
Agreement on Murray-Darling Basin Reform – Referral
Intergovernmental Agreement on Surface Transport Security
Research Involving Human Embryos and Prohibition of Human Cloning Agreement
Memorandum of Understanding National Response to a Foot and Mouth Disease (FMD) Outbreak
Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations
Natural Gas Pipelines
Tourism Collaboration Intergovernmental Arrangement
Corporations Agreement 2002 as Amended
National Action Plan for Salinity and Water Quality – 2000

Annexure C

Financial Management and Accountability Act 1997 (Cth)

Division 1A – Special Accounts
20 Establishment of Special Accounts by Finance Minister

(1) The Finance Minister may make a written determination that does all of the following:
  (a) establishes a Special Account;
  (b) allows or requires amounts to be credited to the Special Account;
  (c) specifies the purposes for which amounts are allowed or required to be debited from the Special Account.

(1A) A determination under subsection (1) may specify that an amount may or must be debited from a Special Account established under subsection (1) otherwise than in relation to the making of a real or notional payment.

(2) The Finance Minister may make a determination that revokes or varies a determination made under subsection (1).

(3) The Finance Minister may make a determination that abolishes a Special Account established under subsection (1).

(4) The CRF is hereby appropriated for expenditure for the purposes of a Special Account established under subsection (1), up to the balance for the time being of the Special Account.

(4A) If the Finance Minister makes a determination that allows an amount standing to the credit of a Special Account to be expended in making payments for a particular purpose, then, unless the contrary intention appears, the amount may also be applied in making notional payments for that purpose.

(5) Whenever an amount is debited against the appropriation in subsection (4), the amount is taken to be also debited from the Special Account.

[Author's note: CRF means Consolidated Revenue Fund.]

21 Special Accounts established by other Acts

(1) If another Act establishes a Special Account and identifies the purposes of the Special Account, then the CRF is hereby appropriated for expenditure for those purposes, up to the balance for the time being of the Special Account.
Note 1: An Act that establishes a Special Account will identify the amounts that are to be credited to the Special Account.
Note 2: An Appropriation Act provides for amounts to be credited to a Special Account if any of the purposes of the Account is a purpose that is covered by an item in the Appropriation Act.
Note 3: See section 32A for when the crediting or debiting of an amount takes effect.

(1A) If an Act allows an amount standing to the credit of a Special Account to be applied, debited, paid or otherwise used for a particular purpose, then, unless the contrary intention appears, the amount may also be applied, paid or otherwise used in making a notional payment for that purpose.

(2) Whenever an amount is debited against the appropriation in subsection (1), the amount is taken to be also debited from the Special Account.

22 Disallowance of determinations relating to Special Accounts

(1) This section applies to a determination made by the Finance Minister under subsection 20(1) or (2).

(2) The Finance Minister must cause a copy of the determination to be tabled in each House of the Parliament.

(3) Either House may, following a motion upon notice, pass a resolution disallowing the determination. To be effective, the resolution must be passed within 5 sitting days of the House after the copy of the determination was tabled in the House.

(4) If neither House passes such a resolution, the determination takes effect on the day immediately after the last day upon which such a resolution could have been passed.

Annexure D

Acting Prime Minister and Attorney-General, The Hon. William Morris Hughes, MP, in moving the second reading of a Bill to insert Part XII into the *Judiciary Act* 1903 (Cth) said *inter alia*:

> I know of no measure which has received the attention of the Parliament which is more important than this. It would deserve special attention under any circumstances, and in any country, but particularly does it call for notice in a country under a form of dual government. Ten years have now elapsed since we adopted what is known as a federal form of government, and we have already found out many of its defects as other countries have done. One of these is that it sets up to an extent a domination of the law which even we, the most law abiding people in the world, find most repugnant to our ideas. I speak not in criticism of the rule of the law as generally exercised, but of its dominance in a new sphere which hitherto, under our unified form of government, has been reserved to and occupied by the legislature. Under a Federal form of government this has been regarded as inevitable. Under Federation, the Judiciary occupies as it were,

a position of lofty and **superior censorship** of our legislation. And, of course, obviously it must also exercise those functions which belong properly to the highest judicial Court in the country. It is on matters of law – and to this no possible exception can be taken – the last Court of Appeal. But in another direction it exercises functions of quite a different nature. Although **nominally inferior** to this Legislature, in reality it has shown over and over again, not merely in this country, but more particularly in the United States of America, that it is above and superior to, not only that Parliament, **but what is yet more important, the constitutionally expressed will of the people. I admit at once that it is inevitable that there must be such a body to determine the respective limitations of the States and the Commonwealth, and that it will never do for us to contemplate for a moment a condition of things in which the States and the Commonwealth may make what laws they please irrespective of the extent to which either may trespass upon the other's sphere.** We must have clearly a Court clothed with sufficient authority, and charged with the exercise of these grave and responsible duties. But it by no means follows that we must "endure" – and I use that word advisedly – a condition of things such as has been endured for over a century in the United States of America, and is in existence here today.

Consider how absurd and unnecessary is the position that has arisen whereby a Court created principally – and I speak now not of its functions as a Court of Appeal for private litigants – to determine the constitutional authority of State or Federal Statutes is unable to move until some private individual who considers he has suffered some injustice or a State authority which is interested, brings an action under which the validity of a State [sic Statute] is incidentally determined. As a fact, the Court never directly determines the validity of any Statute; it merely deals with it in connexion with the facts of the case brought before it. . . .(T)he Court especially created to determine the validity of Commonwealth and State laws, does in fact never directly decide the constitutionality of any such laws. This is not a proper and sensible procedure for a great and growing nation like ours to continue, and it is for the purpose of the measure to substitute for this cumbrous, antiquated method of determining the validity of any Statutes one which on the face of it, will more speedily and effectively inform us as to the constitutionality of a measure, enabling the Court to give a calm, dispassionate, and impartial decision upon this one point without the complication of personal relations and personal wrongs . . . . .The Attorney-General will be able to ask the Court the plain question, "Is this measure one which it is within the power of the Parliament to pass?" and we shall get from the Court a straightforward answer. [emphasis added]

Endnotes

1. President Dwight D. Eisenhower, (1953-1961), Address to Conference of Governors, Joint-Federal State Action Committee Progress Report, No. 1, US Government Printing Office, Washington, 1957, 17-22.
2. Joan Priest, Sir Harry Gibbs – Without Fear or Favour, 1995.
3. Sir Robert Menzies, The Measure of the Years, 1970, 85.
4. Victoria v Commonwealth and Hayden (1975) 134 CLR 338.

5. Ibid., at 378.
6. Ibid., at 362.
7. Pape v Commissioner of Taxation & Anor (2009) 238 CLR 1; (2009) 83 ALJR 765; (2009) 257 ALR 1.
8. (1957) 99 CLR 575 at 610.
9. Pape v Commissioner of Taxation & Anor (2009) 238 CLR 1; (2009) 83 ALJR 765; (2009) 257 ALR 1 at para [111].
10. Victoria v Commonwealth and Hayden (1975) 134 CLR 338 at 378-9.
11. A. B. Paterson, "Mulga Bill's Bicycle", in the Collected Verse of A.B. Paterson, 1923, 147-150.
12. Nation Building Program (National Land Transport) Amendment Act 2009 (Act No 56 of 2009), assented 26 June 2009; commenced 27 June 2009.
13. National Bike Path Projects <http://infrastructure .gov.au/regional/files/Bikepaths_5Feb10.pdf>accessed 22/8/2010. See also an example of the Funding Agreement between the Council and the Commonwealth at: <http://infrastructure.gov.au/regional/files/Jobs_ Fund_Short_Form_FA_19Nov09.pdf> accessed 22/8/2010.
14. http://en.wikipedia.org/wiki/The_Sorcerer's_Apprentice accessed 18/6/2010.
15. Goethe, 'The Sorcerer's Apprentice', Der Zauberlehrling, 1797, in David Luke (ed), Goethe, Penguin Books, 173-177.
16. In a press release issued on 7 October 2009, the Governor of the Reserve Bank said:

    > The global economy is resuming growth. With economic policy settings likely to remain expansionary for some time, the recovery will likely continue during 2010 and forecasts are being revised higher. The expansion is generally expected to be modest in the major countries, due to the continuing legacy of the financial crisis. Prospects for Australia's Asian trading partners appear to be noticeably better. Growth in China has been very strong, which is having a significant impact on other economies in the region and on commodity markets. For Australia's trading partner group, growth in 2010 is likely to be close to trend.
    >
    > Sentiment in global financial markets has continued to improve. Nonetheless, the state of balance sheets in some major countries remains a potential constraint on their expansion.
    >
    > Economic conditions in Australia have been stronger than expected and measures of confidence have recovered.

17. Brad Orgill (Chairman), Building the Education Revolution Implementation Taskforce Interim Report , August 2010, 47. <http://www.deewr.gov.au/Department /Documents/BERIT_Interim_Report_06082010.pdf> accessed 22/8/2010.
18. The Auditor-General Audit Report No 33, 2009-10 Performance Audit Building the Education Revolution – Primary Schools for the 21st Century, 13. [There were 14 Block Grant Authorities (BGAs), two per State, one for Catholic Schools and one for independent schools . There was one BGA for each territory.] See also Commonwealth Ombudsman, 2009, Executive Schemes, Canberra, 3, available from: http://www.ombudsman.gov.au/files/investigation_2009_12.pdf accessed15/8/2010.

19. See South Australia v Commonwealth (1962) 108 CLR 130 per McTiernan J at 149, per Taylor J at 149 and Owen J at 157. See also P.J. Magennis Pty. Ltd v Commonwealth (1949) 80 CLR 382 per Dixon J at 409. Anne Twomey, The Constitution of New South Wales, Federation Press, 2004, 845-6, 2004, at 845-6.

20. (1983) 158 CLR 535 at 560.

21. Garry K. Ottosen, Making American Government Work – A Proposal to Reinvigorate Federalism, University Press of America, 1992, at 28.

22. See note 17.

23. Cheryl Saunders, "Intergovernmental Agreements and the Executive Power", 16 Public Law Review, 2005, 294.

24. As at 1 July 2010, there were 58 Special Accounts established under ss 21 and 166 Special Accounts established under s. 20 of the FMA. <http://www.finance.gov.au/financial-framework/financial-management-policy-guidance/docs/Chart-of-Special-Accounts.pdf > accessed 15/8/2010. <http://www.finance.gov.au/publications /fmg-series/docs/Special-Accounts-Guidelines-Final.pdf> accessed 24/8/2010. See also Charles Lawson, "Special Accounts Under the Constitution: Amounts Appropriated for Designated Purposes", 2006, 29(2) UNSWLawJl, at 114.

25. The Hon J. C. Bannon, Supreme Federalist, The Political Life of Sir John Downer, Wakefield Press, 2009, 188.

26. Victoria v. Commonwealth (1975) 134 CLR 338 at 383.

27. S. 88 Judiciary Act 1903 (Cth). Part XII repealed by Act No 45 of 1934 by s 2(3) 4th Schedule.

28. Re Judiciary Act 1903-1920 & In re Navigation Act (1921) 29 CLR 257.

29. Commonwealth of Australia Parliamentary Debates, Vol LIX (1910 1st Session of the 4th Parliament), 6489-6490. See other contributions to 6516 by Mr Deakin; Sir John Quick (particularly at 6511-6514 on whether the Parliament had power to pass such a measure).

30. State Memorial Order of Service for the Rt Hon. Sir Harry Gibbs, GCMG, AC, KBE, St Stephen's Uniting Church, Sydney, 11 July 2005.

Chapter One

The Case for Increased Commonwealth Involvement in Health

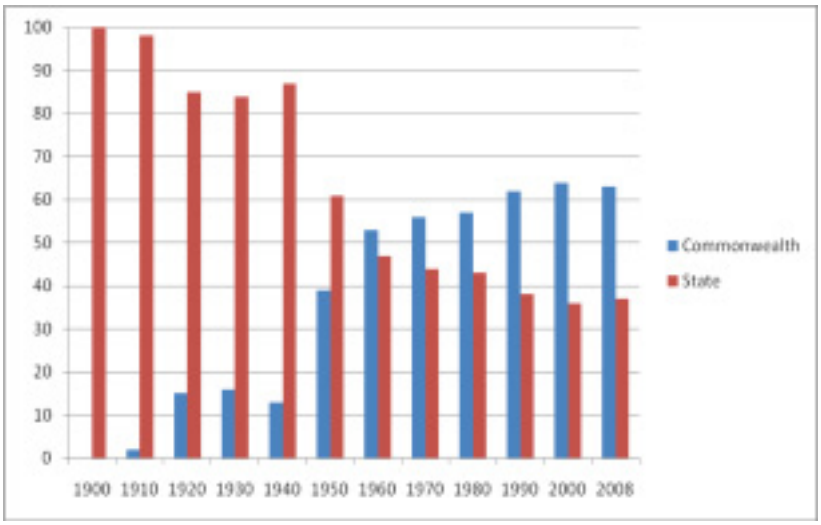
Andrew Podger

The case for increased Commonwealth involvement in health is not based on the poor performance of the States and an assumption of better performance by the national government. It is based in part on Australia's history, but primarily on external factors including changing demands on the health system, changing expectations, and the need for cost controls which promote efficiency and effectiveness and do not undermine equity or quality. Each of these factors can only be addressed successfully by having a single government funder and purchaser of health and aged care services. For Australia, that is only possible if the Commonwealth is given this role.

A brief history

The Commonwealth has steadily increased its share of government funding of health since federation, and has in fact been the dominant government funder since the 1950s.

Figure 1: Shares of Government Spending on Health[1]



From a very limited role focussed on human quarantine, the Commonwealth role expanded[2] following the First World War, then again following the Second World War, and steadily thereafter. Medibank and Medicare in the 1970s and 1980s continued trends already firmly in place.

The initial jump after the First World War was in response to two factors: the needs of our returning soldiers, many of whom were injured or sick, and the impact of the influenza pandemic which demonstrated the need for national action beyond human quarantine to address communicable diseases. The second factor led to establishment of the Commonwealth Department of Health in 1921 with the encouragement and financial assistance of the Rockefeller Foundation.

The next major expansion came after the Second World War following deliberations in the Parliament during the war about the financing of the war effort and the case for offering the Australian community, who were being asked to pay so much, better social security once the war was over.

Health insurance was part of a broader menu of social benefits proposed, including unemployment and sickness benefits and housing support. Not all were enacted and implemented, and the health insurance measures in particular required a change to the Constitution as well as lengthy and fractious debate with the medical profession. Nonetheless, by the end of the 1940s, Australia had a Pharmaceutical Benefits Scheme (PBS) and a *Hospital Benefits Act* 1945 (Cth), the latter directing money via the States. The Commonwealth Rehabilitation Service was also established at this time.

A compromise was reached with the medical profession in the Page Plan under Menzies which introduced a Pensioner Medical Service, with the rest of the population utilising private health insurance with Commonwealth subsidies and regulation. The steady expansion under Menzies of these programs, along with the PBS, took Commonwealth health funding above that of the States. The Coalition Government also introduced the *Aged Persons Homes Act* 1954 (Cth), and later the *Aged Persons Hostels Act* 1972 (Cth), beginning the process of Commonwealth domination of the aged care area.

Medibank in 1975, reintroduced as Medicare in 1984, added further to the Commonwealth's share of health funding but on a base which by then was well over 50 per cent. It has since remained at just under two-thirds of total government spending on health.

A selective summary of major Commonwealth developments in health since Federation is set out in Table 1.

Table 1: Major Commonwealth Initiatives Since Federation

Decade	*Major Commonwealth Initiatives*
1900s	• Federal Quarantine Service
1910s	• Repatriation Commission • Commonwealth Serum Laboratories
1920s	• Commonwealth Department of Health
1930s	• National Health and Medical Research Council
1940s	• Pharmaceutical Benefits Scheme • Hospital Benefits Act • Commonwealth Rehabilitation Service
1950s	• Page Plan (Pensioner Medical Service (PMS), private health insurance subsidies and regulation, school milk program) • Aged Persons Homes Act
1960s	• Expansion of Pharmaceutical Benefits Scheme (PBS), PMS, residential aged care
1970s	• School Dental Scheme • Medibank (Medical Benefits Scheme, free public hospitals, community health services) • Medibank Marks 2 and 3 (means tests, PHI subsidies)
1980s	• Medicare (similar to Medicare Mark 1) • Therapeutic Goods Administration • Better Health Commission • Australian Institute of Health

1990s	• General Practice Strategy (GP Divisions etc) • National Food Authority • Office of Aboriginal and Torres Strait Islander Health • Private health insurance subsidies, life-time community rating • Community aged care expansion, Aged Care Standards and Accreditation Agency • Australian Council for Quality and Safety
2000s	• Expansion of General Practice Strategy, community aged care • Australian Radiation Protection and Nuclear Safety Authority; Gene Technology Regulator • National E-Health Transition Authority • COAG agenda including national regulation of health workforce

Recurring Debates

Apart from the level of funding, there have been a number of recurring debates about the nature of the Commonwealth's role.

The idea of national insurance, aimed to protect Australians from the adverse financial impact of various life events, has attracted significant political support on a number of occasions. National health insurance, along with national superannuation, was debated long and hard in the 1930s and 1940s, and again in the 1970s (along with national compensation) and 1980s. This debate encompassed issues such as whether governments should simply focus on protecting people from poverty, such as through means-tested pensions and benefits financed from general revenue, or whether they should assist people to maintain their living standards in retirement or sickness or unemployment with earnings-related benefits financed through compulsory insurance contributions.

Broadly, Australia's preference for focussing government action on poverty alleviation financed from general revenue has prevailed, though in health a preference towards universal coverage can be detected well before the introduction of Medibank and Medicare with the steady expansion of the earlier schemes. Whichever approach has been favoured, there has long been strong support for national rather than State-based financial protection.

A second recurring debate has been whether Commonwealth involvement in health should be limited to the financing of health insurance, or include the provision of health services. As part of the Commonwealth's repatriation program, it became involved in direct provision of hospital and medical services for veterans. In the 1920s and 1930s the first Director-General of Health, John Howard Lidgett Cumpston, wanted the fledgling Medical Service (established to support the military and the public service, and immigration activity) to become a national health service delivery organisation. He was thwarted by the Treasury which agreed there was a case for insurance, but not for Commonwealth involvement in providing health services. Whitlam also had dreams of the Commonwealth taking over hospitals and running community health services. Sid Sax, head of the Hospitals and Health Services Commission from 1972 to 1978, talked him out of most of this ambition, suggesting, instead, the Commonwealth-State Hospitals Agreement (nowadays, the Australian HealthCare Agreements), with increased Commonwealth funding conditional on free public patient hospital care. The Commonwealth's direct involvement in community health under Whitlam was limited and short-lived.

The Commonwealth's direct involvement in hospitals was substantially wound back in the 1990s in line with New Public Management reforms. Repatriation hospitals were privatised or handed back to the States, and the Department of Veterans' Affairs became the purchaser rather than the provider of services for veterans. Nonetheless, for both veterans and the general public, the Commonwealth's insurance role became more hands-on during the 1990s and 2000s with more sophisticated purchasing rather than simply reimbursing costs, and the establishment of structures

and processes aimed at improving the quality and effectiveness of services. While not involving direct service delivery, initiatives such as establishment of GP divisions and introduction of payments to GPs for computers and nurses and allied health along with rewards for high levels of immunisation and cancer screening, etc, all increased Commonwealth influence in delivery of health services. Similarly, the last 25 years have seen a wide range of Commonwealth initiatives affecting the delivery of services, both through direct funding of service providers such as Aboriginal Medical Services and through conditional grants to the States.

A third recurring issue has been the role of private health insurance. This debate mirrors, to a large extent, the debate about national insurance, with those advocating the latter giving lower priority to the role of private health insurance. Sir Earle Page, Minister for Health from 1949 to 1955, limited the insurance role of the government itself to medical benefits in respect of pensioners, and pharmaceutical benefits, encouraging most Australians to take out private health insurance which was then subject to community rating regulation; Medibank/Medicare made Private Health Insurance far less important. In the 1990s, the steady fall in Private Health Insurance coverage, exacerbated by community rating regulation which had not been removed when Medicare was introduced, was adding to public hospital costs. Both sides of politics, having agreed to support universal Medicare, now looked for options for a complementary role for Private Health Insurance that might be sustained. Commonwealth subsidies were introduced in recognition of the savings to Medicare from reduced public patient admissions, and a new form of community rating was introduced taking more account of the different costs of people at different ages. While the respective roles of Medicare and Private Health Insurance remain matters of political controversy, along with the level and design of any subsidy, no serious question has been raised for more than 50 years about the Commonwealth having responsibility for regulating the Private Health Insurance industry and providing any support.

A final area of debate has been about regulation of the providers of health services. Until recently, this has remained largely with the States. During the last 20 years there has been a significant increase in Commonwealth involvement. Some Commonwealth involvement in residential aged care has been exercised by the conditions for financial support but, even in this area, a major extension of the Commonwealth role took place in the late 1990s with the establishment of the Aged Care Standards and Accreditation Agency. While the States retain the legal authority for accrediting hospitals, there has been a strong shift towards a national approach. Health workforce regulation has become increasingly national also, with more recent in-principle agreements for the Commonwealth taking responsibility.

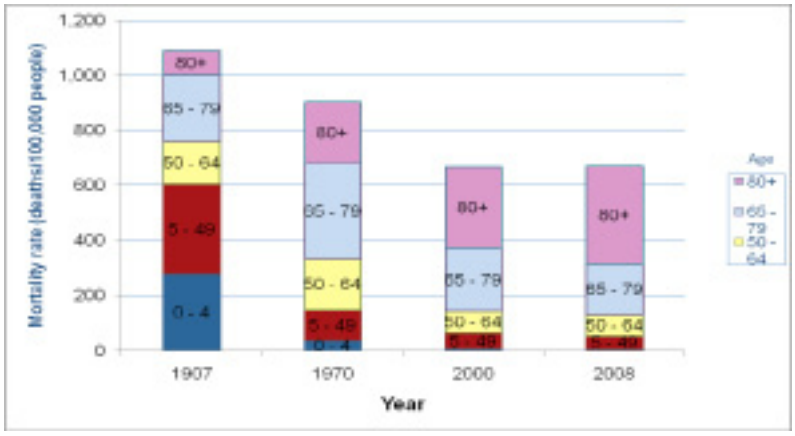
In summary, the Commonwealth is the dominant government funder of health and aged care services, and has been for more than 50 years. It is not directly in the business of service provision, but it is by no means a passive funder simply reimbursing costs. It is increasingly a sophisticated purchaser of services, setting standards and influencing the distribution of services as well as promoting efficiency and cost-effectiveness. It has also long been involved in health industry regulation, and that role is currently expanding as the industry itself is becoming more national.

Where to from here?

The case for a further and substantial increase in the Commonwealth role is based primarily on the changing demand for health services, and the obstacles which current divided responsibilities present to ensuring the most appropriate care for patients and the most efficient and effective use of taxpayer resources.

The changing demand for health services does not reflect growing health problems so much as the downside impact of our success.

Figure 2: Australian Mortality Rates by Age[3]



Life expectancy in Australia is one of the highest in the world, and is continuing to rise. Between 1907 and 1970, this rise was driven mostly by reductions in mortality rates amongst younger people: many more Australians were living to age 50. Since 1970, life expectancy has continued to rise, but this improvement primarily occurs because those who reach age 50 live much longer afterwards. This trend is clearly continuing in the twenty-first century. It may be that Figure 2 will need to be re-drawn in a decade or so to separate mortality rates for those aged 80 to 89 from the rate for those over 90, with possible reductions in rates for those "young" people in their eighties!

What this means is that the health system is now responding to many more frail aged than ever before, and many more with chronic illnesses. More than 80 per cent of the burden of disease is now from chronic illness, mostly amongst the elderly, but also from mental illness and life-style causes. Most of the people concerned can live with a considerable degree of comfort and independence, but they need continuing support services: occasional acute care, drugs which lower their risks and reduce their pain, frequent diagnostic tests and check-ups, various allied health services and possibly personal care services including through residential aged care.

The Australian health system is particularly badly designed to respond to this change. Not only is it structured around programs of different providers (for example, hospitals, doctors, aged care homes and hostels) rather than around patients, but the boundaries are reinforced by having different government funders. The problems involved are not trivial. Rehabilitation services were wound back substantially during the 1990s leaving too much burden on families and/or forcing too many people into residential care.

On the other hand, limited places in residential aged care are still leaving many frail elderly in hospitals rather than in facilities better suited to providing continuing care and support. Emergency departments are clogged with people who really ought to see a general practitioner, and they wait for hours because the triage system rightly says they are not a priority. Patients are discharged without proper consultation with general practitioners and specialists and without proper post-operative care plans. Insufficient investments are being made into targeted prevention services such as diagnostic testing of at-risk population groups. Too many people in nursing homes are being sent to hospitals for services that could and should be provided in their homes. Too many people are dying in hospitals rather than with dignity in the comfort of their homes with their families.

There is no magic answer to these problems. The current approach of different programs funded by different governments is clearly exacerbating the situation. Incentives for the most appropriate and cost effective care are missing. Indeed, when health spending next comes under serious scrutiny, which must be soon, the incentives for service providers will once again be to focus on each one's care responsibilities and to rely on others to fill the gaps.

The other shift in demand which the current health system is struggling to manage is the increase in community expectations for personalised services and choice. This shift requires quite fundamental micro-economic reform, with less emphasis on supply-side controls and more on the demand-side, and greater use of "internal markets" which provide the flexibility to respond to individual preferences without adding to total costs to taxpayers.

Examples of obstacles to micro-economic reform include the lack of an even-playing field for public or private hospital patients. Casemix funding might go some way to resolving the problem, but not the full distance. There is nothing more confusing for the public at the present time than whether to "go public or go private" when admitted to a public hospital. For public hospitals not funded according to numbers of patient episodes, (but by block funds based on estimates drawn from past history), a public patient is a cost without any compensating income; a private patient is a source of income but whose cost can be absorbed by adjusting queues. There is little or no incentive for a public hospital to compete for a contract with a Private Health Insurance fund for private patients as the default payment is generally sufficient, particularly when capital costs are met elsewhere. For the patient, having reached the point of admission, there is no queue-jumping advantage from "going private," only the possibility of choice of doctor and access to a private room (depending on the insurance cover); on the other hand, there is still the likelihood of co-payments that a public patient does not face, notwithstanding improvements during the past ten years in funds reaching agreements with doctors and hospitals on "no or known" co-payments. As far as the Private Health Insurance funds are concerned, members "going public" relieve them of an expense, and encourages them to design products with high front-end deductibles intended precisely to cost-shift to public hospitals and hence to government and taxpayers.

It seems impossible to sort out this muddle while there are different government funders and different purchasing regimes, as well as fundamental flaws in the regulation and subsidies for private health insurance.

Micro-economic reform is also made more difficult when each health program has its own approach to co-payments, most of which are crude and not well-designed to balance the need to manage moral hazard and the need to allow reasonable access to appropriate services. A patient-focussed regime is far more likely to get the balance right.

More generally, the current program focus is almost certainly allocating resources inefficiently as well as inequitably. It is hard to believe that the separate budget arrangements for each program equates to the optimal balance of funds for the most cost-effective mix of services for individuals. There is growing evidence of excessive resources for hospitals and inadequate investment in primary and preventive services, including community support services for the aged and mentally ill. There is also evidence of the limitations of Medical Benefits Scheme/Pharmaceutical Benefits Scheme arrangements for ensuring primary care support for people in rural and Indigenous communities in particular, but there is understandable reluctance by the States to make up the difference.

Options

All this points to the need for a health system with the following design principles:

Table 2: Optimal System Design Principles

- National framework but with flexibility at a lower level.
- Mixed public and private system:
  - o governments concentrate on regulating, funding and purchasing;
  - o service provision primarily private or charitable;
  - o increased competition amongst providers, increased sophistication amongst purchasers;
  - o substantial role for private health insurance;
  - o significant role for co-payments and private contributions.
- Single funder and/or single purchaser, with funds following patients rather than being defined by strict functional or jurisdictional boundaries.
- More emphasis on primary care support, including continuity of care for those needing ongoing services across the system, and increased investment in preventive health.

The key options to help us move in this direction are:

A. States to have full responsibility for public purchasing of all health and aged care services.

B. The Commonwealth to take full financial responsibility as both public funder and public purchaser.

C. Commonwealth/State pooling with State or regional purchasers buying the full range of health and aged care services for the population involved.

D. Managed competition (Scotton model[4] or NHHRC's "Medicare Select"[5]).

Option A could follow Canadian practice with national principles set out in Commonwealth legislation together with a suitable revenue-sharing agreement. Spain also has a provincial-based system but reliant on national government funding. The question is, could such a system work in Australia given our history and our approach to health and health insurance? What would we actually do about the Medical Benefits Scheme and the Pharmaceutical Benefits Scheme, or the system of legislated entitlements for aged care services? Could or should we reverse the trend towards national approaches to industry regulation? What about private health insurance (the Canadians have effectively banned a substantial role for private health insurance under their "Medicare principles")? Whatever the theorists might say about the benefits of subsidiarity, it is hard to see that this option is either politically feasible or economically sensible given our history and the current operational design of our system.

Leaving aside Option B for the moment, pooling along the lines of Option C was canvassed in some detail in the deliberations of the Council of Australian Governments in the 1990s. In theory, multiple government funders pooling their resources and using a single purchaser structure would achieve all the benefits of a single government funder as there would be no incentive to shift costs between funders or between programs. All costs and gains at the margin would be shared. The practical problems, however, proved to be immense: how to agree on the risk-sharing, how to agree on the policy framework, how to agree on the structure for purchasing and its accountability framework? The Howard Government in 1996 agreed to test the idea in one area. It chose aged care which does not have the demand-driven design challenges of the Medical Benefits Scheme or the Pharmaceutical Benefits Scheme. But even this idea was rejected out of hand by every State and territory. Discussion did not even reach first base. Moreover, pooling arrangements with shared responsibilities present

other major practical problems including highly bureaucratic processes, delays in decision-making, and limited scrutiny of administration by legislatures.

Option D has some important attractions and could draw on the Netherlands' experience and some experience in the United States. It involves identifying each individual's risk-rated Medicare premium and paying that to the health insurance fund or healthcare manager chosen by the individual. These funds and managers would then compete for business, and would have incentives to optimise the healthcare of their members through the most cost-effective means they can find. The funds could also choose to offer additional benefits for members willing to pay for them. Accordingly, the option has the theoretical benefits of more choice and increased competition while still offering universal coverage.

Option D is, at best, "unproven". The World Bank notes there are significant benefits from competing providers but limited, if any, gains from competing insurers. Private insurers may not be as effective in managing moral hazard as governments, and policing them to ensure they are, indeed, meeting their Medicare responsibilities and not avoiding risks by adverse selection techniques, etc, is not straightforward. Possibly more to the point right now is that to identify and pay risk-rated Medicare premiums requires a government to appropriate the funds. In Australia, this could only be done by the Commonwealth. Those attracted to this option need to identify a pathway to its implementation, a pathway which must involve the Commonwealth taking full financial responsibility.

This, in my view, leaves us with Option B, the Commonwealth as single government funder and purchaser. This would not rule out a later move to the Option D.

Making the Commonwealth Takeover Model Work

Option B requires the Commonwealth to be both funder and purchaser. The challenge of managing moral hazard requires increasing sophistication in purchasing, using a mix of fee for service or activity-based-funding, and funding based on populations and outcomes. Equity also demands pro-active purchasing, for example, to ensure services are available in rural and remote areas and for marginal groups.

Being essentially a monopsony purchaser, the Commonwealth also needs to develop a regulatory framework for setting prices within policies set by politicians. To take full advantage of being a single funder, the Commonwealth should also establish the capacity to analyse the health and financial risks of different population groups to develop strategies for most cost-effective support, complementing existing program-based strategies for determining cost-effective products and services.

There is little if any need for the Commonwealth to be involved in direct service provision. Indeed, the separation of purchasing from providing offers substantial benefits in terms of the professional independence of providers and the promotion of innovation, as well as greater efficiency through competition. But purchasing needs to be at a far more local level than nationally if there are to be improvements in allocational efficiency. While some national prices may be appropriate (for casemix, MBS, PBS, aged care entitlements), a considerable degree of flexibility about the quantum and mix of services, and to allow for variations in demand and supply, will be needed at a sub-national level (and, in most cases, at a sub-State or regional level).

Such a purchasing regime should not operate unilaterally. Owners of assets and managers of services should have some input into the policy framework, and access to some mechanism to review decisions taken by the price regulators.

This suggests some continuing roles for the States notwithstanding the Commonwealth being the sole funder and purchaser. These include contributing to the policy framework, particularly for the price regulators, through COAG or one of its ministerial councils. States should also take the lead on place management including the definition of regions and localities. Assuming the Commonwealth

establishes some regional planning and purchasing structure, States and/or local government should be involved to help ensure appropriate placement of services.

States are likely to remain the owner of many major assets, and responsible for their governance. They may choose to transfer some of this role to local government or even community and not-for-profit organisations such as churches and charities. As such, they also need to have access to processes for review of pricing decisions by the Commonwealth regulators.

It is also possible to leave room for a State to choose to supplement the Commonwealth funding to meet perceived demands from their electors that are not being met by the Commonwealth. There would be dangers, however, of the Commonwealth cost-shifting its responsibilities in the future and opening up new boundary problems.

Conclusion

Current arrangements involve serious and increasingly important structural impediments to best and most cost-effective health care. The Commonwealth as the single government funder and purchaser would not automatically improve the system, but it is essential to future improvements and micro-economic reform.

Endnotes

1. AIHW; and Podger 1979.
2. Beddie 2001.
3. AIHW 2006, 2010.
4. Scotton 1994.
5. National Health and Hospitals Reform Commission 2009.

References

Australian Institute of Health, *Australian Health Expenditure 1970-71 to 1984-85,* AGPS, 1988.

Australian Institute of Health and Welfare, *Health Expenditure Bulletin,* No. 17, September, 2001.

Australian Institute of Health and Welfare, *Mortality over the twentieth century in Australia,* 2006.

Australian Institute of Health and Welfare, *Australia's Health,* 2010.

Francesca Beddie, *Putting Life into Years: The Commonwealth's Role in Australia's Health Since 1901*, Commonwealth of Australia, 2001.

National Health and Hospitals Reform Commission, *A National Health and Hospitals Network for Australia's Future,* Australian Government, 2010, Canberra.

A.S. Podger, 1979, "Expenditures on Social Welfare in Australia, 1900-1970", in Ronald Mendelsohn (ed), *The Condition of the People*, George Allen and Unwin, 1979.

A.S. Podger, 2006, 'Directions for Health Reform in Australia', in Productivity Commission, *Productive Federalism, Proceedings of a Roundtable*, February 2006.

A.S. Podger, "A Model Health System for Australia", The Inaugural Menzies Centre Lecture on Public Health Policy, the Menzies Centre for Public Health Policy, 3 February 2006, published as a series of articles in the *Asia Pacific Journal of Health Management*, Volume 1, 1 and 2; and Vol 2, 1, 2006.

Richard Scotton, "The Scotton Model", in Productivity Commission, *Managed Competition in Health Care,* Workshop Proceedings, 2002.

Chapter Two

The Case for Less Commonwealth Involvement in State Government Services

A Practical View Based Around Exploiting Competition, Innovation and Entrepreneurship

Dr Dan Norton

I am not a constitutional lawyer, an academic nor currently an active participant in State/federal deliberations on who does what. I have, however, been involved in such deliberations in the past and I have also been involved in a number of areas where Commonwealth/State cooperation has been required – specifically in areas including agriculture, electricity, transport, medical science research, education and water.

My reason for speaking at this conference is that I am vitally interested in sustainable practical outcomes for the betterment of Australians.

I want to make it clear at the outset that I am not going to concentrate on the important issue of where, and how much, governments should intervene in economic and social activity, and what services they should provide or sponsor. I am going to take for granted that government needs to act in this space. I note, however, that the role of government is being radically reassessed since the global financial crisis in many countries. Of particular relevance to Australia are the changes starting to materialise in the United States and the United Kingdom, driven by their fiscal problems. Even though Australia's fiscal problems are not of the same magnitude, we are very likely to follow their lead, in my opinion, and move to smaller government against the previous trend.

I also want to stress that I do not see better outcomes being an issue just about the split between Commonwealth/State responsibilities for service delivery. What I intend to argue is that better outcomes require the same drivers as economic growth – competition, innovation and entrepreneurship. More effective Commonwealth and State involvement in service delivery requires a framework that harnesses these mechanisms both inside and outside government.

Discussions about federalism often focus on Commonwealth versus State issues – discussing tensions between historical decisions made at Federation, which were guided by some sound principles but also influenced by the politics of the day, and contemporary economic structures, public pressures and politics. The title I was asked to speak on is a reflection of this!

The missing element in my view is how to move beyond cutting the cake of responsibility for service delivery in the sphere requiring government intervention and focusing on using the three tools that we know underpin growth in the rest of the economy. This involves consideration of other options for service delivery, including local government, community groups and the private sector.

Why have a federation?

This is a logical starting point for what I have to say. It is instructive to note two quotes. The first from Sir Samuel Griffith in 1891, as used in the promotional material for this conference:

> We must not lose sight of the essential condition that this is to be a federation of States and not a single government of Australia. The separate States are to continue as autonomous bodies, surrendering only so much of their power as is necessary for the

> establishment of general government to do for them collectively what they cannot do individually themselves.

The second is from Prime Minister John Howard in a radio interview on 27 November 2002:

> Well, I suppose if we were starting Australia all over again, we'd only have . . . we mightn't have State Governments. But we're not starting Australia all over again. We've got to deal with the present system we have and we've all got to deal with history. And we have State Government, we have Local Government, we have the Federal Government, and we've got to try and make the system work. I think we do have a lot of layers of Government in this country.[1]

Historical antecedents aside, there are a couple of major reasons for having a federation.

First, federation is built on the principle of subsidiarity.

A basic argument for doing some things at a State or regional or local level, rather than at the national level, stems from the subsidiarity principle. It is inherent in the quote from Sir Samuel Griffith.

The *Oxford English Dictionary* defines subsidiarity as the idea that "a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level".

In other words, only have central government do what cannot be effectively done locally. A classical example of this is protecting the nation from external aggression.

The reasons for applying the subsidiarity principle are multifaceted. A prime reason is that it best aligns local activity with local interests – exploiting direct influence and feedback if you like. It better enables different regional interests and priorities to be reflected by government. After all, there are big differences between North Queensland, urban Sydney and south-west Western Australia, to pick three regions.

As well, in the classical liberal view, no central authority is likely to have the knowledge necessary to intervene wisely on local issues.

Applying the subsidiarity principle also has benefits in terms of limiting central power, providing some protection against bad government. The abuse of power is much easier when it is concentrated centrally. Subsidiarity ensures that citizens do not put "all their eggs" in one government basket.

Subsidiarity also has strong links to the notion of local experimentation and innovation, as opposed to conformity to one approach, which is a consequence of centralism. This is one of the key points I shall return to later.

A centralist would say: do it centrally unless there is a compelling reason to do it locally. As a subsidiarist, I say: do it locally unless there is compelling reason to do it centrally. Understanding this difference in mindset is crucial to what I am going to say in the rest of my speech.

A second reason for a federation is to exploit competition. Competitive federalism is a consequence of the application of the subsidiarity principle. It involves competition between regional or local governments – competition for citizens, investment, tourism, etc. It also provides greater choice and diversity.

National solutions can always be agreed if there is a compelling case, but a one-size-fits-all approach is usually not the norm.

Competitive federalism acknowledges that no-one has a monopoly on the best approach in all situations. Better outcomes result from the greater policy innovation and experimentation that flow from competition between governments in a federation.

Very importantly, it rewards success and penalises failure!

A recent comparison of national governments by Twomey and Withers has shown that federations

have smaller public sectors than centralised or unitary systems, with public spending as a share of GDP being 13 per cent higher on average in unitary countries.[2] According to their analysis, compared to centralised, unitary governments, federal nations such as Australia have:

- more efficient governments; and
- higher rates of economic growth and higher per capita GDP.

Federation has its challenges

Federalism in Australia certainly has its challenges today. I need to address some of these briefly to provide a context for my central arguments on Commonwealth involvement in State government service delivery.

The Constitution established what the Commonwealth Government was responsible for and what the States were responsible for, largely consistent with the subsidiarity principle at the time. Resolving questions about who should do what now cannot, however, be easily resolved by simply going back to the list of Federal powers set out in section 51 of the Constitution.

Some major subsequent developments have considerably clouded the issue. These include:

- firstly, the effective control of most taxation being taken, over time, by the Commonwealth (with the exception against the trend being the Howard Government's decision to provide the States and territories with a growing revenue base in terms of the proceeds from the GST);
- secondly, the changed role and political composition of the Senate away from the original concept of it being a "State's house";
- thirdly, the gradual integration of commercial and social activities across States as transport and communication barriers have diminished (making more aspects of commercial and social activity national in nature); and
- fourthly, the advent of the use of the external affairs power (Constitution, section 51 (xxix)) to intervene and, indeed, override States in areas where they otherwise have constitutional responsibility.

On the first development, taxation, as pointed out by a number of commentators, Wolfgang Kasper for one, effective competitive federalism is difficult with the Commonwealth holding most tax revenue and the States dependent on "hand-outs" to carry out their constitutional functions – vertical fiscal imbalance is the technical term for this.[3] The ease with which the Commonwealth can use financial carrots to "buy off" States and territories was shown with the recent attempted claw-back of some of the GST revenue in the "health deal", with the notable exception of Western Australia.

In my view, the single biggest impediment to a rational resolution of Commonwealth/State roles in service delivery is the power that rests with the Commonwealth in terms of taxation revenue. The motto I learned long ago as a Treasury official resonates here: remember the golden rule – he who has the gold rules!

On the second development, the changed role of the Senate – the Senate has long moved from a focus of protecting States and territories, and there seems no prospect of a reversal of this.

On the third development, the national nature of much economic and social activity, greater national co-ordination is required now than was necessary at the time of Federation. To be effective, federalism needs to be tempered by comparable laws and regulations in key areas – for example, to facilitate free trade and the movement of people, efficient national business activity and a competitive labour market. The revolutionary changes we have seen in communications technology have also made the country and the world a smaller place with impacts on where activities are carried out.

As an aside, communications technology is a two-edged sword. It has hollowed out regions as many back-office tasks previously done locally are now done centrally or even overseas. This is having significant impacts on many local economies across the nation, requiring greater attention from the State and Commonwealth governments. However, the technology also allows things to be done locally that previously had to be done centrally. The coming revolution in the health sector driven by central analysis and diagnosis of locally obtained patient medical data, supplemented by appropriate treatment advice, will make local medical services more viable. I shall return to this later.

Greater economic and social integration does not necessarily mean, however, that the Commonwealth must take over more responsibility from the States – there is scope for co-operative approaches to deal with many of these issues. I have first hand experience with three successful ministerial companies with Commonwealth and State ownership that embody a co-operative approach to ensuring nationally consistent service delivery. These operate in the diverse areas of the national electricity market, a national approach to the application of vehicle telematics in conjunction with the private sector, and education services to support national coherence in curriculum development.

The last of the four developments, the use of the external affairs power, gives an activist Commonwealth Government a means to lever itself into traditional State areas of responsibility via signing treaties. This contentious area is beyond my brief in this paper.

But there is another related element at play here, too – the strong tendency for power to centralise and for delegated authority to diminish, often as a result of the supposed imperative for administrative and financial accountability. I shall come back to this issue later.

A practical case for less Commonwealth involvement

Apart from the classic reasons for federalism that I have briefly overviewed, what then are the practical reasons why the Commonwealth should reduce involvement in State service delivery?

I would like to begin by stressing what I am going to argue for and, importantly, what am I not arguing about? I am going to argue four things:

1. the subsidiarity principle remains relevant and should guide what the Commonwealth does not do. In particular, local and regional interests and needs differ across Australia in important ways and need to be dealt with locally, not nationally, wherever possible;
2. there are differences in the capabilities, interests and incentives of the Commonwealth and State bureaucracies that impact on the effectiveness and efficiency of service delivery;
3. competition needs to be harnessed – there is great merit in different approaches being developed, trialled and applied – the Commonwealth does not have a monopoly on the best approach. Neither does the traditional government sector *per se;*
4. improving service delivery requires innovation, which in turn requires risk-taking and entrepreneurship. This raises tensions with bureaucratic approaches to administrative process and accountability.

The issue is not just Commonwealth versus State delivery of services. State and territory governments have many of the same deficiencies as the Commonwealth Government when it comes to their relationship with other layers in the pyramid. Local government, local institutions (for example, schools and hospitals), community groups and the private sector also have key roles that are often overlooked.

What I am not going to argue is that the States should always have exclusive interest in certain matters. I believe it is unrealistic to abstract from the common political interest at both the State and Commonwealth levels in most things. The question is not who should have *exclusive responsibility* for policy and funding in a specific area of service delivery, but how responsibility should be split in three key areas:

- policy formulation
- funding
- service delivery.

In this regard, a challenge is how to make the system work better. At one level, this involves the way COAG and ministerial councils operate. Reform in this area is ongoing – and it needs to be, because the current arrangements are sub-optimal. At another level, it requires new approaches to be pursued, based on exploiting the three tools I keep referring to – competition, innovation and entrepreneurship.

There are also some areas of the provision of services that the Commonwealth and the States should not be involved with directly at all because they can be more efficiently and effectively provided by the private sector. Governments have withdrawn from (that is, privatised) some commercial activities such as banking, airlines and some utilities. There is more to do, however, albeit mostly at the State level.

The subsidiarity principle should still guide who should do what today.

While as Australians we have much in common, where we live impacts on us in many ways. Local features and factors (including demographics) are reflected in the nature of employment opportunities, infrastructure requirements and service needs (for example, health and education and training). As well, they influence the social, recreational and cultural interests and priorities of communities.

Parramatta is very different from Bunbury or Townsville. A one-size-fits-all approach to all issues, determined in Canberra, just does not make sense.

Likewise, as I have previously pointed out, the subsidiarity principle needs to apply within States as well. It is still important that locals have the ability to influence what happens locally where practical.

The tendency to centralise always seems to dominate – it flows like a strong current that goes in one direction only. To counteract this requires concerted efforts to make local institutions stronger and more effective.

In particular, it requires reform of Commonwealth/State financial relations to give the States more financial autonomy.

Why are differences in capabilities and interests important?

The federal bureaucracy is well resourced with many very qualified staff who like policy, and neither like nor are comfortable with front-line service delivery. In fact, there are only a few areas where the Commonwealth directly provides services to citizens (welfare payments and immigration are two examples).

In key areas, the Commonwealth is in the policy zone, not the service delivery zone: for example, in education, health and transport. To put it bluntly – federal officials, many of whom are cloistered in Canberra for most of their working lives, see policy as a higher order calling that is more befitting of their lofty position than getting their hands dirty with service delivery and implementation matters.

This has some important implications:

- expertise in service delivery, and in project implementation *per se*, is often limited. This means that when the Commonwealth strays into direct service delivery it can stumble – as highlighted in the home insulation saga;
- awareness and interest in service delivery problems in the bureaucracy are often low (although federal politicians may be getting direct feedback). This translates into what the Prime Minister, Julia Gillard, towards the end of the 2010 election campaign, somewhat reluctantly admitted were mistakes in what she called "program development and program delivery";
- also, being remote from the realities of service delivery can impact negatively on the quality of policy formulation.

At the State level, things are not perfect by any means, but there is generally more interest and expertise in direct service delivery. In addition, there is a more practical consideration of real service delivery issues in policy formulation. Also, the feedback loop to politicians is shorter!

As I have already stressed, the greater the level of *specific* Commonwealth funding for a specific service, perhaps logically, the greater will be the level of Commonwealth involvement in how the funds are used. Amongst other things, this is driven by accountability requirements on the use of public money. The problem is that, if you push requirements too far, it results in unnecessary administrative overheads and waste.

A recent approach to dealing with Commonwealth/State mutual policy interests has been to establish National Partnership Agreements. These articulate "objectives, outcomes, outputs and performance indicators, and clarify the roles and responsibilities, that will guide the Commonwealth and States in the delivery of services across the relevant sectors".[4]

I have not the time to go into the details of this latest iteration in defining such arrangements. At face value this may appear to be a reasonable approach to delineating who does what, and on what basis. The problem is that in practice the agreements are a mechanism for greater Commonwealth interference in State service delivery. Specific purpose payments, which had their own limitations, have been replaced by apparently broader funding arrangements – but tied to detailed and onerous accountability arrangements that provide a mechanism for Federal interference in the name of accountability.

The only real solution to this is a reform of Commonwealth/State financial arrangements that moves to greater block funding, without an industry at the Commonwealth level (and consequently at the State/territory level also) establishing detailed targets and measuring performance, with the associated administrative costs.

How can competition be harnessed? A defining feature of competition is that there are winners and losers. This is good enough for private economic activity and the development of new knowledge in science, technology and health. Why should not we use it more in public sector activity?

To an extent, federalism can facilitate competitive approaches in service delivery (hence competitive federalism). Less Commonwealth intervention in State service delivery areas would facilitate more competition in establishing better approaches.

In my view, however, there are broader possibilities. The Commonwealth, under the Howard Government, pursued this in a number of areas such as delivery of services to unemployed people.

There is still greater scope, however, to harness competition across areas including health, social services and public housing.

In education, competition can also be further enhanced. The Victorian Government is pursuing this with vocational education and training by extending competitive opportunities for private registered training organisations in competition with technical and further education institutes (that is, TAFEs). If we did not have competitive federalism in this area we might all be following the NSW centralised approach that shies away from competition!

As I said, competition involves an acceptance that some competitors will not succeed. There has to be an acceptance of this and frameworks to cope with its consequences (for example, dealing with citizens who need to move to better performing service providers).

What has innovation and entrepreneurship to offer?

The last forty five years since Lyndon Johnson's Great Society experiment have clearly shown that alleviating social problems through central action is problematic and challenging, to say the least. If we have learned anything, it is that success is more likely to blossom from a thousand flowers than from strongly centralised approaches. This involves promoting innovation and entrepreneurship in dealing with social problems.

The Economist had an interesting article on this very approach in the United Kingdom and the United States. In the UK, David Cameron is experimenting with a concept of Big Society – a bit of a misnomer in that what it is about is harnessing the energies of what might be more appropriately called "little society" – voluntary groups, community groups, charities, etc. But the idea reflects an appreciation that we need to use "social entrepreneurs" more.

As any manager knows, if you are going to delegate, you have to relinquish some authority and use accountability to promote the intended outcome. A real problem with Commonwealth funding of any service delivery in States and elsewhere is that it is highly risk adverse. It is accompanied by reporting and accountability requirements that are often beyond the capability of funded entities.

I have already discussed this in terms of Commonwealth/State financial relations. In dealing with other service deliverers, governments need to take a different approach to risk management than traditionally applied. Risk-averse mechanisms with large reporting and other administrative overheads need to be replaced by smarter mechanisms where risk is managed appropriately, not eliminated – this requires simpler contracts and performance agreements, less reporting and targeted auditing.

In this regard it will be worth following how reforms in the United Kingdom to abolish reporting requirements for local government proceed.

As mentioned above, communications technology is an important potential enabler of innovative local solutions for service delivery to citizens. I strongly believe that broadband technology will drive further innovation in this area. I am not talking specifically about the current National Broadband Network delivery model although, as I was a director of NBN Tasmania for a short period, I have views about it. What I am concentrating on is the scope for broadband technology, however it is delivered, to facilitate new solutions to old service delivery problems.

But who is sponsoring research on this? Both the Commonwealth and State governments should be. They should also be explicitly sponsoring innovation and promoting entrepreneurships in local service delivery.

The beauty of applying innovation in local service delivery is that you do not need to rush in with a comprehensive solution. You can trial alternative options and exploit competition between them. It is likely that no one option will come out in front in all situations – solutions usually need to match local needs and resources.

Citizens and the press will also need to be educated to accept that some experiments will not work, but the overall outcome should still be better. We do this with the funding of research – not every medical research project delivers something of practical value. But, when you get a winner, the impact can be profound.

Conclusion

What are my takeaway messages?

There are three:

- subsidiarity and competitive federalism continue to be important mechanisms to promote better outcomes, but without changed Commonwealth/State financial arrangements which give greater autonomy to State/territories, serious erosion of State autonomy will continue;
- we must harness the power of competition, innovation and entrepreneurship in dealing with problems requiring government intervention and service delivery. This will require smarter approaches to government funding, moving from risk aversion to risk management; and, finally,
- If we are going to be biased, we should be biased against centralism – the wind usually blows in that direction, and therefore needs to be consistently fought against. The danger of centralism is, after all, one of the great lessons from the twentieth century!

Endnotes

1. Transcript of interview available at: http://www.australianpolitics.com/news/2002/11/02-11-27.shtml.
2. Anne Twomey and Glen Withers, *Australia's Federal Future*, a report for the Council for the Australian Federation, 2007, 12-13. Available at http://www.caf.gov.au/ policyinnovation.aspx.
3. Wolfgang Kasper, "Australia's hollow federalism. Can we revive competitive governance?", *IPA Review*, October 2007.
4. See details at http://www.federalfinancialrelations.gov.au.

Chapter Three

The Attack on Property Rights

Lorraine Finlay

Federal Court Judge: *And what Law are you basing this argument on?*
Darryl Kerrigan: *The Law of bloody common sense! … A man's home is his castle … You can't just walk in and steal our home …*

— *The Castle*, 1997

Darryl Kerrigan's "law of common sense" is becoming an increasingly rare commodity in Australia when it comes to dealing with property rights. In recent years there has been "a gradual, but significant, erosion of traditional protections for private property rights".[1] The disregard for and lack of interest that is shown in property rights is somewhat unusual given the highly fashionable status within some Australian circles of the idea of a National Bill of Rights and enhanced protections for individual human rights more generally. As Chris Berg from the Institute of Public Affairs has observed:

> … in the late 20th century, the right to property became the mistreated stepchild of human rights law. Related, but unloved.

This paper will argue that property rights in Australia are currently being attacked simultaneously on a number of fronts, and that the existing protections are insufficient and largely symbolic. Part One will consider whether private property rights remain important in the modern context and will outline the existing mechanisms for the protection of property rights.

Part Two will consider a number of recent examples illustrative of the continued attack on property rights, notably the *Wild Rivers* legislation in Queensland; the impact of native vegetation legislation (as highlighted in the case of Peter Spencer); the allocation of water entitlements (as seen in the High Court decisions in *ICM Agriculture Pty Ltd v Commonwealth*[2] and *Arnold v Minister Administering the Water Management Act 2000*[3]); the compulsory acquisition of land for the purposes of urban redevelopment (through the case study of *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*[4]); and the significant costs imposed on private property owners through heritage listings. Finally, Part Three will consider a number of proposals designed to strengthen the protection of property rights in Australia and will evaluate their potential effectiveness in terms of reasserting the central importance of meaningful private property rights in Australia.

Part I: A Reflection of the Values of a Bygone Era?

Defining Property Rights

When we are discussing property rights it is important to remember that we are not just speaking about a limited, classical understanding of property in terms of real or personal property. Rather, as was confirmed by the High Court of Australia in *Minister of State for the Army v Dalziel*:

> Property, it has been said, is *nomen generalissimum* and extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profits or use in land of another, and choses in action.[5]

This broad definition was confirmed in *Dorman v Rodgers*, with Murphy J concluding that:

> In modern legal systems, 'property' embraces every possible interest recognized by law which a person can have in anything and includes practically all valuable rights.[6]

Similarly, our understanding of private property rights in the modern context has developed beyond the question of mere possession or title to encompass a wider "bundle of rights". In addition to recognized title and possession, "the protection of property rights has evolved to mean owners have the right to obtain benefits from their property, including the right to put it to productive use and to dispose of it through sale".[7] Property rights, therefore, encompass "the right to own property, the right to dispose of property and the right to exclude others".[8]

The Continued Importance of Property Rights

Recognition of the importance of private property rights can be traced back to the *Magna Carta*. Property rights were expressly mentioned in Article 39 of the *Magna Carta 1215*, which provided that:

> No freeman shall be arrested, or detained in prison, or deprived of his freehold, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.[9]

Since that time leading philosophers and political thinkers have emphasized the link between private property rights and the protection of individual liberty. This was noted by Henry Maine, who claimed that the history of individual property rights and history of civilization "cannot be disentangled".[10] Similarly, John Adams observed that:

> Property is surely a right of mankind as real as liberty . . . The moment that the idea is admitted into society that property is not as sacred as the laws of god, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. Property must be secured or liberty cannot exist.[11]

The connection between private property and the rule of law has also been strongly emphasized, with Jeremy Bentham stating:

> Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.[12]

To this end, the protection of property rights has long been seen as part of the legitimate role of government. John Locke saw the preservation of property as the "great and chief end … of men uniting into Commonwealths and putting themselves under government," with the purpose of government being to join with others to "unite for the mutual benefit of their lives, liberties and estate, which I call by the general name, property".[13] James Madison also saw government as having a central role in protecting private property, stating:

> Government is instituted to protect property of every sort; as well as that which lies in the various rights of individuals … this being the end of government, that alone is a just government, which impartially secures, to every man, whatever is his own.[14]

The reverse has also been recognized. William Pitt acknowledged that private property may itself have an important role to play in protecting individuals from despotic governments, declaring:

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter, the rain may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement.[15]

Do property rights continue to have relevance and importance in the modern day? Justice Murphy certainly claimed, in *Attorney-General (Cth); Ex rel Mckinlay v Commonwealth*, that "[t]he exaltation of property rights over civic and political rights is a reflection of the values of a bygone era".[16] Similarly, the protection of property rights has been called by some to be "an archaic notion, a relic of a time long gone when the status of an individual would be determined by the property he owned".[17]

This paper argues that private property rights are just as important today as in the past. The link between property rights and individual liberty remains relevant in the modern context, and the foundations for both individual freedoms and economic security may be found in private property rights. In relation to this point, it has been emphasized that:

> Without private property rights there is no way to check the power of the state over the individual. When the state gains control over private property rights the ability to create wealth stagnates or even declines, thereby creating poverty and misery rather than freedom and wealth.[18]

The link between private property rights and the rule of law also continues to be relevant in the modern context, with Hayek observing that:

> The principle of "no expropriation without just compensation" has always been recognized wherever the rule of law has prevailed. It is, however, not always recognized that this is an integral and indispensable element of the principle of the supremacy of the law. Justice requires it; but what is more important is that it is our chief assurance that those necessary infringements of the private sphere will be allowed only in instances where the public gain is clearly greater than the harm done by the disappointment of normal individual expectations.[19]

At a more practical level, a secure system of property rights is an essential ingredient for economic growth and prosperity as it provides people with both the incentive and security that are necessary to allow them to confidently save and invest. There is a well established causal link between property rights and higher standards of living,[20] with the ownership of private property motivating individuals "to improve the productivity and value of assets in the realization that family and designated heirs may benefit from such endeavour".[21] In short, "[t]he evidence is irrefutable that the protection of property rights is the key to wealth accumulation and secure and stable societies".[22]

The importance of property rights, and of fair compensation being paid when private property is compulsorily acquired by government, was emphasized by Justice Heydon in *ICM Agriculture Pty Ltd v The Commonwealth*:

> Unless they have a duty to pay compensation, legislatures will tend to experience undue temptation to acquire the property of citizens, and will tend to give into it, because this will usually be cheaper than employing some alternative technique. The threat that legislatures will acquire property without just compensation will result in people electing not to generate property by saving, or developing their property to less than optimal levels, or seeking a greater rate of return to meet the risk of acquisition, or pursuing investment opportunities in jurisdictions which do provide compensation for compulsory acquisition. The threat of acquisition without compensation thus damages incentives to invest. It damages the prospect of a dynamically efficient economy in which incentives to invest improve long-term social welfare by creating an optimal level and allocation of investment resources … And there is a peculiar injustice in removing what may be the whole of one citizen's assets without compensation instead of funding compensation for that citizen by taking a very small part of the assets of all taxpayers…[23]

The continued importance of private property rights in the modern context can be clearly illustrated by considering the disastrous consequences of "Fast Track Land Reform" program in Zimbabwe. Under this program, which commenced in the late 1990s, the Zimbabwean Government has "acquired" thousands of farms without paying compensation. This has been ostensibly done to address historical and racial injustices. The government-appointed Utete Commission has estimated that "during the first three years of land reform some 250,000 people and their 1.3 million dependents were forcibly displaced from commercial farms alone".[24] The farm invasions have continued even after the signing of the power-sharing arrangement between ZANU-PF and the Movement for Democratic Change in September 2008, "with 480 new incidents of violence against farmers recorded"[25].

The results of this program have been catastrophic for Zimbabwe, resulting in "a pullout of foreign investment, defaults on farm bank loans, and a massive decline in agricultural production".[26] The Justice for Agriculture organization has estimated "that more than half of all the farms taken over by the State are now derelict and abandoned".[27] The Commercial Farmers' Union has estimated that the total output of the Zimbabwean agricultural industry has declined from 4.3 million tons of agricultural products worth approximately US$3.347 billion in 2000, to just over 1.348 million tons worth approximately US$1 billion in 2009.[28] There is clearly a link here between the government seizures and land reform measures and the worsening and uncertain economic environment in Zimbabwe.

The Protection of Property Rights

The right to private property, and the importance of guaranteeing just compensation if private property is expropriated by government, has been recognized in a range of international instruments, declaratory rights documents, and domestic constitutions. One of the earliest examples, the *Declaration of the Rights of Man and the Citizen*, was adopted by the National Constituent Assembly in France in 1789. Article 17 provides:

> Property being an inviolable and sacred right, no one may be deprived of it except as required by evident and legally ascertained public necessity, and on condition of previous just compensation.

More recently, the right to own property has been enshrined in Article 17 of the *Universal Declaration of Human Rights*, which also provides that "no one shall be arbitrarily deprived of his property". The right to property is also contained, in various forms, within regional instruments such as the *American Convention on Human Rights* and the *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.* Similar protections are also offered by certain domestic

constitutions. The Constitution of the United States, for example, provides a level of constitutional protection for property rights through the due process clauses of the Fifth and Fourteenth Amendments and the takings clause of the Fifth Amendment. Private property rights have even been recently recognized in China. In 2003 the Central Committee of the Chinese Communist Party agreed to amend the Chinese Constitution to include such rights.[29] The key issue here is whether such constitutional guarantees end up offering substantive protections or whether, in practice, they have limited symbolic value.

Within Australia the importance of private property rights was recognized by the framers with the inclusion of s. 51(xxxi) of the Constitution. Section 51(xxxi) provides that:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

Section 51(xxxi) is distinct in that it is one of the few guarantees of individual rights within the Australian Constitution. Although it has been described as a "provision of a fundamental character"[30] and a "very great constitutional safeguard,"[31] the "just terms" guarantee in fact offers only limited protection to property rights in Australia, with there being two main limitations to its efficacy – one structural, and the other interpretive.

The most obvious limitation is the fact that the guarantee does not extend to State governments, who are able to acquire property compulsorily without being required to provide just terms compensation or, indeed, any compensation at all.[32] A proposal to extend the guarantee under s. 51(xxxi) to State governments was rejected by the Australian people at the 1988 referendum with a national "no" vote of 69 per cent. It should be noted here that the question about "fair terms" compensation was just one part of a larger question that also included the extension of the right to trial by jury and the extension of freedom of religion and that the referendum itself included four separate questions.

The second limitation is the narrow approach to the interpretation of s. 51(xxxi) that has been regularly applied by the High Court of Australia. This has resulted in s. 51(xxxi) proving "under modern conditions, to be an insurance policy with some disconcerting exclusion clauses".[33] One example is the technical definition of "acquisition" that has been strictly applied in cases such as *Mutual Pools & Staff Pty Ltd v The Commonwealth*[34] and *ICM Agriculture Pty Ltd v Commonwealth*,[35] with the result that the just terms guarantee can effectively be side-stepped by the Commonwealth Government if it limits or restricts property rights in a manner that does not amount to an actual acquisition. The end result is that the protection offered by the constitutional guarantee under s. 51(xxxi) is limited and has not been capable of preventing the attacks on property rights that will be discussed below.

An Absolute Right?

It is important to acknowledge at the outset that property rights are not absolute, and that it is recognized that there will necessarily be limitations to what an owner is allowed to do with their property. The first broadly accepted limitation is that some level of state regulation will be required to ensure that an individual's use of their property does not unreasonably affect the right of others to enjoy their own property.

The second, and more controversial, area of state regulation has been the traditional right of "eminent domain". Once known as the "despotic power," this is the right of the state to compel the transfer of private property to the state for some public purpose. It is accepted that it may sometimes be necessary, and entirely reasonable, for the state to exercise its power of eminent domain to deliver

required public policy outcomes. However, as will be illustrated by the examples discussed below, this is a power that is increasingly being exercised for questionable ends and without proper regard being given to the real costs that are being imposed on the affected individuals.

Whilst acknowledging that it is necessary and entirely proper to have some restrictions attaching to private property rights this paper argues that there are numerous examples in Australia today of government actions simply going too far in restricting or removing property rights. The fundamental rule that should be applied is that governments "should err on the side of restraint, rather than interference in property rights".[36] At the very least, if it is considered necessary for governments to impose measures that interfere with an individual's property rights, then the payment of just compensation should be an automatic precondition of government action. Unfortunately, the examples discussed in Part Two below suggest that this is not the current approach in Australia, but rather that we are living in an environment where property rights are too often afforded little respect by government.

Part II: Recent Examples

The cases discussed below are all examples of government regulations and actions that have removed or damaged the property rights of individuals in Australia. These should not be seen as isolated examples, or as the only relevant examples. There are numerous further case studies that could have been discussed in this paper, ranging from large national policy initiatives such as the proposals for the mining profits tax, emissions trading scheme, or national broadband network, through to individual decisions directly affecting particular people and properties, such as the refusal by the Victorian Civil and Administrative Tribunal in cases such as *Gippsland Coastal Board v South Gippsland Shire Council*[37] and *Myers v South Gippsland Shire Council*[38] to grant development consents on coastal land in part because of climate change considerations. Rather, the following examples are symptomatic of a larger problem and highlight the need for a broader campaign to restore respect and protection of property rights.

Wild Rivers Legislation in Queensland

Probably the most controversial example of an attack on property rights by a State government in recent times has been the introduction by the Queensland Government of the *Wild Rivers Act* 2005 (Qld). The *Wild Rivers* legislation was designed "to preserve the natural values of rivers that have all, or almost all, of their natural values intact"[39] by creating a regulatory framework around declared areas to protect them from new development activities that have the potential to degrade their "natural values". Put simply, the legislation is designed to prevent and restrict development in protected areas in the name of environmental sustainability. By June 2010 there had been ten formal *Wild River* declarations. Declared *Wild River* areas include the Archer, Lockhart and Stewart rivers in the Cape York Peninsula; Settlement Creek, Morning Inlet, the Gregory River and Staaten River in the Gulf of Carpentaria; Hinchinbrook and Fraser Islands; and the Wenlock River Basin.[40]

The Wilderness Society has been one prominent proponent of the *Wild Rivers* legislation, claiming that the policy:

> … affords these rivers protection under a regime that prevents large-scale development threats, such as in-stream mining, damming and intensive irrigation, while supporting the continuation or establishment of smaller scale commercial uses, eco-tourism and other sustainable industries.[41]

The legislation has, however, generated significant controversy. In particular, it has highlighted divisions between environmental groups and indigenous groups, who have opposed the legislation on the basis that it adversely affects economic opportunities and restricts the native title property

rights of indigenous peoples in declared areas. The potential impact of the *Wild Rivers* legislation on indigenous communities (both immediately and in the longer term) is enormous, as noted by the Director of the Cape York Institute for Policy and Leadership, Noel Pearson:

> The impact on the Cape York Reform Agenda . . . is significant. Our reform agenda which focuses on rebuilding individual responsibilities, reciprocity and incentives, is designed to break widespread passive welfare dependence and build economic independence …
>
> Yet the highly restrictive nature of the *Wild Rivers Act*, which imposes layers of red tape on communities and individuals seeking to self-start small-scale enterprises, mocks that progress and significant investment. They hurtle our reform initiatives backwards.
>
> The most perverse effect of Queensland's *Wild Rivers* scheme is that it will make small scale environmentally sustainable developments more difficult, whilst at the same time not prevent large-scale industrial developments such as mining.[42]

It is not only directly affected indigenous communities who have opposed the legislation. For example, Dr Peter Call from the Anglican Diocese of Brisbane has publicly expressed his opposition to the policy, saying that the legislation erodes indigenous property rights and job opportunities.[43] Similarly, Professor Ross Fitzgerald has argued:

> Surely indigenous and non-indigenous people have a reasonable expectation that control over their land means they will determine future land use and management subject to a fair and reasonable regulatory framework. For many indigenous people it seems ironic that, while they have recently seen the return of their traditional lands, control over these lands is being removed by government at the behest of white-dominated conservation and heritage groups.[44]

The central problem with the *Wild Rivers* legislation is that it stops those with a legal interest in the declared areas from being able to make their own decisions about how best to exercise their interest. For example, in relation to the declared areas on the Cape York Peninsula, this "has effectively taken away from the Indigenous people of Cape York the ability to use . . . their land in the way that they would like".[45] A *Wild Rivers* declaration effectively locks up the land, requires a complex development application process to be negotiated if any development is to occur and makes it increasingly difficult to attract third party investment to the area. This has significant and long-term economic consequences and makes economic development in these areas entirely prohibitive. The legislation also fails to provide for any compensation to be paid to those whose property rights are affected.

An example of the economic consequences of this policy was provided by the Queensland Resources Council. It has suggested that if this legislation had been in place a decade ago both the Century mine in Far North Queensland (one of the world's largest zinc mines) and the bauxite mines at Weipa would not exist.[46] A more concrete example of the economic effects can be seen in the announcement by Cape Alumina Ltd that it would be reviewing its $1.2 billion Pisolite Hills bauxite mine and port project in West Cape York Peninsula after the announcement of the Wenlock Basin *Wild River* Declaration in June 2010. Shortly afterwards, this was also followed by Matilda Zircon announcing that it would be giving up the exploration tenements that it held in the Cape York Peninsula.[47]

A Private Member's Bill in response to the Queensland legislation was introduced in the House of Representatives on 8 February 2010 and in the Senate on 25 February 2010. The *Wild Rivers (Environmental Management) Bill* 2010 was expressly intended "to protect the interests of Aboriginal traditional owners in the management, development and use of native title land situated in wild

river areas"[48] and sought to do this by requiring that "the development or use of native title land in a wild river area cannot be regulated under the relevant Queensland legislation unless the Aboriginal traditional owners of the land agree".[49] This bill has been passed by the Senate, but has yet to be passed by the House of Representatives, although it is worth noting that the newly-elected Member for Leichhardt declared immediately following his election that the bill would be a priority if the Coalition ended up forming government.[50]

Legal action has also commenced, with a writ challenging three *Wild River* declarations being lodged with the High Court of Australia. The central claim is that the declarations made under the legislation breach both the *Native Title Act* and the *Racial Discrimination Act.*

There is no doubt that there is a public benefit in protecting areas of environmental significance. The *Wild Rivers* legislation appears, however, to take the view that environmental protection is necessarily mutually exclusive from sustainable development, and fails to acknowledge the serious economic consequences that flow from its implementation. In addition to this, the *Wild Rivers* legislation places the costs burden almost exclusively on the Aboriginal traditional owners by removing their right to manage, develop and use their land. The legislation claims to be targeted at achieving a broad public benefit through the protection and preservation of environmentally significant areas. If this is the case, then surely it would be more equitable to share the costs amongst the broader public?

Native Vegetation Legislation

In his address to the 2009 Property Rights Australia Conference Noel Pearson drew the link between the battle against the Queensland *Wild Rivers* legislation and the battle against the ban on regrowth clearing under the *Vegetation Management Act* 1999 (Qld).[51] Both pieces of legislation represent an attack on property rights and both pieces of legislation fail to provide any compensation to landholders whose property rights are lost or diminished. For these reasons, both pieces of legislation (in their current forms) should be opposed.

The attack by governments on property rights has been particularly pronounced in rural and regional Australia, with farmers forced to comply with an increasingly complicated, stringent and punitive legal regime of restrictive conservation and environmental regulations. One example of this is the introduction of native vegetation and biodiversity regulations – such as the *Native Vegetation Act* 2003 (NSW) and the *Vegetation Management Act* 1999 (Qld) – which limit and regulate the clearance of native vegetation on private land in rural areas. In the 2004 *Inquiry Report into the Impacts of Native Vegetation and Biodiversity Regulations* the Productivity Commission concluded that:

> … the current heavy reliance on regulating the clearance of native vegetation on private rural land, typically without compensating landholders, has imposed substantial costs on many landholders who have retained native vegetation on their properties. Nor does regulation appear to have been particularly effective in achieving environmental goals – in some situations, it seems to have been counter-productive.[52]

Perversely, the costs involved with these policies have been predominantly borne by those farmers who have previously been the most environmentally responsible, being the farmers who have previously "voluntarily chosen to fence off wetlands, plant native species, retain old trees for habitat and keep stock out of waterways".[53] Farmers whose properties are then reclassified for conservation effectively lose the productive capacity and, therefore, the value of their land. As the land itself has not technically been acquired, there is no requirement for compensation to be paid, notwithstanding that the farmer has effectively lost control of his own property and that his property rights have clearly been significantly curtailed. As Louise Staley has observed:

> By contrast, the environmentally irresponsible farmer is much less likely to face restrictions because there is nothing left to protect.[54]

This point was reinforced by the evidence given at a public parliamentary committee hearing by a farmer in Dandaragan, Western Australia:

> [W]ith hindsight, we should have borrowed money, cleared the lot and then none of us would be here today wasting our time and our son would be still [living with] us instead of having to go off the farm to look for work. It does not feel good to have your neighbours look over your fence and say "you should have cleared sooner and then you would not have this worry".[55]

The dilemma faced by farmers in this highly regulated and bureaucratic environment was clearly outlined in the following example provided by Jim Hoggett from the Institute of Public Affairs:

> Farmer Jim is thinking of felling one of the 20,000 trees on his property for fenceposts. He has used up his 30 tree (0.15 per cent) exemption. He looks alone of the 19,970 trees. He has to consider: what slope it is on; whether it has a rare species; whether it has any hollows or is on the way to having hollows; what native animals or birds are feeding off it or are likely to do so; what effect it has on the forest canopy; whether it is near a stream; whether it is of aboriginal significance; etc., etc. Then he will be in a position to make a lengthy submission to government seeking permission to fell. Welcome to the world of tree-by-tree approvals.[56]

The case that most starkly illustrates the simple injustice of the existing state of affairs is that of Peter Spencer. Peter Spencer owns Saarahnlee, a property at Shannons Flat in New South Wales. The property is subject to native vegetation legislation,[57] which requires that development consent under the *Environmental Planning and Assessment Act* 1979 (NSW) be obtained before any native vegetation is cleared. Spencer applied for consent to clear 1402 hectares at Saarahnlee. Consent was refused. It was claimed that the combined effect of the native vegetation legislation and the refusal of development consent amounted to an acquisition of property in that it left the property entirely unsuitable for commercial farming.

The restrictions imposed on Spencer were in this case imposed under State legislation, meaning that there is no direct requirement for just terms compensation to be made available. However, Spencer argued that the acquisition was effected and authorized by Commonwealth legislation – specifically the *Natural Resources Management (Financial Assistance) Act* 1992 (Cth) and the *Natural Heritage Trust of Australia Act* 1997 (Cth) – and that the legislative framework in NSW was linked to a number of Inter-Governmental Agreements signed between that State and the Commonwealth. Spencer claimed that the land clearing restrictions in NSW that were preventing him from farming his land had been imposed at the Commonwealth's request as greenhouse gas abatement measures to allow Australia to meet its international targets under the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*. As a result, he argued that the guarantee of just terms compensation under s. 51(xxxi) of the Constitution was enlivened. As the Commonwealth had made no offer of compensation to Spencer the acquisition of his property was therefore unconstitutional.

Spencer commenced legal action in relation to this issue with the filing of an original Notice of Motion in the Federal Court of Australia on 12 March 2007. Since then, he has appeared in court more than 200 times in relation to this matter.[58] The central questions being raised before the courts are whether the *Natural Resources Management (Financial Assistance) Act* 1992 (Cth) and the *Natural Heritage Trust of Australia Act* 1997 (Cth) can be characterized as laws with respect to the acquisition of property within the meaning of s. 51(xxxi) of the Constitution, and whether the Commonwealth can authorize an agreement that would require a State to use its power to acquire property on unjust terms. This argument has been rejected by Justice Emmett and, on appeal, by the Full Federal Court.

A Notice of Constitutional Matter has been filed with the High Court of Australia, with *Spencer v Commonwealth of Australia* being heard on 16 June 2010 and a decision on the application for special leave being reserved.

Although Spencer has not been successful in his legal arguments to date, the courts have been well aware of the broader context in which this legal action has been brought and the serious injustice that underpins it. For example, on 26 August 2008 Emmett J dismissed Spencer's application for interlocutory relief in the Federal Court but, in doing so, observed:

> One cannot but feel the utmost sympathy for Mr Spencer if it be the case that Saarahnlee has been effectively sterilized by the State Statutes, with the effect that he can no longer carry on at Saarahnlee the activities which he was able to carry on prior to the enactment of the State Statutes.

Similarly, in the NSW Supreme Court, Rothman J commented that although the requested remedies for judicial review, misleading and deceptive conduct, or unconscionable conduct, had not been made out:

> … it is an extremely disheartening and sad occasion that a person, whose life and resources have been placed into a rural property for the purposes of conducting a grazing and farming business, has been required to resort to this action.
>
> Governments, not courts, make judgments about political policy relating to what, within reason, is for the benefit of the community. Mr Spencer does not dispute that the objects of the conservation policies adopted in the agreement between the Commonwealth and New South Wales are, at one level, for the benefit of the community.
>
> The Federal and State Governments have entered into a scheme to improve the environment and, in so doing, improve the lot of other rural and other proprietors. Nevertheless, they have done so at the expense of Mr Spencer.
>
> While all members of society must accept that there will be restrictions on their activities "for the greater good of society," when those restrictions prevent or prohibit a business activity that was hitherto legitimate, because of the area in which it is operating, and assistance is offered which does not fully compensate for the restrictions imposed, society is asking Mr Spencer, and people in his position, to pay for its benefit.

During this time Peter Spencer also engaged in a 52-day hunger strike from the top of a wind mast platform on his property to correspond with the United Nations Framework Convention on Climate Change in Copenhagen. The hunger strike was intended to call attention to his demand that the Commonwealth Government should pay fair compensation to him, and other affected property owners whose land rights had been diminished by land clearing restrictions. After ending his hunger strike (following medical advice), Spencer maintained that he would continue his fight "on the ground".[59]

Ultimately, the root of the problem in the case of Peter Spencer "lies in the native vegetation laws that have prevented him from clearing – and farming – much of his land".[60]

In the 2004 *Inquiry Report into the Impacts of Native Vegetation and Biodiversity Regulations* the Productivity Commission concluded that, while the retention, management and rehabilitation of native vegetation and biodiversity were important objectives, "existing regulatory approaches are not as effective as they could be in promoting these objectives and impose significant costs".[61] In particular, it was concluded that the effectiveness of the clearing restrictions had been compromised,

that "perverse environmental outcomes" often resulted and that landholders "... are being prevented from developing their properties, switching to more profitable land use, and from introducing cost-saving innovations. Arbitrary reclassification of regrowth vegetation as remnant and restrictions on clearing woodland thickening in some jurisdictions are reducing yields and areas that can be used for agricultural production".[62]

Again, the case of Peter Spencer is not an isolated incident. This is a problem that is all too common in rural areas and that urgently needs to be addressed. While it is certainly necessary and desirable to ensure that the environment is protected, and there is clearly a public benefit to be gained from effective environmental legislation, the existing regulatory framework is becoming overly complicated and restrictive and the compliance costs fall almost exclusively on one small section of our community. The case of Peter Spencer highlights the need to ensure that property owners whose rights are necessarily restricted in the pursuit of a broader public interest are automatically given fair compensation. It also highlights the inadequacy of the existing mechanisms for the protection of property rights in Australia.

Allocation of Water Entitlements

The management of scarce water resources is a critical issue in Australia, particularly in rural and regional areas. As a result, the Working Party on the Erosion of Property Rights has argued that:

> The existence of fresh water in rural areas is one of the largest determinants of value for land that there is, so to remove the water right is tantamount to a partial and significant resumption of rights that attach to the land, if not the land itself. If the State sees fit to resume the water from a property, then it follows that fair compensation should be paid.[63]

Similarly, Louise Staley has observed that:

> When determining water policy within a property rights framework, the key principle must be the protection of existing rights to water. It is unacceptable for current users of water to have the rules changed and massive additional charges imposed or complete withdrawal of water when they have made investment decisions based on current rights.[64]

Recent cases concerning the allocation of water entitlements have highlighted the inadequacy of the protection offered by the constitutional "just terms" guarantee under s. 51(xxxi). The first of these is *ICM Agriculture Pty Ltd v The Commonwealth*[65]. In this case the High Court of Australia (by a 6:1 majority) held that the reduction of a licensee's groundwater entitlement by the replacement of groundwater bore licenses[66] with aquifer access licenses[67] did not constitute an acquisition of property. Under the new aquifer access licenses the first and second plaintiffs found that their water entitlements were decreased by approximately 70 per cent, while the third plaintiff suffered a decrease of approximately 66 per cent. The effect of this was "potentially calamitous".[68] For example:

> … while the first two plaintiffs in the year 1 July 2006 to 30 June 2007 had entitlements to take 18,6398 megalitres, and their permitted allocation was 10,351 megalitres, under the aquifer access licences they were only entitled to 5,198 megalitres.[69]

The majority held, however, that as water was a natural resource and the State had always had the power to limit the volume of water taken, its capacity to control the water resource was not enlarged by the reduction in the plaintiffs' water entitlements. A narrow and technical definition of acquisition was applied by the majority, endorsing the approach previously adopted by Deane and

Gaudron JJ in *Mutual Pools & Staff Pty Ltd v The Commonwealth:*

> Nonetheless, the fact remains that s 51(xxxi) is directed to "acquisition" as distinct from deprivation. The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property. For there to be an "acquisition of property," there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property.[70]

As the replacement of the licenses was not held by the majority to constitute an acquisition of property, the requirement for just terms compensation under s. 51(xxxi) was not enlivened in this case.

In his dissenting judgment, Justice Heydon took a broader approach to this question, holding that each of the integers of s. 51(xxxi) should be liberally construed, and citing with approval the conclusion by Dixon J that the constitutional guarantee under s. 51(xxxi) "should be given as full and flexible an operation as will cover the objects it was designed to effect".[71] In determining the meaning of property, for example, Justice Heydon cited with approval the statement by Gummow J in *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* that "one should lean towards a wider rather than narrower concept of property, and look beyond legal forms to the substance of the matter".[72] Justice Heydon concluded that:

> The idea that persons possessing entitlements to take water pursuant to licenses granted under statutory power should not lose those entitlements by governmental compulsion unless they are given just terms is not an inconsistent or incongruous notion.[73]

ICM Agriculture Pty Ltd v The Commonwealth was followed almost immediately by the case of *Arnold v Minister Administering the Water Management Act 2000*[74]*,* which was an appeal brought in essentially the same factual circumstances. The legal question before the High Court in *Arnold* was whether the *National Water Commission Act* 2004 (Cth) and the related Funding Agreement entered into between NSW and the Commonwealth violated s. 100 of the Constitution, which provides that:

> The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

By a 6:1 majority the Court dismissed the appeal, holding that no contravention of s. 100 had occurred. Justice Heydon, in dissent, referred to his reasons in *ICM Agriculture Pty Ltd v The Commonwealth* and reaffirmed his reasoning in that case that the substitution of bore licenses for aquifer access licenses was invalid.[75] He then held that there was no need to consider the merits of the appellant's arguments in *Arnold* in relation to s. 100 as doing so would "not result in substantive orders more favourable than [restoring the original bore licences]".[76]

According to Professor George Williams, the decision in *Arnold* "reveals major problems with Australia's structure of government when it comes to the Murray-Darling Basin". Both *Arnold* and *ICM Agriculture Pty Ltd* highlight the constitutional anomaly that sees the Constitution guarantee "just terms" in relation to any property acquired by the Commonwealth, while the same guarantee is not extended to property acquired by the States. As Professor Williams observed:

> It may be constitutionally valid law for New South Wales to acquire property without compensation, but it should not be. It is offensive in a modern democracy like Australia that the States can acquire property without redress. This should be fixed.[77]

Compulsory Acquisition for Urban Redevelopment

The government's power of eminent domain has always been controversial, particularly in the modern context of urban redevelopment plans where it has been used to transfer land from a private owner to a private developer for the purposes of economic development. While it may be accepted that there might be times when it is appropriate for the State to exercise the power of eminent domain, it is also important to recognize that:

> The power to compulsorily acquire privately owned land is one of the most significant powers that the modern Western State possesses, and as such must be carefully exercised.[78]

The US case of *Kelo v City of New London*[79] provides an early example of the use of the power of eminent domain to further urban redevelopment plans, and offers an interesting contrast to analogous cases in Australia. In *Kelo*, the City of New London compulsorily acquired the property owned by Susette Kelo, but then proceeded to sell it to a private developer as part of a revitalization plan for the city. The question for the US Supreme Court "was over whether compulsory acquisition for private purposes that would result in higher economic activity and taxes paid was legitimate".[80] By a margin of 5:4 the Supreme Court upheld the acquisition of the property, with Ms Kelo being forced to move from her cottage. The controversial nature of the decision, and the public outcry that resulted, directly led to the introduction of reforms in more than 40 States designed to prevent governments from exercising their power of eminent domain in pursuit of this type of public purpose.

When this very same question arose recently in Australia the roles played by the courts and the Parliament were entirely reversed, with the High Court of Australia cast in the role as the defender of property rights and the NSW Parliament subsequently acting to defeat these interests. The case in question was *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council.*[81] The controversy arose over a decision by the Parramatta City Council to enter into a Public Private Partnership with private developers (specifically, two companies in the Grocon Group) for the redevelopment of the Parramatta City Centre. As part of the $1.6 billion Civic Place development the Council sent Proposed Acquisition Notices to the owners of the land within the redevelopment block. Under the Development Agreement between the Council and the private developers, parts of the acquired land would then be transferred to the developers in return for money and other benefits. Two of the owners – Ray Fazzolari and Michael Winston-Smith – challenged the proposed acquisition of their property.

Under the *Local Government Act* 1993 (NSW) and the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) local councils in NSW have broad powers of compulsory acquisition. A local council is given the power under s. 186(1) of the *Local Government Act* to acquire land "for the purpose of exercising any of its functions" although, critically in this case, an important limitation is introduced by s. 188. It states that land may not be compulsorily acquired without the owner's approval "if it is being acquired for the purpose of re-sale". The central question in this case, therefore, was whether the land that was being acquired was, in fact, being acquired for the purpose of re-sale. The case ended up before the High Court of Australia, where the five member Court unanimously upheld the rights of the property owners and held that the compulsory acquisition of the land was unlawful. The High Court interpreted the compulsory acquisition powers narrowly[82] and found that the purpose for which the Parramatta City Council was attempting to acquire the land was to re-sell it to Grocon, which, under the legislation, they could not do without the approval of the owner. In holding the acquisition to be unlawful the High Court restored the injunctive relief that had originally been granted in the Land and Environment Court. If that had been the end of the matter it would have been seen as an unequivocal reinforcement and protection of private property rights by the courts.

Unfortunately, that was not the end of the matter. The *Land Acquisition (Just Terms Compensation) Amendment Bill* 2009 (NSW) was subsequently introduced into the NSW Parliament. It was passed

on 17 June 2009. Without discussing the specific details of the legislation, it is sufficient for our purposes to note that when the bill was introduced into Parliament it was expressly acknowledged by the Government that "the focus of the bill is to overcome an aspect of the High Court's decision that the Government considers may produce anomalous and unintended consequences for landowners, native titleholders and public authorities alike".[83] The legislation effectively allows the Parramatta City Council – and any other local council in the future – to invoke a legal fiction to avoid the limitation on the Council's power of re-sale that was reinforced by the High Court in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*.

This is a fundamental change in the law and broadens the power of eminent domain, effectively allowing local councils to acquire property compulsorily for the purpose of then transferring it to a private developer. The fact that the NSW Parliament so readily approved such a significant qualification to individual property rights – and that this was passed with bi-partisan support – should be enormously concerning to all property owners in this country.

Heritage Listings

The increasing use of heritage listing regulations in Australia provides a more gradual example of the long-term erosion of private property rights. Heritage registers are extensively used throughout Australia, with different registers operating at different levels of government. For example, on 23 June 2010 the Heritage Council of Western Australia celebrated the 1,300th listing on the State Register of Heritage Places with the listing of the Aquinas College Administration Building and Chapel.[84] In Western Australia there are currently 36 historic precincts listed in the State Register[85] and 74 Heritage Agreements in place[86].

There is no doubt that heritage preservation provides a public benefit to the entire community. However, at the same time, it is necessary to recognize that:

> … the legal and economic costs of heritage preservation are disproportionately borne by private property owners to the extent that their property rights are eroded. This cost burden on private owners is economically unreasonable and a rebalancing of the costs of heritage conservation is desirable. Specifically, the community's contribution ought to be greater because of the benefits it gains from heritage preservation.[87]

Similarly, the Productivity Commission has also concluded that, for privately-owned places, "the existing arrangements are often ineffective, inefficient and unfair".[88] In relation to privately owned property the Productivity Commission observed that:

> Statutory listing involves applying added regulatory controls over private owners' use and enjoyment of their property. While there is scope in the legislation for governments to consider the cost consequences of this at the time of the listing (and a few do), owners have no right to insist that this is done. Appeals are limited to issues of heritage significance and due process – namely that specified procedures for notification and gazettal have been followed. As a result, many of the appeals on these grounds are a proxy for owner concerns with the cost consequences of statutory listing.[89]

Once a property is placed on the heritage register the owner is restricted in the use that he is able to make of his own property. He is not able to demolish or renovate the heritage listed building as he may wish (unless he is able to perform renovations in compliance with strict heritage regulations), is not able to develop the property on which the building is situated, and is liable to pay for heritage maintenance. An owner can find his property listed even if he does not support its listing;[90] there is no avenue of appeal, and there is no compensation for any reduction in the property's value.

Further, Louise Staley has noted that heritage legislation actually operates as a strong disincentive to property owners maintaining their property, and may well have unintended effects:

> Some property owners particularly those with buildings of marginal heritage value allow them to deteriorate to the point where all heritage value is lost and the buildings are condemned. Others risk fines and conviction to bring the bulldozers in at midnight, making a calculation that the risks are outweighed by the potential for making a reasonable return from redevelopment.[91]

There is a recognized "disconnect" which arises from the fact that there is no cost associated with heritage listing a property for the bureaucrats who make that decision, but it is a decision with enormous financial consequences for the person whose property is listed. This was acknowledged as a problem by the Productivity Commission, which noted that it "leads to a strong incentive to 'overlist' properties, as there is no penalty to the government for doing so".[92] The Productivity Commission has suggested that heritage listing should only be possible where both the owner and listing authority agree to the property being listed, and that the listing should only stay in effect as long as there is continued consent by the property owner.[93] It was noted that negotiated agreements for heritage listing are already used successfully in a number of overseas jurisdictions.[94] Other suggestions by the Productivity Commission included the introduction of "unreasonable costs" as a basis for appeals by private owners against new listings and requiring governments to pay compensation to individuals whose properties are heritage listed.[95]

Part III: Strengthening and Protecting Property Rights

The above examples provide some insight into the extent of the challenge that we are currently facing. Throughout Australia governments at the local, State and Commonwealth levels are increasingly restricting and undermining property rights in a wide range of areas. Our ultimate aims should be threefold: firstly, to ensure that any necessary acquisitions are carried out in as fair a manner as possible; secondly, to reverse the current trend whereby property rights are regularly and easily attacked and undermined; and, finally, to work towards establishing a renewed respect for the importance of private property rights.

It is an unfortunate reality that private property rights are frequently undermined by the actions of governments at all levels in Australia today. At a minimum, therefore, we need to ensure that the worst aspects of current practices are addressed and that private property owners are dealt with as fairly as possible when their property is acquired. This includes ensuring that property owners are consulted about government decisions or actions that will affect their property rights, and providing avenues of appeal so that unfair restrictions can be challenged.

Most importantly, it requires ensuring that fair compensation is paid as a matter of course. There are two aspects to this. Firstly, it is necessary to extend existing compensation guarantees so that *all* levels of government are required to pay compensation when private property is acquired. Secondly, compensation should be mandatory not only when property is directly acquired by government but also when restrictions are introduced which directly or indirectly reduce the value of the property.

The failure to pay compensation for the removal or reduction of private property rights is not only unfair to the person whose rights have been affected, but is also damaging to good governance. This point was made by Professor Suri Ratnapala in a paper presented earlier to the Samuel Griffith Society:

> Apart from constitutional principle and the demands of justice, the denial of compensation is damaging to good governance. The denial of compensation eliminates the discipline that the price mechanism brings to decision making. A government that

> need not compensate owners has less reason to "get it right" than a government that must. The uncoupling of power and financial responsibility allows governments to seek short term political dividends. It promotes politics and ideology over facts and science.[96]

There are numerous groups and individuals who have recognized the need to strengthen the existing compensation requirements. For example, the NSW Farmers Association has called for "amendments to the Constitution by referendum that enshrine the property rights of all people by requiring State Governments to pay compensation on just terms upon the acquisition of property".[97] The Institute of Public Affairs has similarly argued that State constitutions should be amended to guarantee a right to compensation whenever property rights are appropriated.[98] Going one step further, the Liberal National Party in Queensland has committed to the introduction of a Charter of Property Rights to "legally guarantee the rights of private property owners" and "legally enshrine compensation for landholders whose pre-existing rights are diminished as a result of government policy".[99] Indeed, one of the recommendations made by the National Human Rights Consultation Committee was that an Australian *Human Rights Act* should include a provision protecting property rights and that "the provision should provide for just compensation and due process for the compulsory acquisition by the Commonwealth of property required for public purposes".[100]

This final suggestion does raise an important note of caution. It is important that in trying to correct one problem we do not risk inadvertently creating another. For the same reason that a Charter of Rights should be resisted and is unlikely actually to be effective in protecting rights, a Charter of Property Rights should be resisted and is unlikely actually to be effective in protecting property rights. A Charter of Property Rights raises all of the same concerns and potential difficulties as a broader Charter of Rights. Legislating to provide for an automatic compensation mechanism that is activated when property rights are restricted would be a positive step. This is, however, to be distinguished from legislating to protect the rights themselves, which risks opening the door to all of the disadvantages associated with using a Charter of Rights.

Further, the limitations that are apparent in relation to the existing constitutional guarantee under s. 51(xxxi) provides an important reminder that a constitutional guarantee is not sufficient in itself to ensure that the relevant rights are protected on the ground. The current problem is as much a political problem as it is a legal one. If we are not able to build an environment in which the general public, politicians and government bureaucrats are all encouraged to respect and value private property rights, then we will continue to see the gradual erosion of property rights regardless of any changes that may be made to the surrounding legal framework.

Endnotes

1. Louise Staley, *Reshaping the Landscape: The quiet erosion of property rights in Western Australia*, Institute of Public Affairs & Mannkal Economic Education Foundation, *Project Western Australia* Discussion Paper, December 2007), 1. [Hereafter: Staley, *Reshaping the Landscape*].
2. [2009] HCA 51.
3. [2010] HCA 3.
4. (2009) 165 LGERA 68.
5. (1944) 68 CLR 261, per Starke J at 290.
6. (1982) 148 CLR 365, at 4.
7. Louise Staley, *Property Rights in Western Australia: Time for a Changed Direction*, Institute of Public Affairs Occasional Paper, July 2006, 2.

8. Staley, *Reshaping the Landscape*, 7.
9. WA Legislative Council, Public Administration and Finance Committee, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia (Report No. 7)*, 14 May 2004, [3.17].
10. *Village-Communities in the East and West* (7th ed, 1895), at 230.
11. John Adams, "Defence of the Constitutions of Government of the United States", *Works* (1787), quoted in: Michael S Coffman, *Why Property Rights Matters: How Government Regulations Threaten America*, 2002, 1.
12. *Theory of Legislation*, Hildreth, 1864, 113.
13. Michael S Coffman, *Why Property Rights Matters: How Government Regulations Threaten America*, American Land Foundation, 2002, 1. [Hereafter: Coffman, *Why Property Rights Matter*].
14. *Ibid*., 1.
15. William Pitt, *Speech on the Excise Bill* (Hansard Parliamentary History of England, vol. 15, 1753-1765), quoted in Steven J Eagle, "The Birth of the Property Rights Movement", *Policy Analysis*, No. 558, 15 December 2005.
16. (1975) 135 CLR 1, per Murphy J at [53].
17. America.gov, *Property Rights*, 23 June 2008, 1.
18. Coffman, *Why Property Rights Matter*, 2002, 4.
19. *The Constitution of Liberty*, 1960, 217-218.
20. Staley, *Reshaping the Landscape*, 2007, 7.
21. Working Party on the Erosion of Property Rights, *Property Rights Under Attack in Western Australia: A Paper Addressing the Erosion of Property Rights in Western Australia)*, February 2004, 4.
22. Staley, *Reshaping the Landscape*, 2007, 13.
23. [2009] HCA 51, at [178].
24. Eddie Cross, *The Cost of Zimbabwe's Continuing Farm Invasions*, *Cato Institute Economic Development Bulletin*, No. 12, 18 May 2009, 1.
25. *Ibid*.
26. Craig J Richardson, "How the Loss of Property Rights Caused Zimbabwe's Collapse", *Cato Institute Economic Development Bulletin*, No. 4, November 14, 2005, 2.
27. *Ibid*.
28. Cross, *op. cit.*, 2.
29. Working Party on the Erosion of Property Rights, *Property Rights Under Attack in Western Australia: A Paper Addressing the Erosion of Property Rights in Western Australia*, February 2004, 3.
30. *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, per Rich J at 285.
31. *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, per Barwick CJ at [8].
32. *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

33. John Forbes, "Taking Without Paying: Interpreting Property Rights in Australia's Constitution", *Agenda*, vol. 2(3), 1995, 313.

34. (1994) 179 CLR 155, at 185.

35. [2009]HCA 51.

36. Suri Ratnapala, quoted in Michael Thomson, "Legal experts call for property rights", *Queensland Country Life,* 19 August 2004.

37. [2008] VCAT 1545.

38. [2008] VCAT 2414.

39. *Wild Rivers Act 2005* (Qld), s. 3(1).

40. Premier and Minister for the Arts, *Premier Announces New Wild Rivers*, Media Release, 3 April 2009.

41. The Wilderness Society, *The Wilderness Society supports Cape York Wild River declarations and stands by its work with Traditional Owners.* Accessed at: http://www.wilderness.org.au/regions/queensland/wild-rivers-statement.

42. Senate Legal and Constitutional Affairs Legislation Committee, *Wild Rivers (Environmental Management) Bill 2010 [No. 2]*, June 2010, 36-37.

43. Kristy Sexton-McGrath, "Anglican Church Condemns Wild Rivers law", *ABC News,* 28 April 2010.

44. Ross Fitzgerald, "Land rights under threat from the green lobby", *The Australian*, 27 March 2010.

45. The Hon. Tony Abbott MP, Wild Rivers (Environmental Management) Bill 2010, *CPD (House of Representatives)*, 8 February 2010, 714-715.

46. Kathy McLeish, *Transcript: Wild Rivers*, ABC Stateline, 17 June 2005.

47. Senate Legal and Constitutional Affairs Legislation Committee, *Wild Rivers (Environmental Management) Bill 2010 [No. 2]* (June 2010), 37.

48. *Wild Rivers (Environmental Management) Act 2010,* Long Title.

49. *Ibid*., s. 5.

50. J Walker and S Elks, "Scrapping Wild Rivers legislation 'a priority' says incoming MP", *The Australian,* 23 August 2010.

51. Suzannah Barker, "PRA's new alliance to fight regrowth, Wild Rivers legislation", *Queensland Country Life,* 29 June 2009.

52. Productivity Commission, *Impacts of Native Vegetation and Biodiversity Regulations*, 10 August 2004.

53. Louise Staley, *Property Rights in Western Australia: Time for a Changed Direction*, Institute of Public Affairs Occasional Paper, July 2006, 5.

54. *Ibid*.

55. WA Legislative Council, Public Administration and Finance Committee, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia (Report No. 7)*, 14 May 2004, [7.49].

56. Jim Hoggett, "The Death of Rural Freehold Rights", *Review*, December 2002, 1.

57. Specifically in this case being the *Native Vegetation Act* 2003 (NSW) and, previously, the *Native Vegetation Conservation Act* 1997 (NSW).

58. Amy Dale, "Kevin, you're dreamin', says Peter Spencer", *The Daily Telegraph,* 2 January 2010.

59. Samantha Maiden, "Peter Spencer ends hunger strike protest", *The Australian*, 13 January 2010.

60. Michael Duffy, "Hunger strike up a wind mast is an act of tragedies", *The Sydney Morning Herald,* 9 January 2010.

61. Productivity Commission, *Impacts of Native Vegetation and Biodiversity Regulations*, 10 August 2004.

62. *Ibid*.

63. Working Party on the Erosion of Property Rights, *Property Rights Under Attack in Western Australia: A Paper Addressing the Erosion of Property Rights in Western Australia*, February 2004, 8.

64. Louise Staley, *Property Rights in Western Australia: Time for a Changed Direction*, Institute of Public Affairs Occasional Paper, July 2006, 6.

65. [2009] HCA 51.

66. Issued under the *Water Act* 1912 (NSW).

67. Issued under the *Water Management Act* 2000 (NSW).

68. *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51, per Heydon J at [159].

69. *Ibid*.

70. (1994) 179 CLR 155, at 185.

71. *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, at 349.

72. *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCER 73, per Gummow J at 121.

73. *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51, at [188].

74. [2010] HCA 3.

75. *Arnold v Minister Administering the Water Management Act 2000* [2010] HCA 3, per Heydon J at [81] – [83].

76. *Ibid*., at [83].

77. George Williams, "Stuck in an unfair federal system", *The Sydney Morning Herald,* 16 February 2010.

78. WA Legislative Council, Public Administration and Finance Committee, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia (Report No. 7)*, 14 May 2004, [3.8].

79. 545 U.S. 469 (2005).

80. Staley, *Reshaping the Landscape*, December 2007, 9.

81. (2009) 165 LGERA 68.

82. This narrow interpretation of the power to compulsorily acquire land was again seen recently in *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* [2010] HCA 2. In

this case, the High Court held that the acquisition of land by the Western Australian Planning Commission for the purposes of the Perth to Mandurah Railway was partly invalid because the acquisitions were beyond the relevant purpose for which this power could be exercised.

83. John Aquilina MLA, Land Acquisition (Just Terms Compensation) Amendment Bill 2009, *Hansard*, NSW Legislative Assembly, 15 May 2009.

84. The Hon. John Castrilli MLA, "State celebrates 1,300th heritage listing", *Ministerial Media Statement,* 23 June 2010.

85. Heritage Council of Western Australia, *Annual Report 2008/9,* at 12.

86. *Ibid*., at 13.

87. Elisabeth Costa & Alyce Cassettai, *Heritage Listing: Who Should Bear the Cost?*, September 2007, 4.

88. Productivity Commission, *Conservation of Australia's Historic Heritage Places*, Inquiry Report, 21 July 2006, at XVIII.

89. *Ibid*., at XXV.

90. Heritage Council of Western Australia, *State Register of Heritage Places*, 4th ed, August 2007, 7.

91. Louise Staley, *Property Rights in Western Australia: Time for a Changed Direction*, Institute of Public Affairs Occasional Paper, July 2006, 4.

92. Louise Staley, "Heritage through property", *IPA Review*, April 2006, 5.

93. *Ibid*.

94. Productivity Commission, *Conservation of Australia's Heritage Places*, Inquiry Report, 6 April 2006, at XXIX.

95. *Ibid*.

96. Suri Ratnapala, "Constitutional Vandalism under Green Cover", *Upholding the Australian Constitution*, The Samuel Griffith Society, 2005, vol. 17, 28-59.

97. NSW Farmers Association, *Fairness for All: Property Rights – 2010 Federal Election*, 2010, 4.

98. Institute of Public Affairs, *Hunger Strike Farmer Highlights Erosion of Private Property Rights in Australia*, Media Release, 5 January 2010.

99. John-Paul Langbroek MP, *Address on the Protection of Prime Agricultural Land,* 16 April 2010, 8.

100. National Human Rights Consultation Committee, *Report*, September 2009, 369.

Chapter Four

Tax Reform
The Resource Super Profits Tax and how not to do it

Keith De Lacy

What is reform?

Tax reform should always be guided by fundamental principles – it should be efficient to administer and, even more importantly, it should promote economic efficiency. Efficiency is almost always enhanced by reducing complexity and broadening the base.

The Resource Super Profits Tax (RSPT) did not get much of a look in on these principles; in fact, it was way down the other end of the corridor.

The trouble these days is that it does not seem possible simply to change a tax, or introduce a new tax, without claiming reform. Every tax grab becomes a tax reform. Not only that, it is usually dressed up by the PR team as if they were selling TVs, like selling a 42 inch HD PLASMA Vivo TV!

So we have the Resource Super Profits Tax (RSPT) instead of a Resources Rent Tax! or a Carbon Pollution Reduction Scheme (CPRS) instead of an Emissions Trading Scheme (ETS).

It is more about marketing than economic efficiency. It has been said that the Government spent more time with focus groups on how to sell the RSPT than they did consulting with the resources industry on its design and impact!

Incidentally, the sexy, new, focus-group inspired RSPT label backfired – the miners dropped the Profit part and referred to it more accurately as the Resources Super Tax, and all the retirees of Australia thought the Government was taxing their Super!

The CPRS branding could not have worked too well either because it has been likewise relegated to the scrap heap of history. There seems to be two morals here:

- Focus group wisdom does not equal policy; and
- The Australian people may not be quite as dumb as some believe.

The tax system is often used to pursue social and other so-called reforms, like greater fairness, or changing certain behaviours (that is, curbing alcohol consumption), and so on. However, in these cases, it should **never** be labelled tax reform, because it will inevitably offend against those principles of efficiency I outlined above. Whether it should be labelled social reform is problematical, too, because it will nearly always generate outcomes completely opposite to the intention, but that is another story.

The Resource Super Profits Tax (RSPT)

Ross Garnaut described the RSPT as an "elegant" tax –one was not sure if he was praising it or damning with faint praise, though he was one of the few who understood it because he was deeply involved with the PRRT introduced by the Hawke Government. I did note that Brian Toohey, in the *Financial Review* of 2 July 2010, wrote: "Whenever someone praises an economic theory for its elegance, reach for your shotgun". He claims aesthetics has no place in economics.

I am inclined to say the same thing, that is, reach for the shotgun when proponents claim a new tax will improve fairness, because it almost certainly means it is about redistributing wealth rather than creating it.

Twiggy Forrest from Fortescue Metals labelled it, more bluntly, a 40 per cent nationalisation, which was probably closer to the mark. You see, Ken Henry's "elegant" tax proposed to underwrite 40 per cent of the expenses and take 40 per cent of the profits, something like taking on a joint venture partner. This is what motivated him to muse, under questioning at a Senate committee hearing, that if it was 50 per cent it would make no difference to investment, or even at 70 or 80 per cent!

In order to retain its elegance, or its purity, he proposed, because the Government had not actually contributed its 40 per cent share of capital, to allow the company a return equal to the Long Term Bond Rate (LTBR) before the profits were distributed 60:40. Could you be fairer than that?

Well, yes, you could be.

- You see, they (that is, the Government) were proposing to come in free, that is, effectively appropriate 40 per cent of mature businesses, where in most cases all the risk had been removed – no losses to underwrite there.
- Then the use of the LTBR (approx 5.7 per cent) to determine the so-called allowable profit, which was to compensate the company for investing all the capital. So an allowable profit of 5.7 per cent, and everything above deemed a super profit, to be taxed at 40 per cent. Please, Dr Henry, 5.7 per cent, in a high risk game like resources, the boom and bust industry since time immemorial! No wonder Messrs Swan and Rudd had so much trouble selling it.
- But it was worse than this. This allowable profit was calculated on the written down capital (referred to as the RSPT capital account), not the market value, and in many mature mines this, the capital account, was almost negligible (I will come to Macarthur Coal as an example in a moment); and, finally,
- In calculating the actual super profits tax many expenses which most people would classify as normal, that is, acquisition costs, or interest, or head office expenses, were not allowable deductions. So it ended up a tax on much more than what we know as net profit.

I remember saying, at the time, that if you were not confused by it, then you did not understand it!

RSPT impact on Macarthur Coal

Let me outline the impact it would have had on Macarthur Coal – and I can do this now as it is just empty theorising on what might have been. At this point, let me raise an important relevant point. Have you any idea how difficult it is for a listed public company to wage these battles against a proposed new tax, to spell out the implications?

There are two issues.

- Firstly, disclosure obligations. It is very difficult to talk about potential impacts on your company without being required to release detailed calculations to the ASX; and
- Secondly, if it is potentially very negative, you are talking down your own share price, and no company wants to do that deliberately and, perhaps, needlessly.

At Macarthur Coal our effective rate of taxation this year under the old system is estimated at 42.93 per cent (company tax plus State royalties). This is why we (and miners generally) bridle at the implication we are not paying a fair tax. An effective rate of tax of 43 per cent is among the highest in the world.

We did an exercise as though the RSPT had commenced in 2009-10. In this financial year, its second year of operation, we estimated it would have increased our total tax paid by $67 million, to 59.83 per cent (company tax plus RSPT, after refund of State royalties) – in round terms, an increase in effective tax from 43 per cent to 60 per cent.

You judge whether a 60 per cent tax rate is internationally competitive, or whether it makes a material retrospective impact on the parameters that applied when the decision to invest was made? This is why the issue of sovereign risk raised its ugly head.

Another point: our written-down capital base (capital account) as of 2 May 2010 was $195 million. This was the number on which we were allowed the LTBR, that is, 5.7 per cent of $195 million = $11 million. Well, thank you, Dr Henry. We had a market cap of $3 billion, but our shareholders were allowed a return of $11 million, or just 0.3 per cent, before the super tax applied.

In fact, only a few months earlier, Peabody had made a takeover bid for Macarthur Coal which valued us at a little more than $4 billion. Imagine if they had been successful? Dr Henry was going to allow them a return of $11 million on their $4 billion investment before declaring everything else a super profit and slugging it 40 per cent, to be followed by a 30 per cent company tax.

An elegant tax indeed! I also said at the time that it was a tax that could only have been devised by Canberra public servants who had never had dirt under their finger nails, and could only be accepted by politicians who had never been out in the real world!

It was based on the so-called Brown tax, devised by a Mr Cary Brown in the US in 1948. Yes, 1948, when, I think, it is fair to say socialism did look a viable alternative to many people after the horrors of the Depression and the Second World War. And what a wonderful pedigree it had, 62 years old and never had a child, anywhere in the world!

And what a wonderful gift to Australia in 2010! Especially the timing, with the world teetering precariously on the precipice of a double dip recession, and only the resources sector standing between us and Armageddon! Why not tax it into Armageddon!

Let me return to the proposed commitment to underwrite 40 per cent of expenses, and why this was scoffed at by the industry:

- It was not bankable.
- The industry is prepared to bear its own risk; it does not want a silent partner.
- On established projects, the owners had already borne the risk; and, finally,
- The Government was not going to pay 40 per cent of expenses anyway, just underwrite them, by definition when the company went broke. Can you imagine during the next big recession, with falling commodity prices, tax receipts down and welfare payments up, and the Government paying 40 per cent of accrued expenses so that all these companies could shut up shop and sack their workers! Splendid optics, splendid politics, about as sustainable as Kevin Rudd's approval ratings were!

There must be parts of Australia where it is still legal to smoke dope!

Mineral Resource Rent Tax (MRRT)

And, now, the Mineral Resource Rent Tax. The tax rate has been effectively reduced to 22.5 per cent (well, not literally, it is notionally 30 per cent because this does not sound like such a cave-in, but actually reduced by a strange beast called an extraction allowance, to net it out at 22.5 per cent).

So we have a situation where the tax rate is almost halved, there is a substantially more generous uplift rate (LTBR + 7 per cent), there is an option to use full market value for depreciation purposes, and a dramatically reduced line-up of victims (from 2,500 to 320).

A convincing win for the miners but, surely, a revenue debacle.

But, no, the Treasurer has found the magic pudding! He releases advice that the two-year forward

estimates for the revenue from the tax would only be reduced from $12 billion to 10.5 billion, or just 12.5 per cent.

But not everyone believes in miracles. Under pressure he was forced to admit that the Treasury was using a new set of upgraded commodity price forecasts.

Oh, I see. If you used those assumptions in your original estimates, what would be the impact of the RSPT?

Well, if you insist on indulging in these hypotheticals, $24 billion in the first two years – this, instead of the original $12 billion, and do not forget the first two years are still the ramp-up years.

Wow! So you were really proposing to appropriate something like an additional $20 billion a year from Australian miners, and you variously labelled them bullies, and greedy, and fundamentally dishonest, for not rolling over and saying thank you?

Back to Macarthur Coal. Our calculations on the incomplete information before us indicate that the MRRT will increase our effective rate of tax by one or two per cent, to 44 or 45 per cent at today's price of coal – still high by international standards, but a far cry from 60 per cent under the RSPT – hence the wry silence from the hitherto vocal miners (with a few exceptions) as the Treasurer and the Treasury descended into a paroxysm of spin and fiddle over the forward estimates!

Mind you, I have to say it does not bode well for our country when we measure the acceptability of a tax on the basis that it does less damage than the one it replaced!

In the Queensland coal industry we pay State royalties based on the value of sales, and a progressive one at that. It is 7 per cent on the first $100 per tonne, and 10 per cent after that. And, as it turns out, there is not very much difference between this percentage of total value of sales, and 22.5 per cent of profits (depending on what shenanigans the Treasury and the Australian Taxation Office get up to when they start re-defining profits). In fact, if we used the long term forecasts for coal prices, State royalties would be greater than the MRRT, that is, the Federal Government could be notionally rebating more than it was collecting.

The Economics of Taxation

I know there are some people – Bob Brown comes to mind – who think that there is no limit to the level of taxes you can levy (on someone else, that is!). But even 5th grade economics would teach you that you reach a point where:

- it becomes internationally uncompetitive; and/or
- it encourages self-defeating and, very often, irrational behaviour.

These same big tax proponents say a resource like coal or iron ore is not internationally mobile. True, but the investment capital certainly is!

And, when you do it retrospectively, you increase sovereign risk – not a good idea in a capital importing country such as Australia. In this respect, I noted recently a survey of more than 400 mining executives around the world by the Fraser Institute in Canada. The survey showed Australia's reputation as an investment destination falling on average from 18th to 31st of 51 jurisdictions.

This survey was completed before the compromise that was the MRRT, but I am not sure this matters much. There is still the global perception of a new tax. And, sad to say, sovereign risk is exactly that, sovereign risk; it does not confine itself to resources.

There has been a suggestion that the industry had asked for a profits-based royalty tax. I doubt this is the case. They simply saw the writing on the wall. Be that as it may, I personally have some serious reservations about a profits-based royalty, because it is not possible to distinguish rents from efficient management. Every time you save a quid you pay a quid as it were.

To a certain extent it encourages the exploitation of more marginal projects at the expense of more efficient ones.

The Accounting Miasma

At the outset I said tax reform should be guided by the principles of simplicity and efficiency. Yet tax changes always seem to add another layer of complexity. In this regard the RSPT was a doozy, and the MRRT no better.

We may now have to prepare a new set of **MRRT accounts**, which will be very complex, with a new set of valuations, expense and depreciation issues to be addressed, probably also independent expert valuations. This on top of our **statutory accounts** based on international accounting standards, **taxation accounts** which have a whole range of different schedules to statutory accounts. Then there are **royalty accounts** because we still pay State royalties even though they will be refunded, and our own **management accounts** so that we can understand what the hell is going on.

Federal Treasury – the Sad Victim

One of the greatest tragedies in this whole fiasco is the immense damage it has done to the credibility of the Federal Treasury. The most common pejoratives abounding in the Board rooms of Australia are that they are naive and ideological, or that they have found God or, more simply, that they have lost the plot.

Which is not altogether fair, because there is much in the Henry review which is very worthy – although you would not know this because of the RSPT fiasco.

This credibility hit was probably inevitable because the whole tax reform process was set up to fail in the first place. As the architect of the review, Ken Henry became its chief advocate, seriously compromising his and the Treasury's independence. Who was left to provide the independent advice – apart from the enlightened adolescents in ministerial offices?

Is it any wonder that Treasurer Wayne Swan was reduced to quoting from an unpublished Californian undergraduate paper to support his fantasy that Australian miners were only paying 17 per cent tax, or that the MRRT revenue assumptions were conveniently based on a different set of resource price assumptions to that of the RSPT two months earlier?

It is all very sad.

System-wide Tax Review – Some Rules

Let me give you some simple, home-spun KDL rules for wide-ranging tax reform:

- Keep it independent. Then the Treasury can fulfil its time honoured role of providing independent advice to Government, to do all the necessary independent checking and modelling and scoping, and so on.
- Do it in the good times. There will always be winners and losers and it is easier to accommodate the losers when you are flush with revenue.
- Do not do it in an election year!
- Consult with the real world.
- Stick to the principles of efficiency and simplicity I outlined at the beginning.

Intergenerational Equity

Apart from the class war rhetoric embodied in the phrase, *a fairer share for all Australians*, there was, and there still remains, a more plausible argument that we are exploiting our non-renewable resources at the expense of future generations.

But, if you accept this argument, you must equally accept that all of the resource rental revenue must go into a sovereign wealth fund the capital component of which is inviolable. You do not do

anything for intergenerational equity by imposing a resource rent tax and then, if you will pardon the French, pissing it up against the wall.

Which is what we have been doing:

- The States with their royalties since time immemorial.
- The Howard Government, with its middle class welfare using revenue from the mining boom – you know, the family tax benefits, baby bonuses, health insurance rebates . . . The splendid irony in all this was that Kevin Rudd accused Howard of splurging the $360 billion of extra revenue generated by the resources boom. He was right.
- But Rudd never took his own advice. He doubled the tax but never scheduled any of it for a wealth fund – it was to pay back the deficit, more middle class welfare . . .

Which brings me to my final point but one, albeit a bit irreverent.

Why do governments always think that they can spend taxpayers' money better, or more productively, than taxpayers can – you know the attitude embedded in the tabloid phrase, *a fairer share for all Australians*? If a mining company increases profit we either invest it in new capacity or return it to shareholders in the form of dividends. Can you spend it better than that?

Tom Albanese from Rio, in Brisbane in August 2010, said that over the last five years Rio had Australian earnings of $36 billion but they had invested $37 billion in new capacity.

But we get into the debate about big government, and that is for another time.

The Virtues of Mining

I am proud to be a miner, although it is seen as politically incorrect in the leafy suburbs. I started off life as an underground miner, with a jack hammer and a hand shovel. I am still there, albeit a bit further from the coal face! Or the hand shovel!

- Mining generates enormous primary wealth – the rest of the economy lives off the primary wealth generators.
- Whilst the absolute number of employees is not great, I read an American study which showed for every job generated in mining 11 were created in the rest of the economy.
- We create jobs, commerce and wealth in regional areas – away from the over-crowded cities.
- We pay good wages.
- We, and our employees, pay very large taxes.
- Our exports greatly contribute to funding the nation's current account.
- And, while there is a downside as our exports put upward pressure on the Australian dollar, this is ultimately a measure of our wealth, and standards of living, *vis à vis* the rest of the world.
- Mining is a very sophisticated industry in which Australia has expertise, technologies and equipment which gives us a competitive edge and which we also export to the world.
- And we are good blokes!

The industry is tolerated rather than appreciated. The RSPT saga proved that. But Australians to a person are infinitely better off because of our contribution in so many ways.

Chapter Five

The National Broadband Network and the Acquisition of Property

Grant Donaldson, SC, and Richard Douglas

When asked to speak about this issue, it was in one sense far more interesting than it is now and, in another sense, far less interesting.

Everyone is aware of the political issues that are presently unresolved and the apparent situation that various of the Independents with whom the Government and Opposition are now liaising have seemingly very different positions in respect of the National Broadband Network. That is the interesting bit as regards this topic.

The circumstance that has led to a lesser degree of interest is that at the end of June 2010 (after I was asked to do this paper) the Government, NBN Co Limited – I will come to explain what this is below – and Telstra entered into a Heads of Agreement that would seem to have resolved or put to one side many of the issues that might otherwise have arisen as regards the National Broadband Network and s. 51(xxxi) of the Constitution.

That said, the story or the context is an interesting one – even to those not remotely interested in technology such as me – and warrants a telling.

The "National Broadband Network"

Fibre optic technology

The National Broadband Network is simply the laying of fibre optic cable to what is said to be 90 per cent of Australian homes, businesses, etc. The other 10 per cent that cannot be (presumably economically) reached by fibre optic cable will be connected to the National Broadband Network by what are described as advanced wireless and satellite technologies.

The 10 per cent of users are those in the most remote areas of Australia.

The fibre optic cable (which transmits data by pulses of laser light rather than by pulses of electricity) is primary designed to enhance internet services, though it can also carry information such as television and radio programming and telephone services. It would seem that pretty much everything that is today "carried" by means of existing copper wire technology (most home telephones), or wireless technology (radio, television and much internet) and satellite (no idea) can be carried more quickly and more densely by use of the fibre optic cable. Fibre optic cable is, for example, the means by which most subsea intercontinental cables now carry data.

The fibre optic cable is a corporeal thing. It is essentially a glass and plastic strand with "information" carried along it in light that is shone down the cable by lasers. Receivers at various places can collect (and decode) information sent by laser.

The benefit of the fibre optic cable is that much more information can be carried and the speed of the system is much greater than the current system. Fibre optic cable operates, unsurprisingly, at the speed of light which the physicists tell us is – for most purposes – as fast as possible.

Events culminating in NBN Co Limited

Unfortunately I am not much interested in these matters and so I did not follow all that carefully the various dramas that culminated in the Commonwealth Government announcing that the National

Broadband Network would be delivered or provided by the means currently proposed. I will explain these means presently.

That said, it seems to me that the position that has been arrived at is one that was driven in part – if not in large part – by s. 51(xxxi) of the Constitution and the limitations that this provision places on Commonwealth government action.

The provision of broadband by means of the laying of fibre optic cabling was a policy taken to the 2007 federal election by the ALP. In 2008 the Labor Government sought tenders to lay and provide the fibre optic cable and other necessary services. Famously, Telstra did not meaningfully respond and none of the other proposals was accepted. Frankly, it is hard to imagine – for reasons that I will explain – that any private body other than Telstra could have submitted a meaningful proposal.

After this debacle, the Government abandoned this process – which was in effect for the private sector to lay and provide the fibre optic cable and other necessary services. Instead of this, the Government announced at the end of July 2009 that a corporation, the shares of which were owned by the Government (NBN Co Limited), would build and operate the National Broadband Network. Until fairly recently the board of NBN Co Limited comprised three senior Commonwealth public servants.

In May 2010 the Government released an "implementation study", commissioned by it and prepared by McKinsey and KPMG.[1] The report "suggested" that the National Broadband Network could not be practically implemented, or not at the projected cost, without participation by Telstra.[2]

In June 2010 the Government and NBN Co Limited announced that NBN Co Limited and Telstra had entered into a "Financial Heads of Agreement" pursuant to which Telstra would provide to NBN Co Limited access to its facilities and over time Telstra would transfer its traffic onto the National Broadband Network. As part of this transfer Telstra would decommission its copper cable network. I assume that what this means is that over time all of the services which Telstra currently provides via its copper cable network will be delivered via the fibre optic cable.

If the "Financial Heads of Agreement" is publicly available I have not been able to find it and consequently I have not read it. Common sense would suggest, however, that in light of this agreement the likelihood of dispute with Telstra is less likely than it otherwise would have been, even if the prospect of such dispute has not been excluded completely.

Necessary interaction between the National Broadband Network and existing Telstra infrastructure

The National Broadband Network seemed always to contemplate use of at least part of the existing Telstra infrastructure. I can explain my incomplete understanding of this shortly.

Telstra had over time obtained the public switched telephone network which had since Federation until the 1980s been operated by the Commonwealth government. The public switched telephone network is a massive piece of infrastructure involving copper-based cabling (or wire) to most houses and businesses in Australia. The public switched telephone network involves this wire running from a home or business premise to a local exchange. The wire from the home or business premise is known as a "local loop" and there are over 10 million of these currently in operation. Telstra owns and operates the local exchanges and there are over 5 000 of these.

Initially the public switched telephone network could only transmit sounds and was used exclusively for telephones though, for some time, the Telstra local loops carried other things including internet access services.

As part of the privatisation of Telstra and the injection of competition into the telecommunications industry, Telstra was required to provide access to certain parts of this infrastructure to competitors. This was principally provided for by means of the "telecommunications access regime" found in Part XIC of the *Trade Practices Act* 1974.

In *Telstra Corporation Limited v The Commonwealth* (2008) 234 CLR 210, Telstra unsuccessfully contended that the forced "telecommunications access regime" imposed upon it in Part XIC of the *Trade Practices Act* 1974 effected an acquisition of its property in some of its local loops, other than on just terms.

In *Telstra Corporation Limited v The Commonwealth* the matter at issue involved a requirement that Telstra provide to competitors use of local loops in the sense of permitting competitors to use the copper wire and, in some cases, to allow competitors to install its equipment in Telstra's local exchanges. Again, a local exchange is a physical thing and place.

As I understand it, what is proposed to occur with the National Broadband Network is that the fibre optic cable, which as a corporeal thing, will be owned by NBN Co Limited. The broadband service will be delivered by cable in one of two ways. First, a "fibre to premises" mode, by which a fibre optic cable will run from Telstra's local exchange to (in effect) every separate home and business premise with an optical splitter splitting the cable at each necessary point. Second, a "fibre to node" mode by which the fibre optic cable is run from Telstra's local exchange to a node at which the fibre optic cable terminates. From the node to each home or business premise, the broadband service is carried on the existing Telstra copper wire.

Various splitters, routers and other transmission infrastructure owned by Telstra, if any, will be required for the non-fibre optic aspects of the National Broadband Network. The cost of building parallel structures which duplicate the existing Telstra infrastructure is not fully costed by the KPMG McKinsey report, presumably because such a cost not with anything approaching desirable parameters from the government's capital outlay obligations.

Issues that may arise

As noted above, the Financial Heads of Agreement that NBN Co Limited and Telstra had entered into have not been publicly disclosed and so I have no idea whether there are any remnant issues with s. 51(xxxi). It would be odd if there were, particularly as the Government, NBN Co Limited and Telstra all announced at the time of the Heads of Agreement that the arrangement had a value of $11 billion *to Telstra* [emphasis added]. Interestingly, within this $11 billion is the following: "… the Federal Government has agreed to progress public policy reforms with an attributed value of approximately $2 billion". It is not at all clear what this is or was intended to be.

Of course, what might come to pass in all of this is dependent upon political considerations that are being worked through at the present time, and it may well be that acquisition issues may arise at some time in the future.

There are a number of acquisition issues that could possibly arise. Some have been considered in *Telstra Corporation Limited v The Commonwealth* (2008) 234 CLR 210, others not.

Many of the issues that could arise are of great complexity having regard to the manner in which Telstra has come to have vested in it certain rights. Further, certain of these rights are themselves unique and the nature of proprietary right or interest held by Telstra is complex. To resort to terminology commonly used, Telstra's bundle of rights in certain of its property is difficult to characterize and define. I cannot and am not going to expand on this in full, other than to set out a passage from a native title judgment of Sundberg J which dealt with a very large part of the Kimberley area of Western Australia; see *Neowarra v Western Australia* [2003] FCA 1402 at [648]-[649].

> 648 From 1901 to the present Telstra and its predecessors have exercised statutory land access powers to install telecommunications facilities on Crown land and privately owned land. The powers are not qualified by reference to the identity of the owner of the land or by reference to the nature of the interest in the land held by any person. The legislation relevant to the facilities within the claim area is the *Telecommunications Act*

1975 (s 16), the *Australian Telecommunications Corporation Act* 1989 (Cth) (s 88), the *Telecommunications Act* 1991 (Cth) (s 129) and the *Telecommunications Act* 1997 (Cth) (Sch 3, cl 5-7).

649 Telstra owns four types of telecommunications facilities within the claim area: radio system sites, customer terminals, optic fibre cabling and local distribution cabling. In the claim area it makes extensive use of digital radio concentrator systems (DRCS Systems) to deliver standard services. In a DRCS System the radio signal is carried via radio transmitters (also called "repeaters") constructed at intervals of between ten and fifty kilometres along the path of the system. Each DRCS System is usually comprised of between six and twenty repeaters. Each customer serviced through a DRCS System is either cabled from a nearby repeater or connected to it by a radio link via a mast installed at the customer's premises. The facility at the customer's premises is referred to as a "customer terminal". There are two DRCS Systems within the claim area.…

Just from this description it can be seen that in remote areas of Australia, the Telstra infrastructure involves rights that are undoubtedly proprietary in radio tower sites, customer terminals, optic fibre cabling, local distribution cabling, repeater stations and radio masts installed at customer premises. No doubt, the definition of the proprietary rights of Telstra in each of these types of infrastructure involves some complexity. Further, this list exemplifies that the value of the Telstra assets at stake is vast, not only in book value, but further by the fact that their utilization in remote areas avoids native title considerations. If NBN Co Limited was required to negotiate land access arrangements with native title holders for cable routes, tower sites and the like, there would be no prospect of the National Broadband Network being delivered within any sensible period.

It is unclear how much if any of this infrastructure will be utilized in the National Broadband Network and if so and what – how much and how. But some issues that may have to be addressed are as follows. First, it has been recognized and accepted that statutory proprietary rights, in the sense of proprietary rights created and constituted by legislation, are not excluded from the operation of s. 51(xxxi) of the Constitution simply on the basis that such rights are inherently susceptible to subsequent legislative modification or extinguishment; see *Attorney-General (NT) v Chaffey* (2007) 81 ALJR 1388 at 1393-1394. In one sense this is a trite proposition in this country having regard to the ubiquity of Torrens-type legislation.

Second, even though it was held unanimously in *Telstra Corporation Limited v The Commonwealth* that the compulsory third party access regime there considered did not constitute an acquisition of Telstra's property, this conclusion was premised upon the following critical finding (at [51]):

… the public switched telephone network which Telstra now owns (and of which the local loops form part) was originally a public asset owned and operated as a monopoly since Federation by the Commonwealth. Second, the successive steps of corporatisation and privatisation that have led to Telstra now owning the public switched telephone network (and the local loops that are now in issue) were steps which were accompanied by measures which gave competitors of Telstra access to the use of the assets of that network. In particular, as noted earlier in these reasons, the step of vesting assets of the public switched telephone network in Telstra, in 1992, was preceded by the enactment of the *1991 Telecommunications Act*. At all times thereafter Telstra has operated as a carrier, first under the *1991 Telecommunications Act*, and later under the *1997 Telecommunications Act*, within a regulatory regime by which other carriers have the right to interconnect their facilities to Telstra's network and to obtain access to services supplied by Telstra , and Telstra has like rights with respect to other carriers. Telstra has

> never owned or operated any of the assets that now comprise the public switched telephone network except under and in accordance with legislative provisions that were directed to "promoting . . . competition in the telecommunications industry generally and among carriers" and sought to achieve this goal by "giving each carrier the right . . . to obtain access to services supplied by the other carriers".

It seems to me that fundamentally different issues arise with the National Broadband Network. For instance, even if Telstra's infrastructure assets – and various of its property rights – have been held (and defined having regard to) legislative provisions that were directed to promoting competition in the telecommunications industry by giving each carrier the right to obtain access to the property of other carriers *in respect of telecommunications usage*, it might be hard for some to accept that this also involved providing access to a government monopolist, which NBN Co Limited is, for purposes not contemplated when the assets subject to the telecommunciations and TPA at the time the assets were transferred to Telstra. Further, this consideration also depends very much upon what the relevant "telecommunications industry" is.

In effect, when Telstra was granted the property rights at issue, the rights always included an obligation to share; imposing the obligation to share did not then involve an acquisition of anything.

Third, different issues will arise with different proprietary rights held by Telstra. To illustrate: it may be that the property right which Telstra has in a local exchange to which it must give access to a competitor so that the competitor can attach its own equipment is in a different category to the right it has to the easement along a suburban street – which easement is proposed to be used by NBN Co Limited so as to render Telstra's copper wire which is in the easement completely redundant. Careful attention will of course have to be paid to the precise proprietary interest of Telstra being affected.

Fourth, the matter of greatest interest to me in the jurisprudence of s. 51(xxxi) emerges from the word *acquisition.* In the US Constitution, the relevant aspect of the Fifth Amendment has always been referred to as the "taking clause", and s. 51(xxxi) of our Constitution the "acquisition provision". The Fifth Amendment refers to a person being "deprived [. . .] of property" (in relation to due process) and that "nor shall private property be taken for public use, without just compensation". Since before the *Tasmanian Dams case* (1983) 158 CLR 1 it has been thought of as trite that a destruction of a property right is not an acquisition. As observed by Mason, J in the *Tasmanian Dams case* (1983) 158 CLR:

> It is not enough that the legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.[3]

> This is akin to an aphorism from *Mutual Pools and Staff Pty Lrd v Commonwealth*((1994) 179 CLR 155 at 185, that acquisition is distinct from deprivation. Although it can also be compared with the Court's holding that "Accordingly, 'acquisition' in paragraph 51(xxxi) extends to the extinguishment of a vested cause of action, at least where the extinguishment results in a direct benefit or financial gain (which, of course, includes a liability being brought to an end without payment or other satisfaction) and the cause of action is one that arises under the general law".[4]

But what about a destruction of a property right for the purpose of (of course, "for the purpose of " is a term that must be treated with care) enabling the Commonwealth to carry on a business over the carcass of the destroyed property? It is to be remembered that "property" extends to every species of valuable rights and interest including choses in action, the right to receive money and a cause of

action for damages;[5] and that "property" and "acquisition" in the constitutional guarantee are to be construed liberally.[6]

What if here Telstra is required to permit NBN Co Limited to use certain of its property rights which will have the effect of rendering other of its property rights valueless? So, Telstra must permit NBN Co Limited to use its easement like rights to lay fibre optic cabling, which will in practical terms render the copper wire cable valueless? The Commonwealth has not acquired the copper wire cable, but it has rendered it valueless. The nature of the property right will be important. It may be thought that a statutorily created property right ever susceptible to later statutory emasculation is to be considered differently from some other forms of property right.

An "acquisition" requires that there must be an acquisition whereby the Commonwealth *or another* acquires an interest in property, however slight or insubstantial.[7] The term "acquisition" directs attention to whether something is or will be received. In relation to constitutional guarantees and prohibitions, an act may not be done indirectly which would be forbidden directly.[8]

In the absence of the details of a specific proposal for compromise of property rights, it is not possible to conclude about whether a proposal infringes s. 51(xxxi) of the Constitution.

However, it is possible to identify some developments which impact on the ambit of the scope of s.51(xxxi) and may lead to it playing, as in the past, a substantial role in the life of the nation.

In *Wurridjal v Commonwealth of Australia* [2009] HCA 2, the High Court considered, and overturned, the doctrine that the territories power under s. 122 of the Constitution is not subject to s. 51(xxxi) because s. 122 is plenary in quality and unlimited and unqualified in point of subject matter (see French CJ at [54]-[55]).

The Court overturned its previous ruling (Kirby J dissenting) and held that because:

> Section 51 of the Constitution confers powers upon the Parliament to make laws for the "peace, order, and good government of the Commonwealth" with respect to the various matters set out in that section;
>
> It is hardly necessary to say that when you have, as you do in paragraph 51(xxxi), an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification: Attorney-General (Cth) v Schmidt (1961) 105 CLR 361 at 371–372 per Dixon CJ;
>
> In the absence of any indication of contrary intention, the other legislative powers reposed in the Parliament must be construed so that they do not authorize the making of a law which can properly be characterized as a law with respect to the acquisition of property for any relevant purpose otherwise than on just terms: Mutual Pools & Staff Pty Ltd v The Commonwealth (1994) 179 CLR 155 at 169;
>
> These considerations indicate that an integrated approach to the availability of legislative powers and limits on them throughout the Commonwealth is to be preferred where the language of the Constitution so permits;
>
> That conclusion favours, although it is not determinative of, the proposition that s. 122 is subject to limitations on legislative powers which are of general application; and
>
> It therefore favours, although it is not determinative of, the proposition that laws made under s 122 which effect compulsory acquisition of property must do so on just terms within the meaning of paragraph 51(xxxi);

Consequently, the exercise of Commonwealth legislative power in respect of the territories was subject to the limitations inherent in paragraph 51(xxxi): French CJ at [73] to [81].

This decision, overturning the 40-year position that the territories power is not subject to the limit in s. 51(xxxi)[9] may suggest a revival of the idea of s. 51(xxxi) as much a limit on Commonwealth power as it is a warrant to exercise eminent domain.

Such a view is not novel. That the Commonwealth acquisition clause bears similarities to the takings clause in the Fifth Amendment of the US Constitution is a reflection of the actual deliberations of the Constitutional Convention.

Dixon J, as he then was, said in 1941 that the source for s. 51(xxxi) was the Fifth Amendment of the US Constitution: *Andrews v Howell* (1941) 65 CLR 255 at 282. As recently as 2009, Kirby J agreed with this characterization, stating that Australia's acquisition clause was "inspired by the Fifth Amendment to the Constitution of the United States": *Wurridjal v Commonwealth* (2009) HCA 2 at [306].

That Crown seizure of property is to be confined is an old English principle in the construction of statutes. As Bowen LJ held in *London and North Western Railway Co v Evans* [1893] 1 Ch 16 at 28:

> [T]he Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him.
> See also *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508.

However, s. 51(xxxi) goes further, identifying a power that the Imperial Parliament already had – exercising eminent domain – a subjecting its exercise to justiciable limits. In a recent article, Duane L. Oster has drawn our attention to the significance of the Fifth Amendment to the US Constitution to the drafters of the Australian Constitution: Ostler, Duane L., *The Drafting of the Australian Commonwealth Acquisition Clause*, (2009) 28 U Tas LR 211.

He reminds us that, on 25 January 1898, Edmund Barton made a new proposal to the Constitutional Convention. He suggested that a general acquisition clause should be inserted into the then clause 52 (subsequently renumbered as clause 51), to the effect that the Commonwealth Parliament would have power to make laws regarding "[T]he acquisition of property on just terms from any State or person for the purposes of the Commonwealth". That language is very similar to the final form of words adopted in s.51(xxxi).

Sir Isaac Isaacs had already informed the Convention that, in his view, the power of eminent domain was already possessed by the colonies without further warrant: On 25 and 28 January 1898; *Official Report of the National Australasian Constitutional Debates (Third Session)* at http://www.aph.gov.au/senate/pubs/ records.htm.

In *NSW v Commonwealth* (1915) 20 CLR 54, 78, Barton subsequently made the observation that, in "some of the States of the American Union the power of expropriation is limited by their Constitutions to acquisition on just terms". Barton's apprehension of the US State constitutions accords with what the Fifth Amendment does provide, namely, "just compensation".

In *Georgiadis*, as mentioned (another occasion on which Telstra sought to invoke s. 51(xxxi)), the Court held that at least where the extinguishment results in a direct benefit or financial gain (which, of course, includes a liability being brought to an end without payment or other satisfaction) and the cause of action is one that arises under the general law, an "acquisition" has occurred.

This is consistent with the tenor of the US Supreme Court decisions, which have held that regulatory extinguishment of certain property rights amounts to a "taking", although – formally – an asset is not taken by the Federal or State Government.

Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it

was generally thought that the Takings Clause reached only a "direct appropriation" of property, or the functional equivalent of a "practical ouster of [the owner's] possession". That doctrine will be familiar to readers of the judgments of the High Court. Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the "police power", "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared". These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking".

In *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992), a dispute arose after the petitioner purchased certain beachfront property in South Carolina. In 1988, the South Carolina Legislature enacted the *Beachfront Management Act*, which had the direct effect of barring Mr Lucas from erecting any permanent habitable structures on his two parcels of land. A State trial court found that this prohibition rendered Lucas's parcels "valueless".

Scalia J recalled that *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "set formula" for determining how far is too far, preferring to "engage in . . . essentially ad hoc, factual inquiries".

However, the Court described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.

The second circumstance in which the Court found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of the asset. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate State interests or denies an owner economically viable use of his land".

Similar issues to those considered by the High Court in *Telstra* have arisen in the United States under the US *Telecommunications Act* 1996. While signing the 1996 Act into law, President Clinton said, "[T]oday, with the stroke of a pen, our laws will catch up with our future. We will help to create an open marketplace where competition and innovation can move as quick as light". In summary, under the 1996 Act, FCC rule-making increased access of competitive local exchange carriers ("CLECs") to the facilities of incumbent local exchange carriers ("ILECs") by removing certain competition barriers.

In a 2002 decision, *Verizon Corp. v. FCC*, 535 U.S. 467 (2002), the US Supreme Court broadly upheld the provision of the US Federal *Telecommunications Act* 1996 regulations against statutory and administrative law challenge, but largely declined to review the incumbents' constitutional claims under the Takings Clause. The Court held that the incumbent telecommunications corporations (who were being required to make their networks available) were misconceived to argue "to the effect that there may be a taking challenge if a ratemaking body makes opportunistic methodology changes just to minimize a utility's return on capital investment. There is no evidence that the decision [. . .] was arbitrary, opportunistic, or undertaken with a confiscatory purpose": cf *Duquesne Light Co. v. Barasch*, 488 U. S. 299 (1989).

What might this import for the NBN and Telstra? (a company representing 4 per cent of the S&P/ASX 200, and therefore comprising a material part of the retirement savings of a large number of Australians). To answer that question is to engage in a speculation, but not, I hope, an uninformed one.

First, the "just terms" qualification to the power of s. 51(xxxi) can be seen, in the wake of *Wurridjal* decision, to have reemerged as a confinement of the legislative power of the Commonwealth and

not merely a qualification upon a power. I say "re-emerge" because that quality is one which Justice Dixon and, I suggest, Justices Barton, Isaacs and O'Connor appreciated.

Second, an acquisition may more readily comprehend the extinguishment of rights to the benefit of another. The NBN proposal may, for practical purposes, depend upon the taking of access from Telstra for last mile and transmission infrastructure access not for telephonic communications – which was held to be lawful in the 2008 *Telstra* decision – but for the purpose of non-telephonic data transmission.

Third, the US Supreme Court's construction of the word "taking" in the Fifth Amendment – namely, that the exercise of regulatory power to effect a practical extinguishment of rights is unlawful (even where there is no reciprocal "receipt" of the extinguished right) – is reconcilable with Australian cases which have considered the ambit of s. 51(xxxi).

Fourth, were the Commonwealth to seek to commandeer or regulate the Telstra infrastructure for the purpose of the NBN project, that may well constitute an acquisition (whether by the Commonwealth or its emanation) which would fall outside the power granted by s.51(xxxi) and infringe the just terms confinement.

Whether this question will be pressed by the Government or by Telstra itself remains to be seen.

I would conclude:

If the English constitution was the mother the Australian Constitution, we should not lose sight of the US Constitution being, in respect of s. 51(xxxi), as elsewhere, very much its older brother.

National policy at the highest level has foundered upon the reefs of s. 51(xxxi), as Prime Minister Chifley learned to his cost in the Bank Nationalisation case.

The confinements upon power adopted by the Australian people in the referenda held during 1898 to 1900 retain their capacity to surprise the executive, the legislature and ourselves. It is not beyond the 26 plain words of s. 51(xxxi) to do so again.

Endnotes

1. http://www.dbcde.gov.au/nbn_implementation_study.
2. See 1.4.3 at pages 34-35, 43, 94, 113, 245, 336, 349 "The commercial logic for both NBN Co and for Telstra to share dark fibre on reasonable terms is compelling. An agreement would reduce NBN Co's capital expenditure significantly", 397 (". . . . in the worst case, fibre deployment costs blow out [. . . . and] the Government's funding requirement is $32.6 billion" as compared with the estimated $26 billion in the preferred scenario:) and 398.
3. See also *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304 per Mason CJ, Deane and Gaudron JJ.
4. *Georgiadis* at 305.
5. *Georgiadis* at 303-4.
6. *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349-350.
7. *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304 per Mason CJ, Deane and Gaudron JJ.
8. *Georgiadis* at 304-5.
9. *Teori Tau v The Commonwealth* (1969) 119 CLR 564, 44 ALJR 25, [1969] HCA 62, [1971] ALR 190.

Chapter Six

Revisiting Proposals for a State Income Tax

Professor Jonathan Pincus

Friends, the text for today is from Saint Peter:

> *A fundamental principle of responsible government in any system is that each government must raise the money it spends.* (Peter Walsh, 9th conference of The Samuel Griffith Society)

First, some potted history:

- In 1942, the Commonwealth excluded the States from the income tax field.
- In 1952, the Commonwealth abandoned land tax in favour of the States. Menzies had sought to return some income taxing powers, but the smaller and poorer States resisted.
- In 1971, the Commonwealth abandoned payroll tax in favour of the States, blunting State agitation for access to the income tax.
- In 2000, the Commonwealth abandoned its sales taxes and created the GST, the full revenue of which goes to the States (so far).
- In 2020, the Commonwealth abandoned its income tax in favour of the States, raised the GST to 20 per cent, and kept and spent all the GST revenues itself;

and thus our Federation was saved.

Ah, another 2020 fantasy: each government funding its own spending, all its own spending, and nothing but its own spending.

To displace all Commonwealth grants, the States and territories would need to increase their own tax revenues by about 140 per cent, or their own taxes and charges by about 90 per cent.[1]

Less fantastic but still unlikely is for the Commonwealth to offer a swap of the following kind: Make room for the States to impose their own income taxes, in return for ending some of the grants to the States that are funded from Commonwealth income tax revenues. Malcolm Fraser put something like this to the States, and they did not welcome the offer, especially the smaller and poorer States. It would not have satisfied Peter Walsh's fundamental principle because it would not have put an end to Commonwealth grants to the States.

The fiscal-federal arrangements that cause most damage to political responsibility are Commonwealth specific purpose grants to the States, and the Commonwealth Grants Commission. Abolish both, and responsibility will return. Their complete abolition will be extremely difficult, because they are so heavily entrenched politically. However, something could still be done to improve political responsibility.

In the 1920s and '30s, almost all Commonwealth grants to the States were free of conditions: they were twenty-five shillings per head until the later 1920s, when they were converted to a fixed sum for each State.

A modern version of non-discriminatory, unconditional grants is desirable. It would mean that a State would have to find its own funding for any spending in excess of the fixed grants from the

Commonwealth. Although this fiscal arrangement would fail the stringent "Walsh test", it would still be a great improvement. However, it is difficult to see how an end to all non-GST grants could be brought about politically, because it probably involves finding a bargain that is acceptable to all of the States.

Say, instead of complete abolition of non-GST grants, the States were offered a small or moderate reduction in grants, matched by a small access to their own income taxes. I suspect that it would not greatly change the political and fiscal incentives facing the States and the Commonwealth.

So: the 2020 vision of the States as fully self-financing is extremely desirable but extremely unlikely. A reinstatement of the 1920s system, under which the States receive fixed and unconditional grants, is desirable but difficult. Giving the States a bit of access to income taxes, offset by a fall in grants, is a bit more likely, but would not have a great effect on fiscal and political responsibility by itself.

In the remainder of this paper, I will first discuss non-GST grants, their effects, and what a State income tax would do. This leads to a discussion of vertical fiscal imbalance. I then turn to GST grants, and illustrate how the system of equalising the fiscal capacities of the various States and territories, via the Grants Commission, damages fiscal responsibility. There are brief conclusions.

Non-GST grants

Non-GST grants are vehicles for Commonwealth influence on State and territory governments. In 2010-11, these are budgeted to be $46 billion, or 14 per cent of Commonwealth revenues. Most of these grants carry conditions, and only very rarely has a State refused to comply and refused the money. These grants mean that there is shared and confused responsibility in the matters covered by the grants.[2]

The first effect of giving the States access to the income tax would be to reduce the size and importance of non-GST grants, and make it harder for the Commonwealth to insert itself into affairs of the States. The second effect would be that States would have to weigh the value of extra State spending against the need to find additional State revenues.

The Rudd Government consolidated and reduced the number of separate specific purpose payments, and created some new categories, to be administered via the COAG Reform Council. However, the continuing temptation to create new specific purpose grants was well illustrated during the last election, when Ms Gillard promised to fund 80 per cent of the $2.6 billion cost of the Parramatta-Epping railway line.

This rail line did not appear in the list of proposals that New South Wales previously put forward for consideration by Infrastructure Australia. Yet suddenly funding is promised. Presumably, the New South Wales Government would have preferred capital funds to go elsewhere. But the prospect of winning a western Sydney seat proved too much for Ms Gillard.

For the Commonwealth Government to offer funding for some specific project or purpose, there must be some net positive payoff to the Commonwealth. The Commonwealth has to do the taxing, so it wants some political advantage from the spending. The obverse is that the State is relieved of having to collect sufficient tax revenue, but it has to share the political kudos, and to re-order its spending priorities.

Now here is a funny thing: this $2.1 billion grant may add only $0.6 billion to the funds of New South Wales, less than one-third of what Ms Gillard promised – a pea and thimble trick. Unless the Commonwealth pre-empts the CGC decision on the matter, the CGC is likely to treat the $2.1 billion grant "by inclusion": in effect, putting the $2.1 billion in with the pool of GST funds to be distributed across the States and territories.[3]

If all non-GST grants were treated by inclusion, it would nullify attempts by the Commonwealth to control the spending decisions of the States and territories. Alternatively, treating all non-GST grants by exclusion would make the extent of Commonwealth control over State spending decisions plain. For political accountability, the worst situation is when some non-GST grants are treated one way, and some the other.

When he was Commonwealth Treasurer, Peter Costello said that he would agree to any change in Grants Commission processes that had the unanimous support of the States and territories. The States and territories did not unanimously ask Treasurer Costello to instruct the CGC to treat all non-GST grants by inclusion. One must conclude, therefore, that State and territory governments, by keeping alive the prospect of retaining a larger share of non-GST grants than the CGC would recommend, showed that the States prefer to avoid taking more responsibility for their own spending.[4]

Satisfying Peter Walsh's principle of responsibility

One way for the States to finance their own spending from their own-source revenues is by a sufficient *transfer of areas of State spending* to the Commonwealth. Presumably, this is something that the proponents of a State income tax want to avoid.

Alternatively, through new or higher State taxes and charges, the *States could generate sufficient additional revenue* to cover all State recurrent spending. The latter course would be political suicide for any State government, unless there was an offsetting reduction in the Commonwealth tax take. The most obvious ways to achieve such a reduction in the Commonwealth's tax take is for the Commonwealth to transfer some of its taxing powers to the States, or to share those powers with the States. Two such transfers were mentioned earlier: land tax and payroll tax.[5]

The whys of vertical fiscal imbalance

It is rare for States in a federation to be fully self-financing. Usually, there is some centralisation of tax collection in the hands of the national government, together with a significant degree of decentralisation of spending decisions to the States, which are partly funded by federal grants.

This kind of arrangement – which results in vertical fiscal imbalance – receives solid support from the standard economics texts on fiscal federalism.[6]

On the spending side, the "principle of subsidiarity" suggests that some significant decisions should be made "locally", close to those affected.[7] On the taxing side – where I will focus attention – the case for centralisation of high-yielding taxes depends on an analysis of the effects of interstate tax competition on the size and economic cost of taxation.

A centralised tax monopoly or cartel can gather more revenue than can a set of competitive governments.[8] In wartime, when the income tax was centralised, the objective of maximizing tax revenue was easily justified. Otherwise, a tax cartel or monopoly may sound unambiguously bad for the taxpayers generally. However, in tax matters, things are rarely so simple.

A tax monopoly or tax cartel has more choices than do tax competitors, over the mix of taxes and over the tax rates imposed. As a result there is a trade-off facing tax-payers generally: a tax cartel or tax monopoly collects more tax revenues but maybe at a lower economic cost per dollar collected; a set of tax competitors collects lower revenues but maybe at a higher economic cost per dollar collected.

From the economy in aggregate, tax payments are transfers from the taxpayer to the Treasury: in themselves, transfers neither create nor destroy economic value. But taxes change the economic behaviour of the taxpayers, and these tax-induced responses are the economic cost of the tax. (Some taxes are intended to reduce activity judged to be detrimental to self or others, like smoking; or to stimulate activity judged beneficial to self or others. For simplicity, I ignore them.)

The economic cost of a tax depends on the extent to which it stimulates tax-avoidance activities; and this cost rises more than proportionally with the tax rate—the usual economic shorthand is that the "excess burden of taxation" is proportional to the square of the tax rate. Therefore, a nationally-uniform tax is less costly, economically, than is a set of non-uniform State taxes that collectively raise the same revenue as does the nationally-uniform tax.

This kind of reasoning lies behind the common prescription in fiscal federalism, that the national government should levy income and sales taxes; and the States should levy taxes on land and other

relatively immobile tax bases. If the reverse assignment were made, interstate tax competition would damage the taxing capacity of the nation, or decrease the economic efficiency of the tax system. (Those who accept these generalisations can afford to skip the next section.)

Interstate tax competition

Economists commonly recommend that the central government should levy taxes on readily-relocatable tax bases – like incomes; and leave the less mobile tax bases – like land – to the States. Naturally enough, the financial incentive to move interstate or internationally for reasons of tax depends on the size of the tax burden thereby escaped, relative to the cost of moving. To make the point simply, I will compare situations in which the State or Commonwealth impose the same revenue burden on the taxpayer, so that what matters is the feasibility and cost of moving.

A high income tax imposed by one State on a business can be avoided by moving the business to a lower-taxing State; similarly, for high personal income tax rates. But if that same high rate of State income tax were extended to the nation as a whole, then the income tax could be avoided only by leaving the country altogether, presumably a more costly move. Thus we would expect that a nationally-uniform income tax would have higher rates than would occur if the States had exclusive access to the income tax.[9]

In contrast, a high tax imposed by one State on a vacant piece of land cannot be avoided by moving the taxed object, land, to another State; and the situation would be no different if that rate of land tax had been imposed nationally.

However, the economic cost of any tax depends on how the taxpayer responds to the tax, by changing his or her behaviour, in order to avoid it fully or partly. Other than successfully lobbying for an exemption, there is nothing that the taxpayer can do to avoid the tax bill on a piece of land. Yes, the land can be sold, but then the new owner is liable for the land tax bill.[10]

This is not to deny the fact that the States have used land tax concessions as a means of attracting or retaining businesses, but it is to argue that the scope for interstate tax competition in land taxes is less than for taxes on the incomes or sales or payrolls of businesses, or the incomes or spending of persons. A State land tax incentivises the interstate migration of land-intensive activities; activities with a low land input are virtually unaffected. A State income tax stimulates the interstate migration of all income-intensive activities.

Therefore, interstate tax competition puts more downward pressure on income taxes, payroll taxes and sales taxes, than it does on land taxes (or on taxes on land and property transactions).

Intra-jurisdictional political competition

There is no doubt that the States could raise considerably more payroll taxes and land taxes (but I hope no more from gambling taxes).[11] One reason they do not use their taxing powers effectively and efficiently is that the large and flexible revenue grants from the Commonwealth lessen the fiscal pressure on them. However, there are other forces in play: interstate tax competition; and intra-jurisdictional political competition. The standard theory of fiscal federalism – sketched above – emphasises the former and somewhat neglects intra-jurisdictional politics.

What economists regard as a "good" tax is often hard to sell politically. Margaret Thatcher imposed a poll tax, which is certainly a tax with the low excess economic burden. But politics – not inter-jurisdictional tax competition – defeated it and her.

Estate or death duties provide a nice Australian illustration. Most economists believe that death duties are relatively efficient taxes. As is well known, under Premier Bjelke-Petersen, Queensland abolished these taxes, partly to attract retirees to the State; all other States and territories followed suit. Here was inter-state tax competition in operation. However, it is important to remark that the Commonwealth did not step in and impose its own estate duties; and that the recent report on

Australia's Future Tax System merely recommended that the "Government should promote further study and community discussion of the options".[12]

As was noted, there has been some interstate competition to attract or retain businesses through land tax concessions or "tax holidays". However, it does not seem to explain why land taxation is so greatly underutilized, while very inefficient taxes are levied on the transfer of land titles—*intra*-state politics is probably a more significant factor. Julie Smith noted that, by the end of the 1950s, all land used in primary production and for the primary residence was exempt from State land taxes. For NSW, five-sixths of private land, by value, was exempt: land tax revenue could have been increased by a factor of five if the tax had been levied on all private land. But that was politically impossible.

When the Commonwealth handed over payroll tax, it had a flat rate of 2.5 per cent and was comprehensively applied. However, the States soon created payroll taxes with progressive rates, and with many exemptions and thresholds. Inter-state competition can explain only part of what has happened to the land tax and the payroll tax, and why they collect so much less than it could and should (from the purely economic point of view). Why would we not expect the same to occur if the States regained access to income taxes?

Thus, some proponents of State income taxes want the States not to be able to change the tax base, but to be able to decide on State-specific variations in the tax rates. Some economists have suggested something similar for the payroll tax: a nationally-uniform definition of the taxable payroll, with no exemptions or thresholds; and for each State to choose its single rate.

Fiscal equalisation

Whatever the strength of the arguments just put, in fact Australia has an extraordinarily high degree of vertical fiscal imbalance and centralisation of tax collection. Almost half the spending of the States and territories is funded by Commonwealth grants (and more than 80 per cent in the Northern Territory). The Commonwealth collects over 80 per cent of all tax revenues. For 2010-11, the Commonwealth has budgeted to provide the States with $94 billion in payments. This equals 6.7 per cent of GDP and just under 30 per cent of Commonwealth tax revenues. The grants are about 50/50 GST and other; and approaching half of the "other" get pooled with the GST for purposes of fiscal equalisation.

The GST monies are distributed according to the recommendations of the Commonwealth Grants Commission, which has been set the objective of equalising the fiscal capacities of the States and territories. Roughly, the goal of the CGC is to fund each jurisdiction so that it can afford to provide the average level of publicly-provided goods and services if it levied the average level of taxes and charges (and achieved the average net public financial assets). In the next subsection, I provide examples of how the CGC processes distort political decisions. But, first, I will look at the theory of fiscal equalisation.

For many decades, fiscal equalisation has been advocated mainly on three grounds: it is more equitable; it makes the economy more efficient, mostly through influencing the patterns of settlement; and it affiliates citizens of the smaller and poorer States to the federation. I will discuss each in turn.

Equity is a criterion that usually applies to people, not governments. Moreover, the equity argument for fiscal equalisation must depend primarily on a claim about there being immobile sections of populations who would otherwise be unreasonably disadvantaged by the operation of the fiscal system.

First, we need to consider the equity consequences of inter-jurisdictional mobility. If otherwise-similar people are not treated similarly in the various States and territories, and if those differences are sufficiently great, then people will consider moving to another jurisdiction. There are no legal restrictions on interstate migration; the cash costs of moving have fallen over time; cheap travel and communications assist in the maintenance of links back to the former location; laws, regulations and school curricula have become more uniform across the nation, so the degree of disruption, attendant

on moving, has fallen; and Australia has steadily become more of a single national economy than a set of separated and disparate State economies. And data supports the conclusion that the dispersion of personal income in Australia is relatively small, looking across jurisdictions.

Therefore, no great differences can persist in the ways in which otherwise-similar people are treated in the various States and territories, unless they are immobile between jurisdictions.

However, even without fiscal equalisation there would be a substantial degree of inter-state redistribution, from the richer States to the poorer, mostly through the progressive income tax system, and through the Commonwealth government's provision of nationally-uniform social services and social security payments, both probably redistributing disproportionately towards locationally-immobile sub-populations. And if grants were made equal per capita, then they also would be redistributive towards the poorer States, via the taxes that fund the grants.

Even if the claim were true that immobile sub-populations are unfairly disadvantaged in some jurisdictions, we need to explain how and why grants will change the situations of these badly-served sub-populations in their home States or territories. The first thing to note is that there are two mismatches between this kind of equity argument and the methods of the Grants Commission: the distribution of the grants is not determined solely by considerations of the size and nature of locationally-immobile elements of populations; and there is no guarantee that the grants will benefit those elements of population (and, in the case of remote Indigenous peoples in the Northern Territory, good evidence to the contrary). Secondly, if sub-populations are badly served because their immobility lessens their political weight, then how will equalising grants alter that situation? Specific purpose grants may do the job, but not general revenue grants.

Therefore, I conclude that the equity argument is weak.

Considerations of inter-jurisdictional mobility, which weaken the equity argument, are central to the efficiency argument for fiscal equalisation. For example, say Western Australia retained all of its mineral taxes, and used them to provide superior State services or lower State taxes. Then workers and businesses, even if they would be more productive in the State of origin, could be attracted to Western Australia by its better fiscal offerings: by moving to Western Australia, the workers and businesses in effect become part-owners of Western Australian mineral wealth, without buying a single share in a mining company. Fiscal equalisation means that all Australians become part-owners of Western Australian mineral wealth, without having to move to Western Australia.

The same kind of argument can be made on the expenditure side. Say that Tasmania has a high proportion of retired folk, so that it has relatively high expenditure on services to the retired, and a relatively low payroll tax-base to fund them. Then firms may tend to avoid locating in Tasmania, even if they would have been more productive there.

But these efficiency arguments, based on inter-jurisdictional mobility and incentives for locational choice, do not seal the case that fiscal equalisation improves economic efficiency. Account has also to be taken of claims that fiscal equalisation distorts public decisions, in ways illustrated below.

(The most determined effort at estimating the net effects for Australia of horizontal fiscal equalisation came up with an answer indistinguishable from zero.[13] However, the modelling technique was perhaps too crude to capture some of the effects that *a priori* reasoning suggests could be important.)

Finally, is it not strange that a system of fiscal equalisation, originally devised to affiliate the less populous States more closely to the federation, especially Western Australia, is now itself a source of disaffection with the federation.

The Commonwealth Grants Commission

I now turn to some examples of how the Commonwealth Grants Commission operates. My point is that any system of horizontal fiscal equalisation, and especially a determinedly equalising one, will inevitably distort the policy choices of the State and territory governments, and sometimes very substantially.

Mining

The first example relates to mining, a matter of current political interest. Say that South Australia overcomes "green" and "NIMBY" concerns and approves a new uranium mine. The State requires the miner to pay royalties, which go into the SA government's coffers. But a couple of years later, the Grants Commission completely socializes those revenues, and distributes them to all of the States, so as to equalize fiscal capacities. The State bears all the political cost of agreeing to a mine but, after a couple of years, it retains only a fraction of the mining royalties, equal to its share in the Australian population.

Naturally enough, this encourages the State to offer the miner a lower royalty rate in return for the miner providing works or services of high political but low economic value, and of the kind not captured in the arcane calculations of the Commission.

Making New South Wales the Greece of the Federation

Until now, the Grants Commission has constructed a hypothetical current budget for each State. Depreciation is a charge on the current account. Having distorted incentives on current account – in ways that I have illustrated – the Commission now tries to offset those effects, through a new set of calculations, on the capital account. Its objective is to assess ". . . how much States would need to invest to give them comparable levels of such infrastructure in a year and having that reflected in the GST distribution in that year"; and to give each State the capacity to ". . . keep its net financial worth per capita at average levels . . ." (pp. 6-7).

The Commission supports this change with various arguments, the main being that differential rates of population growth put different pressures on the States to spend on new or additional infrastructure; and that States have used GST monies to fund infrastructure spending.[14]

Under Treasurer Egan, the NSW Government claimed that it borrowed only for those projects that made a commercial return, and which serviced their own debt. That is, NSW used recurrent income to fund the building of hospitals and schools. That would have bequeathed to subsequent NSW governments a larger total of net financial assets than otherwise. To the extent that other States did not assiduously follow the Egan line, then they ended up with smaller net financial assets.

The Grants Commission is now setting about to negate the effects of these past decisions on how to fund infrastructure. Citizens of New South Wales now have more reasons to regret the actions of their Labor governments: if only Treasurer Egan had foreseen this change in the basis of the division of the GST, no doubt he would have financed more of State capital works through debt. Possibly, other Treasurers have arrived at this conclusion.

But of course States can borrow for recurrent spending as well as for capital works. Greece did, and now is being bailed out by other of the European Union governments. Is this a scenario that the Commonwealth Grants Commission has envisaged?

A school voucher system

Say that, in an effort to improve the efficiency and effectiveness of education, a State moved to a voucher system for all schools, government and non-government; and simultaneously legislated to permit the creation of publicly-funded "charter schools". This kind of arrangement has been successfully implemented in a number of countries, including Sweden.

Say that the reforms seemed to improve school efficiency and effectiveness. However, say they caused a flow of students out of government schools and into non-government schools. Under the Grants Commission's methods for calculating for the cost of "standard" levels of publicly-provided services, this State would receive a lower percentage of the pool of GST funds, as a consequence of the decline in enrolments in government schools.

The State would be penalised for increasing school choice; as would parents, if the reduction in GST grants was passed on in the form of a reduced voucher.[15]

Reform the Grants Commission, if you cannot abolish it

My preferred reform is for any grants to the States and territories to be made as equal *per capita* payments, so that each State and territory would bear the fiscal cost of additional tax-funded spending, or enjoy the fiscal benefit of any reduction in tax-funded spending.

This would provide stronger fiscal discipline and incentive to the States and territories, because it would abolish specific purpose grants and inter-state discrimination in general revenue grants; and render the Grants Commission redundant.

Table 1 shows the effects that this would have on budgets: not much for the three eastern States; a huge cut for the Northern Territory.

Table 1: Approximate effects on State budgets of equal per capita grants compared with Grants Commission recommendations, 2010-11 (per cent of general government expenses)

NSW	Vic	Qld	WA	SA	Tas	ACT	NT
1.0	1.3	1.6	6.2	-5.6	-12.3	-2.4	-50.9

Sources: CGC 2010; ABS 5512, 5506

Note: The estimates are the percentage difference between the 2010-11 grants proposed CGC and equal *per capita*, compared with the 2009-10 general government expenditures. The GST collection for 2009-10 was $46.5 billion; the estimate for 2010-11 is around $45 billion.

I recognise that such a reform may be too hard to implement soon, even with generous transitional arrangements, and so I offer a less radical alternative as an interim measure. The new system needs to be relatively simple and transparent, unlike the current one. Then it will be understood by more than a few specialists, which would improve the federal system of governance.

1. Grants should be made to equalise fiscal capacity for standardised populations.
2. On the expenditure side, account should be taken of costs of providing for a small number of locationally-immobile sub-populations or socio-demographic groups (e.g., five). However, no adjustment should be made for differences across the States in the unit costs of services to these sub-populations.
3. As to revenue capacity, the only factor to be taken into account should be natural resource endowments (adapting the method used by the UN Development Program to estimate "natural capital").
4. All Specific Purpose Payments should be dealt with by the Commonwealth Grants Commission's method of inclusion, except payments on account of remote Indigenous populations.

Conclusions

The States and territories are under-using their taxing powers, including those given by the Commonwealth in 1952 –land tax – and in 1971 – payroll. They are under-utilised for ordinary political reasons, but in the background are the massive grants that the Commonwealth makes to the States and territories: the GST and a whole raft of other grants. Do State politicians believe, along with former Premier Joh Bjelke-Petersen, that the only good tax is a Commonwealth tax?

Any transfer of taxing powers to the States would come at the expense of some grants from the Commonwealth to the States. This would make the States and territories more fiscally responsible. However, the effects are likely to be much less, even insignificant, if conditional grants continue to

be offered in substantial amounts, and accepted by the States.

Will the Commonwealth ever voluntarily forgo sufficient income tax to enable the States to be self-financing? There is a strong tendency for federal politicians of all parties to assert that citizens do not care who has constitutional responsibility for a mess; citizens, they say, just want it fixed.

So long as the Commonwealth has the overwhelming fiscal power, then federal politicians can readily find monies to throw at a problem, indirectly or directly. The indirect means are specific purpose grants, and COAG: dangle money in front of the States, to be paid if they perform the trick that the Commonwealth wants performed: e.g., shorten the waiting lists at hospitals; raise school retention rates. The direct route is for the Commonwealth to deliver the fix itself: e.g., fund "super clinics". Rather better is for the Commonwealth to fund private competitors to what is offered by the States, especially in health and education.

Many commentators criticise the overlap, duplication and unclear lines of responsibility that result from these kinds of Commonwealth interventions in the affairs of the States and territories. But at least such direct interventions are reasonably transparent.

Not transparent are the calculations of the Commonwealth Grants Commission: Horizontal Fiscal Equalisation is the second barrier to greater fiscal and political responsibility. It should be abolished or greatly reformed.

For political accountability, the best long run solution is for Commonwealth grants again to be equal *per capita*.

Endnotes

1. In 2007-08, State and territory tax revenues were $53.1b; they spent $161.3b; the Commonwealth made $75.0b in grants (ABS 5506.0 – Taxation Revenue, Australia, 2008-09).

2. In "Commonwealth-State financial relations: the case for competitive federalism", (*Papers on Parliament*, Department of the Senate, Parliament House, Canberra, June 2010, 13 – 26), I discuss vertical competition in a federation –between the central government on one side, and the States and territories on the other. Federal funding of alternatives to what the States offer is likely to be socially beneficial competition between governments (for example, federal funding of independent schools). In contrast, there are unlikely to be lasting and systematic benefits from "cherry picking", or selective Commonwealth intervention in the ordinary operations of the States (for example, setting targets for school retention rates).

3. The CGC estimate of NSW's share of GST grants in 2010-11 is 30.7 per cent (Commonwealth Grants Commission, "Report on Revenue Sharing Relativities", Media Release, 26 February 2010, table 2). 30.7per cent of $2.1b is $0.6b.

4. Some State governments used the threat of loss of funds under the National Competition Policy to force through policies that, for political reasons, they could not implement otherwise. In "An Implicit Contract Theory of Intergovernmental Grants", *Publius: The Journal of Federalism* 20 (Fall 1990), 129-144, Geoff Brennan and I discuss how the Commonwealth influences State spending by ways other than the imposition of explicit conditions on the grants.

5. The GST arrangements are best seen as a switch in the national tax mix towards indirect taxes. The Commonwealth created a new Commonwealth indirect tax, the GST, which collected more revenue than had been collected in aggregate from the taxes abolished, which were Commonwealth sales taxes and some State "nuisance" taxes. With the GST revenue hypothecated to the States (so far), there was a considerably reduced call on income tax proceeds as a source of grants to the States, and so scope was created for a reduction in income taxation.

6. I outlined the arguments at the 13th meeting of the Society. In light of subsequent developments, I have refined my conclusions (a.k.a. changed my mind). I remain sanguine about vertical fiscal imbalance on average, but I paid too little attention to VFI on the margin; and thus too little attention to the damage to political responsibility. I paid too little attention to the effect of fiscal imbalance on the extent of fiscal equalisation. Here I especially thank Henry Ergas for his comments, criticisms and ideas.

7. Theodore J Lowi, an American political scientist, asserts that conservatives support devolution of spending decisions because "local" decisions are more likely to please right-wingers and racists (see "Think Globally, Lose Locally", *Boston Review*, April/May 1998, at http://bostonreview.net/BR23.2/lowi.html). Myself, I believe that the principle of subsidiarity is incompatible with the principle of competitive federalism.

8. Government spending in unitary countries was 13 per cent higher than in federations, 1988-2000 (Anne Twomey and Glenn Withers, *Australia's Federal Future*, report for the Council of the Australian Federation, 2007, 13.

9. Julie Smith discusses the variations in State income tax rates in Chapter 4 of her 2002 ANU PhD thesis, *The Changing Redistributional Role of Taxation in Australia Since Federation*.

10. For completeness, note that economists expect the sale price of land to be reduced by the full amount of any land tax, so that selling the land does not help the owner avoid the burden of land tax.

11. The Commonwealth Grants Commission does not attempt to take gambling tax into account in its calculations of tax capacities. Maybe this has encouraged the States and territories (other than WA) to look increasingly to gambling taxes for more revenue.

12. *Final Report, Australia's Future Tax System*, recommendation 25.

13. P. M. Dixon, M. R. Picton and M. Rimmer, "Efficiency Effects of Inter-Government Financial Transfers in Australia" *Australian Economic Review*, vol. 35 (3), 2002, 304-15.

14. This latter poses a puzzle: the States have significant sources of current revenue in addition to the GST; how then does the Commission know "the" source of current account funds for infrastructure spending?

15. The Commission has considerable discretion and could change the way that it treats expenses on schooling, if this became a political issue.

Chapter Seven

John Stone, Federalism and the Commonwealth Treasury

Des Moore

I first met John Stone, I think it was in 1958, when he was then the Treasury Representative in London; I was just over the road from Australia House at the London School of Economics completing what was then known as a Bachelor of Science (Econ) degree (one wonders if the "science" component has survived the GFC!). Those were the days when, despite the terrible war-time destruction, Britain was still regarded as an important economic and financial power, the Commonwealth was known as the British Commonwealth, most of Australia's international reserves were held in sterling and London's financial market remained a major source of the Australian government borrowings that Keynes had observed in the early 1930s were high enough to justify the 20 per cent reduction in government spending decided in the 1931 Premiers' Plan. The front page attention given in Australia in the 1950s to Bank of England decisions on what was known as *the* Bank rate have long ceased to be a policy indicator for Australia.

But the situation that then existed justified two Treasury officers in London (after abandoning some years ago the stationing of any representative in London, the Treasury has recently restored one). Coming from the almost complete absence of a reasonable place to eat out in sparsely populated Canberra, one essential qualification for any appointee was a capacity to discover the right places to lunch. You will understand that for an impecunious student I was pleased to soon be invited by John to help savour the classic British dish of beef and Yorkshire pudding from Simpsons in The Strand, which is still carving from silver-domed trolleys at the table. I also succumbed to John's persuasive tones, using words I doubt he would repeat quite so fulsomely today, that life in Canberra would appeal to Felicity and me if I joined the Treasury on return to Australia.

As it happens I joined Treasury *in* London and had the advantage of working with John in the Australia House office for several months before moving to Canberra early in 1959. Our relationship did not stop then. I soon discovered that John not only assumed an ongoing responsibility for those he recruited but also took a personal interest in their developing lives. Indeed, in researching this presentation I came across 15 pages of "encouragement" letters he sent to me in the next two years. Such encouragement continued when he returned to Canberra in 1961 and, over subsequent years, he showed that, whether it involved professional or other staff, he assumed almost personal responsibility for the well-being of those who worked for him. Those letters bore the stamp of a person who, one could quickly see, wanted to do his utmost to ensure citizens enjoyed good government. The responsibilities he assumed were not confined to the personal well-being of colleagues but extended to correcting potential recalcitrants at the Hotel Canberra on Friday evenings. Such activities later extended to the National Press Club where those members of the Press Gallery unable to understand the correct course of economic policy were put on the right track.

My Australia House experience was of enormous value because I benefited greatly from experiencing bilaterally John's outstanding capacity to think through a problem and to express succinctly the likely solution in impeccable English. But it was also rather scary for a raw economics graduate. John's exceptional ability had already been recognised both in Canberra and London as his appointment in 1958 as Treasury Representative came after about two earlier years as Assistant in the London office that included six months secondment to what was then the holy of holies, the UK Treasury, then

well known as an employer principally of classical scholars. As one of the very few economists then working in the UK Treasury, that was doubtless an educative experience.

My period in the London office in 1958 also allowed time for Felicity and me to meet Nancy and appreciate, even then, her remarkable contribution to their partnership, including the five children to whom she gave birth, two in London. Of course, we discovered when dining at John and Nancy's first residence in London that one major problem Nancy faced in 1958 was not babies but how to handle the provision of the English washing facilities that assumed once-a-week was sufficient in a bath whose water was coal-heated!

One demonstration of John's analytical ability came soon after my arrival in the Australia House office when Canberra sought his advice on a tax issue that emerged from reports of a judicial decision in an English court. Not satisfied with obtaining an assessment from relevant authorities in Whitehall he set about analysing the decision and sent a lengthy rejection of the judge's reasoning back to Canberra – a precursor to his role in founding The Samuel Griffith Society.

When Julian Leeser asked me to talk about the Stone role in the Treasury and Federalism, I flinched because of the seeming enormity of the task, involving as it does some assessment not only of the man himself but of his contribution to building the role of Treasury in what I call the governance of society. That enormity was enhanced after a discussion with John himself, which brought home just how extensive and how important a role he has played in influencing public debate about the structure of society and government both while in the Treasury and since. A role, I might add, that is far too little acknowledged.

My assessment will inevitably fall well short of doing justice to John, partly because my memory of earlier times is fading in regard to detail but also because of my often limited involvement in the important events and developments to which John contributed. Such involvement as occurred, together with continuing contact and involvement after the Treasury years, has led me to conclude that, while many citizens become well known because they have contributed to society through the successful pursuit of a particular occupation or profession, there are few who play a leading role in genuinely making their prime objective the promotion of the interests of the nation. I believe John has made a major contribution there.

I should acknowledge, however, that you are going to get a slightly one-sided view. As in all large organisations views differed within the Treasury and they also differed outside the department as to the policies that should be pursued and the way that they should be presented. The perception I will give you today would not be universally accepted, even as to detail, by some of those Treasury colleagues who were John's and my contemporaries.[2] Equally, there were some who resented that the main responsibility for providing economic advice lay with the Treasury. Because of the firm expression by John of his views, that resentment has particular application to the period when he was a senior Treasury officer. In one sense John experienced the glory days of the Treasury and that was importantly due to the power of his views. As we have recently witnessed, the Treasury still has an important role to play but it faces increased competition in assessing and providing economic advice.

Before offering some examples of John's contribution, I want to point out that a measure of the man and how he acted as a benchmark continues to crop up today, some 26 years after he resigned as Secretary in 1984.

My benchmark derives from an observation on a recently published book by Blanche d'Alpuget – which I have no intention of reading – entitled *Hawke: the Prime Minister.* It is reported that, in commenting on this book, Hawke's then principal economic adviser, Ross Garnaut, suggested that, in the Hawke/Keating relationship, Paul Keating got a "lot of confidence" from the decision to float the dollar because he "had taken a position contrary to John Stone . . . and . . . that was crucial in building his confidence". This illustrates the respect still given to the Stone view even today.

However, as with his analysis on global warming now, Professor Garnaut is in error and it is shameful that Keating has never acknowledged that, well before the December 1983 decision to

float, John Stone (who by then had been Secretary for nearly five years)[3] had advised Keating that "Treasury supported *and in fact proposed* . . . the freeing of spot against forward . . . [and] the proposed changes were aimed at 'developing the market in foreign exchange' and 'loosening up the exchange rate' " [emphasis added]. As John subsequently pointed out, a freeing of the forward market would inevitably have led within a relatively short time to a floating (spot) rate.[4]

What Garnaut also failed to acknowledge is that Labor's decision in December 1983, only nine months after assuming office, to float the dollar and remove exchange controls was taken without Cabinet consideration of any submission by Treasury on the pros and cons of the action, or on possible subsequent policy action, of which there was none. According to the author of the book it was taken at a late night meeting in Hawke's office (possibly by an infant gang of four!) and doubtless reflected the views of Garnaut and the Reserve Bank, both of whom favoured having the market determine the exchange rate rather than having it being continually adjusted by a committee for which the Government could be held directly responsible.[5]

Perhaps the absence of a request for a Treasury submission reflected ministers' concern to avoid the official recording of the Treasury's (and John's) view that any decision to float needed to have regard to the regulatory framework within which the exchange rate would emerge and of accompanying changes in other economic policies, particularly monetary policy. The decision to float with virtually no exchange controls exposed Australia to volatile capital movements and ignored the existence of such controls in many other countries with floating exchange rates.[6] Relevant is the comment in the book by Keating's economic adviser that "Stone's complaint that there were no high quality studies of the issues was quite right – the quality of the papers provided by the Reserve Bank to Keating was very poor".[7] The best that could be offered the Treasury by the Hawke Government was to invite Stone and two of his henchmen (one of whom happened to be me) to attend a Cabinet meeting and be given the chance to respond orally – but to an obviously already-taken decision. Needless to say, there was not much joy in that exercise.

I must add here that, in the Shann Memorial Lecture[8] John delivered in August 1984 while still in the Treasury (but after announcing his resignation as Secretary), John expressed the view that "the decisions taken by the present Government on 9 December last will stand as its greatest achievement when all else is forgotten". He went on to remind those at the lecture that in his presentation at the May 1984 OECD review of the Australian economy he had suggested it would "work very much to the end of 'locking' Australia into the wider world, with all the benefits – and no doubt problems also – which that will entail". This Stone lecture in his home State is, incidentally, still well worth reading for its analysis of "financial mismanagement, protectionism and ossified labour markets", on the latter of which he described the then current system of wage determination as "a crime against society".

The myth that Keating had a confidence boost because he took a decision contrary to John Stone raises the question of how the decision worked out in practice. While this is not the place to undertake any detailed examination of the many developments after the float and the factors contributing to them, two developments are worth recalling. First, after the December 1983 float at about 87 cents to the US dollar the exchange rate steadily went downhill and by May 1986 was about 15 per cent lower at 74 cents – thereby adding, of course, to the high rate of inflation from which the Australian economy was already suffering. Second, at this point, Treasurer Keating went into panic mode and made his famous public comment that, unless Australia adopted policies that would improve its international competitiveness, it was in danger of becoming a banana republic. Although various factors contributed to the depreciation and Keating's outburst, I think John could reasonably claim that there was a major failure by the Government to implement other regulatory and policy changes at the time of the float.[9] Whether or not Keating's outburst was partly designed to persuade his fellow ministers to improve their game, it was followed by some recognition that, as politicians sometimes acknowledge, "something needed to be done" on the policy front. But that is another story.

Taking a step back to Whitlam times[10] (most of the initial year of which I had the good fortune to miss in London), John Stone was then Deputy Secretary (Economic) and managed to stay the course through a period when there was great difficulty at times in deciding whether Australia actually had an operative federal government. This is a story that has yet to be fully told[11] but I think it is fair to claim that Treasury and John in particular played a major part in trying to keep the government within survival bounds when it was actually pretty much inoperative.

My suspicion is that this Whitlam experience confirmed John's views about the desirability of both limiting the role of government and spreading the exercise of its responsibilities and power. It scarcely warrants saying that the experience of more recent times under the Howard and Rudd governments provides further confirmation. Based on the performance of those two governments plus Whitlam, no federal party can sustain a claim that it would succeed in having the Commonwealth play an efficient and effective role in the delivery of, say, health and education services. The attempt by the Rudd Government to solve the alleged problem with health services by increasing the Commonwealth's share of funding to 60 per cent has already produced a leaked analysis by Victoria indicating that most of the new arrangements supposedly agreed at the friendly COAG meetings are not applicable to that State (so much also for ending the blame game!). Unfortunately, each of the main parties in the 2010 federal election sought my vote on the basis that from Canberra they will improve funding and structural arrangements for health services delivered by the States.[12]

It is pertinent here to refer to the article[13] John wrote after an address by Prime Minister Howard in May 2005 entitled "Reflections on Australian Federalism".[14] That article endorsed Howard's claim that his government's goal was to "expand individual choice, freedom and opportunity, not to expand the reach of central government" but pointed out that the rest of the address was in effect a plea "for yet more intrusions by Canberra into areas which are none of its business". The Government should, John said, "give primacy to protecting our federal Constitution, our most important bulwark against the centralisation of power in Canberra (the depredations of the High Court and successive federal governments notwithstanding)". John emphasised that he was saying this not as "a Howard hater" but as someone who had supported and continued to support his prime ministership as "vital for the cause of cultural conservatism". Members of this Society will naturally recall the many concerns expressed about the state of federalism by former President, Sir Harry Gibbs, as well as the centralist warnings by John, one of my favourites being his *cri-de-coeur* after the 2004 federal election regarding "the swelling tide of ignorant centralism rushing out of Canberra" and "the ignorant mouthings" of certain ministers.[15]

Notwithstanding John's critical remarks about Howard's centralism, after the latter's defeat in November 2007 the Stone contribution to the first chapter of *The Howard Era* book[16] took the position that "in my view Howard was the best, or at least the very equal best (with Menzies) prime minister in our history". That conclusion was reached in part by observing that, as with the reigns of the two world leaders John most admires – that is, Margaret Thatcher and Ronald Reagan – the overall situation at the end of the reigns was much different, for the better, from what it had been at the start. However, I doubt that this applies in the case of Australian federalism: rather the opposite, as we can see from the many Commonwealth intrusive promises during the recent election!

I divert here to refer to the conclusion, reached in my 1995 paper to the Society,[17] that, if specific purpose grants by the Commonwealth to the States had been converted to general purpose grants, there would then have been "little or no change in States' expenditures on the great majority of targeted activities". In short, the provision of specific purpose rather than general purpose grants by the Commonwealth was "largely an exercise of political power" and probably would not have resulted in any significant increase in total government expenditure in the various areas targeted by those specific grants. My guess is that, notwithstanding Rudd Government claims of "the most significant reform of Australia's federal relations in decades",[18] a substitution of general purpose for the still large specific purpose grants by the Commonwealth[19] would today still make little difference to national expenditure in the areas concerned.

Returning to the Whitlam period, some may recall that it established in March 1973 a task force to review the Continuing Expenditure Policies of the Previous Government, with the former Governor of the Reserve Bank, Dr Coombs, as chairman. This sought to identify how the new government's spending priorities might be reconciled with existing programs. It is evident from the report of the Task Force published in June 1973 (followed shortly after by the surprise 25 per cent reduction in tariffs) that, as the sole Treasury member,[20] John succeeded in having the Task Force (which included a future Chief Justice of NSW) identify a large number of existing expenditure programs eligible for cutting or eliminating.[21]

Unfortunately, the 1973-74 Budget still produced a much higher (nominal) increase in spending than in 1972-73 (18.9 per cent, cf 12.7 per cent),[22] including a very large rise in spending on education and health that increased the proportion of funding of such activities by the Commonwealth. Under the Whitlam Government the centralisation approach resulted in the number of specific purpose payments to the States jumping to 100 (cf 30 in 1964-65) and the amounts provided under such programs increased by nearly seven times over its three years in Canberra.[23]

Moving to the drama of the 1974-75 Budget, the closeness of the May 1974 double dissolution election, and the deterioration in inflation and employment that was an issue in that election, led Gough Whitlam to obtain advice from the Treasury on a tougher fiscal policy. However, no cuts in expenditure were included in the limited measures actually announced in July 1974 by Treasurer Crean after the Premiers had been told at the June 1974 Premiers' Conference that the economic situation demanded funds "starvation" for them. Attempts by John and Treasury colleagues to constrain Commonwealth spending were thwarted by the effective take-over of the budget process by the Deputy Prime Minister, Jim Cairns, and the 1974-75 Budget actually brought down showed a very large estimated increase of more than 30 per cent (nominal) in spending.[24] Despite his supposed leadership abilities Whitlam was unable or unwilling to discipline his ministers and the government became barely functional[25] during the framing of the 1974-75 Budget. The Treasury's economic and budget advisers then came under strong attack from a range of ministers and the chaotic circumstances that developed allowed most ministers to readily secure "Cabinet" approval for additional expenditure allocations for their portfolios. Economic advice by Treasury, including even on the likely budget deficit, was overtaken by advice from other sources without regard to the national interest.

Following this chaotic budget process the then still Treasurer, Frank Crean, delivered the 1974-75 Budget speech on the much later date than normal of 17 September 1974. History tells us that about the same time the Minister for Minerals and Energy, Rex Connor, had started canvassing with foreign money market carpet baggers a borrowing for 20 years by the Australian Government of the then enormous amount of US$4 billion, said to be available from certain overseas sources. The extraordinary story is now well-known of how Tirath Khemlani from Pakistan effectively conned, or was allowed to con, a number of senior ministers that he had access to such funds – at, of course, a sizeable commission. I say "allowed to con" because the then Attorney-General, Senator Lionel Murphy, had no apparent compunction in agreeing to the borrowing and advised Whitlam orally that it could be regarded as being for "temporary purposes" thereby not requiring Loan Council approval from the States.[26]

I say "history tells us" that discussions with the money hawker started around the September Budget because it was not until three months or so later that Treasury was informed, through an officer in the Attorney-General's Department, of what was going on. On the same day, 10 December 1974, John sent a three-page minute to Treasurer Crean setting out a series of questions raising various economic, legal, and foreign policy aspects and asking why a commission of 2.5 per cent would be paid up to a week before the funds were received. That minute was evidently circulated to other ministers, one of whom leaked it to journalist Alan Reid who reproduced it in his book, *The Whitlam Venture*, published in 1976. Reid started his book by characterising the authorisation of

Connor by ministers on 14 December 1974 to pursue the borrowing as the "death warrant" of the Government.

Unfortunately, in a sign of the times, Crean was dismissed the day after receiving the minute, which meant he became out of play, as it were. But John was then heavily involved in many continuing inter-changes initiated by Treasury head, Sir Frederick Wheeler, with other senior Commonwealth officials, mainly the then head of the Department of the Prime Minister and Cabinet, John Menadue. Those discussions, principally designed to have the proposal receive due process, usually occurred in Wheeler's office where he used a loudspeaker reception – as well as a certain amount of lubrication to help the concentration of those other Treasury officers present!

The astonishing thing is that this canvassing of overseas borrowings through intermediaries continued well into 1975 and when Treasurer Cairns also became heavily involved in his own loan raising venture it soon began to appear like the old nursery rhyme of Jack a Nory. Some may recall the rhyme went as follows:

I'll tell you a story,
About Jack a Nory,
And now my story's done,
I'll tell you another,
Of Jack and his brother,
And now my story is done.

Well, it was not Jack but Jim who was soon done!

As head of the Overseas Economic Relations Division I accompanied Cairns to the OECD Ministerial Council meeting in May 1975 from which he was recalled.[27] Whitlam plucked up the courage to ask him to quit as Treasurer and on 5 June 1975 he agreed to move to the Environment ministry. But it then emerged that he had lied to the House of Representatives in denying that he had offered a commission of 2.5 per cent to his intermediary. Whitlam judged that he now had enough Caucus support to dismiss him.

By contrast with the obsequious attitude of other departments, the continued drawing of attention by the Treasury to the need for due process of loan proposals may well have prevented Australia suffering a downgrading in its credit rating and, for this, John must take a good deal of the credit. The Treasury's overall experience of the Whitlam years was, however, scarcely encouraging from a national interest perspective.

Returning briefly to the 1973-74 Budget, about its only saving grace was inclusion of a functional classification of outlays and receipts that provided a much improved framework for analysis of policy proposals and objectives. This change was an extension of the national accounting presentation of the Commonwealth budgetary accounts developed in the Economic and Financial Surveys Branch (of the General Financial and Economic Policy Division) after John became its head in 1963. That development filled an important analytical gap that existed in the statistics then published by the (then) Bureau of Census and Statistics.

While head of the Economic and Financial Surveys Branch, John also exerted a significant influence on policy thinking and decision-making on economic policy.

Perhaps the most significant contribution was the role he played as head of a small Treasury team which analysed the 1965 report of the Committee of Economic Enquiry, chaired by Sir James Vernon of CSR. The vice-chairman of that inquiry was Sir John Crawford, who had been the head of the Department of Trade before resigning to move to the Australian National University. Crawford had well-known protectionist and planning inclinations, admired the visions of his minister, John McEwen, and saw the inquiry as an opportunity to create an "independent" group of economic policy advisers (with himself as its head?) as a rival to Treasury. The Stone team compiled no less

than 14 Cabinet submissions for the Treasurer, Harold Holt. After Cabinet consideration, Deputy Secretary Sir Richard Randall was asked by Sir Robert Menzies to draft a statement for him. I think it fair to say that, while Menzies himself added some choice bits when dismissing the Vernon recommendations in his statement to the House of Representatives,[28] the genesis came from the contribution John made to the whole exercise.

As head of what might be described, without in any way down-grading other parts of Treasury, as the deep-thinking branch, John also initiated an important new series of Treasury publications on matters of topical and important economic interest (published as Special Supplements to the Treasury Information Bulletin). These included *The Meaning and Measurement of Economic Growth* (Nov 1964), *The Australian Balance of Payments* (Feb 1966) and *Investment Analysis* (July 1966). The publication on the balance of payments was described in The Institute of Public Affairs journal, *Review*, as "the finest piece of applied economic analysis produced in Australia since the war".

Subsequently, a Treasury Economic Paper entitled *Economic Growth: Is It Worth Having?,* published at John's initiative in 1973, resulted in John addressing,[29] in a personal capacity, a public seminar held by the Australasian Council of the Club of Rome. He was introduced as the author of "one of the most constructive and articulate criticisms" of the Club's publication, *Limits to Growth*. That publication was of course the precursor of the Intergovernmental Panel on Climate Change reports that purport to convey a similar need for government intervention in the functioning of society. John's commentary to the seminar included a reference to the espousal of worthwhile causes by distinguished men and the response by a Cambridge University cynic to the effect that distinguished men are chiefly involved in conferring distinctions on each other.

These, and other publications which followed as Treasury Economic Papers,[30] added considerable economic substance to the continuing policy debate and were written in a way that could be readily understood by that mythical person known as the intelligent layman. While they carefully avoided taking any political position or openly criticising specific policy proposals, they drew attention to the likely adverse economic implications for the nation of a departure from rational policies. There was a particularly noteworthy reference at the start of the concluding paragraph of the paper on economic growth. It stated: "Of course, while the maximum practicable economic growth is an objective which any government is likely to accept as desirable, it would be entirely unrealistic to expect a government completely to subordinate all of its policies to that aim". If only we had today a Treasury able to address so well the questions raised by policy proposals on, say, climate change!

Stone's initial stirring of the economic debate with Treasury publications was followed by his appointment in 1967 as Executive Director for Australia and certain other countries on the Executive Boards of the IMF and World Bank. There, as one of 20 Directors, he soon found himself in the midst of a heated controversy over the role of the IMF. In 1969, the IMF proposed the creation of a de facto international currency, described as Special Drawing Rights (SDRs), supposedly to supplement the availability of currency reserves and gold which the IMF claimed to be insufficient to support the expansion of world trade in the era of fixed exchange rates. As John quickly perceived, this would make the IMF a supplier of cheap funds to assist developing countries and provide an excuse for countries to dodge the implementation of policy changes needed, in particular, to deal with the emergence of rising rates of inflation. While at the IMF John wrote the first paper he had published personally.[31] This contained a forerunner of the view he strongly expressed over his subsequent 15 years in Treasury –and, indeed, beyond – that controlling inflation was the central issue facing governments and, in carefully framed words, he sounded a warning note about mechanisms for "international reserves creation".

Despite instructions to the contrary from the Treasurer, William McMahon[32] (and the New Zealand Minister for Finance, Robert Muldoon), John insisted that as IMF Executive Director he had the responsibility, indeed a fiduciary duty to the Fund, for deciding what attitude to adopt to the Special Drawing Rights proposal and he voted against it when it came to the board meeting, the only

Executive Director to do so. Although the then Managing Director, Frenchman Paul Schweitzer, was much displeased, when a row subsequently developed with the Americans over who was to be his successor, Schweitzer took a remarkable step and sought formal advice from Canberra as to whether Mr Stone's name could be advanced as the possible next MD! That produced a response from McMahon that saved John from a possible life at an international institution.

In the event, the move away from fixed exchange rates in 1973, and the reluctance of developed countries to swap their currencies for SDRs held by developing countries, has limited the role of SDRs. However, as indicated by the major increase in 2009 in the allocation of SDRs, the IMF continues its attempts to become the world central bank.

On his return to the Treasury from Washington in 1971, John was appointed head of what was then the rather quaintly named Revenue, Loans and Investment Division. A major responsibility of that division was actually Commonwealth/State relations, a subject on which I had been working for the previous six years but which most Treasury officers shunned because it involved an overlap between economics and politics. Unfortunately our relationship was short. John was soon promoted to Deputy Secretary (Economic) and, in late 1971, I was lent to the Department of the Prime Minister and Cabinet. There I had the privilege of being on call to play squash whenever Prime Minister Billy McMahon was short of a partner.

While head of the RL&I Division John played an important role in developing the response to the pressure being exerted by the States for a so-called growth tax. This followed numerous earlier attempts by the States to widen their tax bases, including by the imposition of a receipts duty and requests for access to income tax, both of which the Commonwealth opposed on the ground that it would mean the end of a uniform income tax system. While this was a general Treasury view, which John supported, the desirability of the States obtaining increased access to tax resources by transferring payroll tax had been recognized for some time within the division, and in his role as division head, John had the main carriage of the matter. However, Prime Minister Gorton had opposed the transfer of payroll tax and it only became possible when McMahon became prime minister in March 1971, leading then to the Commonwealth agreeing to the transfer at the June 1971 Premiers' Conference. Unfortunately, by giving extensive exemptions the States have failed to use the tax as an independent general source of revenue and have treated it as a tax whose primary effect is a deterrent to employment even though businesses probably largely pass it on to the consumer as they do with the GST.

I turn now to the post-1975 period when John was, first, Deputy Secretary (Economic) in the Treasury and, then, Secretary from January 1979 until his resignation five and a half years later in 1984. Even though occupying those positions was, for obvious reasons, a major part of his life in the Treasury, there is all too limited scope to cover the role which John (and more generally) the Treasury played. As all but a year and a half of John's closing years in Treasury was in the Fraser period of government ending in March 1983, and I have already dealt with one post-March 1983 experience with Labor, I now refer only to the Fraser experience.

In John's critique of Howard's 2005 address, "Reflections on Australian Federalism", to which I have already referred, he commented that "we did not re-elect John Howard to emulate Malcolm Fraser's do-nothing debacle". I think that sums up his strong feelings of frustration, if not anger, that with control of the Senate until end of June 1981 Prime Minister Fraser missed major opportunities to take advantage of the obvious widespread antipathy to the Whitlam shemozzle and, in particular, to fulfil the role of a small government crusader in which he portrayed himself. This is not the occasion on which to try to explain why Fraser failed to take those opportunities or why the longer the Fraser period went, the less there seemed to be direct contact with the Treasurer, John Howard. But one prominent journalist mistakenly portrayed in 1992 the policies pursued for much of the Fraser period as reflecting Fraser's "broad acceptance of the John Stone Treasury".[33] The reality is reflected in John's article in *Quadrant* of July-August 2007.[34]

That article responded to claims made in December 2006 by Dr David Kemp, a member of Fraser's private office staff when he assumed office, that there had been a failure to provide appropriate advice on economic policy options to Fraser in 1976. However, in advancing that complaint Kemp acknowledged that throughout 1976 "there were significant differences between the economists in Treasury, the Prime Minister's Department and the Reserve Bank, on the one hand, and the Prime Minister, on the other, over budgetary policy, over the deficit and expenditure cuts, wages policy, monetary policy and the management of the exchange rate", adding that "the key protagonist of the official view was John Stone". John's article indicates that the Treasurer, Phillip Lynch, and his chief private office advisers were also in agreement with what Kemp describes as the "official view". In essence, Fraser was complaining that the advice he received from the public service was not the advice he wanted to receive.

Initially these differences came to a head in the framing of an economic statement in May 1976. This included the indexation of personal income tax[35] that Fraser insisted be part of a package of budgetary measures but which the Treasurer, Lynch, argued strongly against in what John describes as a remarkable 13-page letter to Fraser that has not yet seen the light of day. As to controlling government expenditure, after the enormous expansion in government expenditure under Whitlam from 18.8 per cent of GDP in 1972-73 to a massive 24.2 per cent in 1975-76, one might have expected the Fraser period to produce at least some reduction. However, despite two other attempts at "control measures" in the first half of 1976, and the initial majority in the Senate, the 1976-77 Budget actually produced a small real increase in spending. The Fraser Government completed its terms in office with expenditure levels a significantly higher proportion of GDP than in Whitlam's last year.[36]

One other important complaint by Kemp was that the Reserve Bank "appeared to the Prime Minister to think that its primary task was to support whatever view the Treasury put forward" and that this "frustrated Fraser immensely". It seems highly likely that this "frustration", combined with frustration with the advice being provided by Treasury itself (also reflected in Fraser's biography by Margret Simons),[37] led Fraser to hold on 18 November 1976 a meeting of three other ministers to split the Treasury into two, with the new Department of Finance assuming responsibility for analysis of government expenditure.[38]

As responsibility for economic policy advice remained with the Treasury, this change in itself could be interpreted as no more than a move to improve the efficiency of government. But the split reflected the move by Fraser to increase his capacity to question and challenge ministerial views in Cabinet as well as Treasury views. As he said in his biography, "I tried to be across everything. I would try to know as much as I could, and if I found that when a submission came to cabinet I knew more about it than the minister, well, you knew you had a problem and to be on the alert".[39]

On economic matters Fraser drew directly on the expertise of senior ex-Treasury advisers already in the Department of the Prime Minister and Cabinet in 1975, and, from August 1976, his newly-appointed department head, Alan Carmody, who had been a deputy secretary of the Department of Trade and Industry (and, as John has put it, was an ultra-protectionist).[40]

Soon after Carmody's appointment, it became clear that Fraser wanted to effect a major devaluation.[41] No advice was sought from the Treasury but, at Fraser's direct request, the Governor of the Reserve Bank, Sir Harry Knight, provided him in late October with five papers, including an Executive Summary, stating that "in our view, the case for a devaluation fails on two grounds".

Then, early in November 1976, joint Reserve Bank and Treasury papers assessing two options (no devaluation or a 10 per cent one) were considered by a ministerial group which decided against devaluation. It was immediately following this decision that Fraser instructed the preparation of material on the split of Treasury, presumably partly reflecting his frustration at being unable to get his way. However, later in November, the devaluation issue was again considered at another meeting of ministers. At that meeting Treasury options papers canvassed three possibilities, including a 10

per cent devaluation. But it was decided that there would be a 17.5 per cent devaluation. That was announced on 28 November 1976.[42]

Such policy changes decided for primarily political reasons were also of major importance in determining levels of interest rates during almost the whole Fraser period, adding to the difficulty of bringing the continuing high inflation rate of around 10 per cent per annum under control through monetary policy. In fact, for most of the Fraser period John and the Treasury generally were continually trying to persuade the Government to implement a range of reforms that were clearly needed and which would have effected improvements in economic efficiency. Policy changes were made but they were predominantly changes that Fraser perceived, for the most part wrongly, would have political benefits.

On tariff policy, for example, in addressing an Australian Institute of Management conference in November 1979, John pointed out that the increasingly favourable outlook for mineral exports indicated that imports were also likely to increase and that a response involving the lowering of import protective barriers would in turn make Australian industry more productive.[43] Such comments fell on deaf ears with ministers but did lead the Chamber of Manufactures to ask the Public Service Board about the procedures needed for having the Treasury secretary sacked.

On wages policy, in addressing a 1981 Bureau of Agricultural Economics conference on the Economic Outlook, John observed that, reflecting the inflationary pressures exerted by the "combination of trade unions and arbitral tribunals", the whole question of wage determination was "under review". In reality, however, Fraser shied away from any major conflict with the unions – indeed, on one occasion, let a large proposed wage increase "pass" without critical comment so that he could travel overseas – and late in his term even foreshadowed Labor's Accord by succumbing to a process that included a wage pause agreement with union and employer groups and, at the same time, provided in the 1982-83 Budget "compensatory" reductions in personal income taxes and increases in personal benefits.

As to federalism, the Treasurer, Phillip Lynch, stated in his 1976-77 Budget speech that the Government "accorded a very high priority" to financial relations between the Commonwealth and State and local governments. Lynch made much of the increase in the proportion of Commonwealth assistance provided on an untied basis and of the new basis for determining the States' general purpose grants by providing States a fixed share of personal income tax receipts, which was one of the Liberal Party's election policies in 1975. The States had also been offered the opportunity to impose a surcharge or offer a rebate but no State availed itself of this. While neither the Treasury nor John had any underlying reason to oppose the proposed link between personal income tax receipts and general purpose grants, the yearly fluctuations in personal income tax collections forced the Commonwealth to give the States a guarantee that the amounts received would not be less than they would have received under the pre 1976-77 arrangements. In 1981-82 the arrangements were further changed to provide that the States would then share total taxes collected by the Commonwealth, but with a guarantee that there would be an increase each year in real terms.

Despite this apparently favourable funding arrangement with the States, the total assistance provided to them grew at a slower rate than the Commonwealth's expenditure for its own purposes, that is, all expenditure other than transfers to the States. This failure to bring its own purpose expenditures under control was one of the most disappointing features of the Fraser Government.

It is not surprising, then, that John's Earle Page Memorial Lecture in 1987, made when he was Shadow Minister for Finance, described the final budget of the Fraser era in 1982-83 as "undoubtedly the worst Budget in that Government's term of office".[44] In that lecture he argued for a reduction in the size of government, for a "perestroika" that would include much less Commonwealth intrusion into areas of service delivery "rightly the province of the States". That lecture remains relevant today, including the call for a re-assessment of immigration policies that led Shadow Cabinet to demand that Stone cease references to matters outside his portfolio. Needless to say, such suggestions fell on deaf ears![45]

That 1982-83 Budget experience was highlighted in the advice which, during the caretaker period leading up to the 11 March 1983 election, John sent as Treasury Secretary to Treasurer Howard and on the day following the election to incoming Prime Minister Hawke. This advice showed that the initial estimated budget deficit of $1.7 billion for the year ended June 1983 had by March more than doubled to $4.3 billion due primarily to an estimated real increase in outlays of 7.5 per cent, the highest since 1974-75. The advice also included a preliminary assessment that the 1983-84 deficit would be an enormous $9.6 billion and that even excluding election promises there would be a real increase in outlays of about 5 per cent.[46] As no forward estimates were then included in Budget papers, the publication of the Stone advice by Hawke naturally caused an uproar.[47]

What I have said in this paper relates to only a relatively small part of the contribution John has made, and continues to make, to Australian society. Even the references I have made to his time in Treasury fall well short of his contribution there and to government more generally.

But how does one assess this in the overall scheme of things? I mentioned earlier the suggestion made by John that, in assessing the contributions made by Howard, Thatcher and Reagan, one has to have regard to what the situation was when they assumed office and what it was when they vacated. John and I were in Treasury for almost the same number of years – 30 and 28 respectively – and a tremendous amount of that time was spent trying to persuade others to accept basic reforms in the interests of a better society. In this John performed well beyond the call of duty and through his three years in Parliament and other activities he has continued to play that role ever since. My belief is that the world is a much better place because he responded so well in fighting the attacks and diversions that occur almost constantly, as they do amongst the pieces on a chess board.

As in chess, John Stone may in the process have lost one or two prize pieces but he greatly helped the world of economics and politics to fight off the black knight – and he still has his Queen. Lewis Carroll's *Through the Looking Glass and What Alice Found There* seems to capture a little of the Canberra scene – and beyond.

> *For some minutes Alice stood without speaking, looking out in all directions over the country … 'I declare it's marked out just like a large chess board!' Alice said at last. ' There ought to be some men moving about somewhere – and so there are!' she added in a tone of delight, and her heart began to beat quick with excitement as she went on. 'It's a great huge game of chess that's being played –all over the world –if this is the world at all, you know. Oh, what fun it is! How I* wish *I was one of them! I wouldn't mind being a Pawn, if only I might join – though of course I should* like *to be a Queen, best.*

Endnotes

1. Des Moore, Deputy Secretary, Treasury, 1982-87, is Director, Institute for Private Enterprise.
2. The surprisingly small reference to the period when Stone was Treasury head in *The Centenary of Treasury 1901-2001*, published by the Department of Treasury in 2001, may to some extent reflect some "other" views.
3. As indicated in his book on *Keating: The Inside Story,* Keating's economic adviser, then left wing journalist John Edwards, was allowed access by Keating to a huge number of official papers in his office, including minutes sent to Keating by Stone about exchange rate policy, to write Keating's biography. In his article on "Floating the Australian Dollar" in the *Australian Financial Review*, 11 December 2003, John Stone draws on Edwards's references to those minutes (under the 30 year rule for the preservation of confidentiality of information possessed by public servants, John is not allowed to quote from them until December 2013), including

one that indicated that Treasury had proposed liberalisation of the foreign exchange market as quoted in the text.

4. *Ibid*.

5. Another then prominent outside economic adviser, Barry Hughes, saw market driven changes in the exchange rate as a way of reducing the need for the Government to make other policy adjustments that would help improve Australia's internationally competitive position. For a Labor Government with close connections to the union movement this had obvious appeal as it allowed deregulation of the labour market to be dodged.

6. Many countries, particularly so-called developing countries, still retain controls over capital movements and their exchange rates.

7. *Ibid*. There were, basically, no papers submitted by official agencies.

8. J.O. Stone, Secretary to the Treasury, *1929 and all that . . .* , The Shann Memorial Lecture, 1984, Delivered at the University of Western Australia on 27 August, 1984.

9. The main official explanation is the deterioration in the terms of trade. However, the jump from zero to about 5 percentage points in the "gap" between Australia's inflation rate and the OECD average inflation rate between end 1984 and early 1986 suggests policy failure.

10. From December 1972 to November 1975.

11. Journalist Alan Reid contains some of it in *The Whitlam Venture*, Melbourne, 1976. However, it is written from the perspective of a journalist and is not an assessment of the implications for the national interest.

12. In fact the letter I received from my sitting Labor member was headed: "Better hospitals, more doctors and nurses".

13. John Stone, *The Australian*, 18 April 2005.

14. John Howard, "Reflections on Australian Federalism", address to the Menzies Research Centre, 11 April 2005.

15. John Stone, "Introductory Remarks", *Upholding the Australian Constitution*, vol. 17, The Samuel Griffith Society, 2005, xxxiii-xxxiv.

16. Keith Windschuttle, David Martin Jones and Ray Evans (editors), *The Howard Era*, Quadrant Books, 2009.

17. Des Moore, "Duplication and Overlap: An Exercise in Federal Power", *Upholding the Australian Constitution*, vol. 6, The Samuel Griffith Society, 1995.

18. Budget Paper No 3, 2009-10, page1.The "new framework" is stated to involve a rationalisation of the number of payments to the States and a clearer specification of the roles and responsibilities of each level of government.

19. In 2009-10 specific purpose grants to the States amounted to about $50 billion, or about 14 per cent of total Commonwealth outlays, and more than $33 billion or two thirds of such grants were for health and education.

    In 1974-75, specific purpose grants amounting to $4.1 billion were a considerably higher proportion – 27 per cent – of total outlays. The States do not now receive general purpose grants as such but the condition-free proceeds from the Commonwealth GST that are sent to the States are, in effect, general purpose grants. The basic underlying conditions affecting decision making by the States has not changed.

20. The other members of the Task Force, who included Paddy McGuinness and the then senior adviser to Whitlam, Jim Spigelman, were not obviously suited to the task. Spigelman was appointed Chief Justice in NSW in 1998.

21. The Task Force did not make "recommendations"; it identified "options".

22. In his budget speech Treasurer Crean "explained" that the increase in outlays budgeted for was "more than covered by the increase in receipts" whereas "in 1972-73 outlays increased about twice as fast as receipts". The figures quoted are from the 1973-74 budget statements. Historical data in budget documents for 2010-11 show a lower rate of increase in 1973-74 cf 1972-73 (4.2 per cent cf 7.7 per cent in real terms).

23. Des Moore, "Duplication and Overlap: An Exercise in Federal Power", *Upholding the Australian Constitution*, vol. 6, The Samuel Griffith Society, 1995.

24. The estimated increase in *nominal* terms of 32.4 per cent compared with the actual 1973-74 increase of "only" 20.2 per cent as shown in the budget papers for 1974-75. The estimates for the latter year were no less than 59 per cent higher than the outturn in 1972-73. According to historical data in the budget papers for 2010-11, the *real* increase in outlays was 19.9 per cent in 1974-75 and 15.7 per cent in 1975-76.

25. The Budget Speech was delivered by Mr Crean, who was not "sacked" until 11 December 1974.

26. See Alan Reid, *The Whitlam Adventure*, chapter 1.

27. My recollection is that Cairns was recalled before he had an opportunity to speak but a Treasury colleague stationed in Paris at the time says that Cairns did actually address the Council before his recall.

28. The entry on Menzies in the *Australian Dictionary of Biography*, volume 15, Melbourne University Press, 2000, notes that "McEwen's department was sometimes at odds with the Treasury, occasionally to Menzies' displeasure. This was the case in 1965, for example, when Menzies rejected – on Treasury's advice – the report by Sir James Vernon's committee of economic inquiry, a document understood to embody the views of McEwen's public service lieutenants, in particular his former departmental secretary Sir John Crawford". After 16 years as prime minister, Menzies resigned in January 1966 at age 71; he was succeeded by Harold Holt.

29. John Stone, "Rough Speaking Notes", Australasian Council of the Club of Rome, Public Seminar, 3 November 1973.

30. The first of these was on *Overseas Investment in Australia* in 1972. As head of the Overseas Relations Division I contributed to the sixth of such papers published in 1979 on the *NIEO: An Assessment of the Proposals for a New International Economic Order*. To the chagrin of the Minister and Department of Foreign Affairs, its critical analysis helped prevent the Australian Government from expressing support for the various proposals advanced in United Nations fora by developing countries for changes in the international economic system designed to deal with the alleged failure of the market-oriented system.

31. John Stone, "Inflation and the International Monetary System", *IPA Review*, April-June 1969. Treasury "cleared" the publication of the article.

32. The US Ambassador to Australia called officially on Treasurer McMahon and requested him to instruct the Australian Executive Director to fall into line.

33. In *The End of Certainty* (Allen & Unwin, 1992), for instance, Paul Kelly portrayed "three distinct phases in Fraser's eight years in power. The first, which covers 1976, was that of Fraser

reformism.; the second, from 1977 to 1981-82, saw Fraser's broad acceptance of the John Stone Treasury, "fight inflation first" philosophy; and the third, which covers the final year, saw Fraser break from the Treasury and attempt a series of interventionist experiments, notably an expansionary budget and a wages freeze to counter the recession".

34. John Stone, "The Dismal Beginning to the Fraser Years", *Quadrant*, July-August 2007. The article's main purpose was to reply to strong criticisms made by Dr David Kemp of the advice, or rather the alleged lack of it, provided to Fraser in 1976 by the Treasury, the Reserve Bank as well as the Prime Minister's own department. Those criticisms were made at the release by the National Archives of Australia of the Cabinet papers for 1976, which Kemp attended in lieu of Fraser. However, the article also provides an excellent summary of the terrible economic and budgetary conditions inherited by Fraser from Whitlam.

35. In 1978-79 the standard rate of tax was increased.

36. Fraser claims to have been advised by Treasury head, Sir Frederick Wheeler that, after the Whitlam years, the economy would not take the strain of large cuts in government spending. The historical budget figures published in Budget Paper No 1 for 2010-11 show an increase in total payments in 1976-77 of 14.5 per cent in nominal terms (0.6 per cent real) compared with 30.1 per cent (15.7 per cent real) in 1975-76. In the latter year, however, expenditure was 24.2 per cent of GDP and the deficit of $1.5 billion was 1.8 per cent of GDP compared with expenditures in 1982-83 of 25.7 per cent of GDP and a budget deficit of $3.3 billion still at 1.8 per cent of GDP.

37. Margaret Simons, *Malcolm Fraser – The Political Memoirs,* Miegunyah Press, 2010. See, in particular, the following on page 364 – "Meanwhile, Fraser had become so frustrated with the dogmatism of Treasury and the struggle to acquire a range of policy advice that he decided to split the department into two, establishing the Department of Finance alongside Treasury".

38. The majority of people working in Treasury (840 out of 1480) went to Finance in the split. It should be noted that the Centenary of Treasury publication states incorrectly that the decision was announced on 18 October 1976. The announcement was made on 19 November 1976.

39. *Ibid*.

40. The two ex-Treasury officers were Ian Castles, who later became Secretary, Department of Finance, then Australian Statistician; and Ed Visbord, subsequently Secretary, Department of Employment and Industrial Relations. Alan Carmody was head of the Department of Business and Consumer Affairs when appointed head of Prime Ministers Department. He died in 1978. Another senior appointment in 1979 was Mike Keating, who during the 1974 budget process had provided analysis, without consulting Treasury, which contradicted Treasury advice.

41. At a meeting in early October with the Managing Director of the International Monetary Fund, Fraser had quizzed the latter on his attitude to such action. At a subsequent meeting in the Treasury, the managing director said that, while he had told Fraser that he would not oppose a devaluation, he had indicated that he would not recommend such a course and that "there should not be a devaluation now and the appropriate course would be to follow developments in the economy in the next six months" (from Treasury Note for File quoted in *The Dismal Beginning to the Fraser Years*, op cit).

42. This was quickly reduced by the exchange rate management committee to 12.5 per cent.

43. J.O. Stone, "Australia in a Competitive World – Some Options", Paper presented to the 21st General Management Conference of the Australian Institute of Management, Sydney, 19 November 1979.

44. Senator John Stone, Shadow Minister for Finance and Leader of the National Party in the Senate, *Back to Basics*, Third Earle Page Memorial Lecture, Brennan Hall, St John's College, University of Sydney, 3 December 1987.

45. An advance copy of the lecture had been given to the Leaders of both Coalition parties and not long after that the Leader of the Liberal Party was himself raising the immigration issue.

46. Historical budget figures in current budget papers show real increases in outlays of 6.3 per cent in 1982-83 and 9.4 per cent in 1983-84. The 1983-84 deficit came out at $7.0bn or 3.3 per cent of GDP. Had it reached $9.6 bn it would have been about 4.5 per cent of GDP.

47. Some of the increase in outlays and the deficit reflected the deterioration in economic conditions and the on-going drought. However, there were many new expenditure commitments (including the Darwin-Alice Springs railway!) principally designed to attract votes and reflecting an undisciplined approach to managing government.

JOHN STONE – CURRICULUM VITAE

Educational Qualifications

1942 Perth Modern School – Scholarship.

1946 Leaving Certificate; Western Australian Government University Exhibition for Maths and Physics; *Proxime Accessit*, Gold Medal for English.

1947 Winthrop Scholarship, St George's College, University of WA

1947-50 Bachelor of Science, University of WA (1st Class Honours in Mathematical Physics).

1950 Awarded Rhodes Scholarship for WA (1951).

1951 (Feb-July) Junior Lecturer, Mathematics Department, University of WA.

1951-54 Bachelor of Arts, Oxford University (New College).

1951-52 Reading Honours Schools in Mathematics.

1952 (Mar) -1954
Honours Schools in Politics, Philosophy and Economics (PPE).

Oct 1953 Awarded James Webb Medley Scholarship for best second year student in Economics within the University.

July 1954 Awarded First Class Honours in PPE (formal *viva*).

Sporting Activities

(1) Perth Modern School 1st XI Hockey (Captain) and 1st XI Cricket.

(2) University of Western Australia.

1948 Represented Western Australia at Hockey (Under 21).

1949 Ditto: selected to represent Australia (Under 21).

(3) University of Oxford "Occasional" Oxford University representative at Hockey.

Elected to Vincent's Club, 1953.

Student Activities

University of Western Australia

Elected to Council, Guild of Undergraduates (SRC), 1948; Secretary, 1949; Vice-President, 1950; President, 1951.

St Georges College Winthrop Scholarship, 1947.

Georgian's Prize for best all round contribution to the College, 1949.

Elected Senior Student for 1950.

Employment in the Commonwealth Treasury (1954-84)

1954-56 Assistant to the Australian Treasury Representative in London (including 6 months on secondment to the Economic Section of the UK Treasury).

1956 (Sept) - end 1957

Senior Research Officer, Home Finance Branch, General Financial and Economic Policy (GFEP) Division, Canberra.

1958-61 (April)

Australian Treasury Representative, Australia House, London. Attended various international meetings (GATT; Commonwealth Finance Ministers; Commonwealth Trade and Economic Conference, Montreal; Annual Meetings of International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD) ("World Bank"); Sterling Area Statistical Committee, etc.)

1961-62 Chief Finance Officer, Fiscal and Monetary Policy Branch, GFEP Division, Canberra.

1963-66 Assistant Secretary (Level 2), Economic and Financial Surveys Branch, GFEP Division. Developed the national accounting presentation of the Commonwealth budgetary accounts and initiated new series of Treasury publications on matters of topical economic interest (published as Special Supplements to the Treasury Information Bulletin).

1967-70 On leave without pay from the Commonwealth Public Service as Australia's Executive Director on the Boards of (1) IMF; and (2) World Bank, Washington, DC.

1967-68 Executive Director for Australia, New Zealand and South Africa (IMF and IBRD).

1969-70 Executive Director for Australia, New Zealand and South Africa (IBRD).

Executive Director for Australia, New Zealand, South Africa, Lesotho and Swaziland (IMF).

1971 First Assistant Secretary, Revenue, Loans and Investment Division, Canberra.

Secretary, Australian Loan Council.

Secretary, National Debt Commission.

1971 (November)

Deputy Secretary (Economic). Responsible for the GFEP Division and the Overseas Economic Relations (OER) Division.

1973 Member, Committee of Review of the Continuing Expenditure Policies of the Previous Government (The Coombs Task Force).

1976 Deputy Secretary to the Treasury.

8.1.1979 Secretary to the Treasury.

Member, Reserve Bank Board (ex-officio).

Member, Board of the Commonwealth Banking Corporation (ex-officio).

Member, Defence Committee (ex-officio).

14.9.1984 Resigned as Secretary to the Treasury, and from the Commonwealth Public Service.

Employment Post-Treasury

1984 (October - December)

Professor, Centre of Policy Studies, Monash University.

1985-87 Consultant (half-time) to Potter Partners.

Senior Fellow, Institute of Public Affairs (IPA).

Weekly Columnist, *The Herald* (syndicated to the Sydney Morning Herald and various other capital city dailies).

Various consultancies.

1986-87 Director, Peko-Wallsend Ltd.

1987 (April - June)

Leave without pay from Potters and the IPA in order to undertake a consultancy with the Queensland National Party to develop the "single rate tax" proposals.

1987 (July) Elected Senator for Queensland (National Party).

Elected Leader of the National Party in the Senate.

Shadow Minister for Finance (Howard Shadow Cabinet).

Weekly Columnist for *The Australian* (later for the Murdoch Sunday newspapers throughout Australia).

1989 (May) Member, Opposition Leadership Group (Peacock Shadow Cabinet).

1990 (March)

Resigned Senate seat to stand (unsuccessfully) for House of Representatives (Fairfax).

1990-95 Senior Fellow, Institute of Public Affairs.

1994 (July) - 1996 (March)

Chairman, J T Campbell & Co Limited.

1996-97 Member, Defence Efficiency Review Committee.

1990-98 (March)

Weekly Columnist, *The Australian Financial Review*.

1998-2003 Monthly Columnist, *The Adelaide Review*.

2004-2008 Regular contributor**,** *National Observer* (quarterly).

Occasional contributor, *The Australian***.**

Occasional contributor, *The Australian Financial Review***.**

2008 (March) to date

Regular contributor, *Quadrant* magazine.

Occasional contributor, *The Australian***.**

2008 Elected Member, Mont Pelerin Society.

Other Activities

1972 (November)

Elected Fellow of the Academy of the Social Sciences in Australia (ASSA).

1983 (July) Resigned from Fellowship of ASSA (in disgust at the quality of the Academy's proceedings).

1985 Founding member, Council for the National Interest.

1985-94 Member of the Board of Management.

1986 Founding member, HR Nicholls Society.

1986-89 President.

1990-93 Member of the Board of Management.

1994-95 Treasurer.

1992 Founding member, The Samuel Griffith Society.

Member of the Board of Management.

Conference Convenor.

1992-2008 Editor and Publisher, Proceedings of the Society, *Upholding the Australian Constitution***, Volumes 1 - 21 (2009).**

Updated to: August, 2010

Chapter Eight

The Public Life of John and Nancy Stone

Justice J. D. Heydon

Some positive human qualities spring from the autonomous human spirit – and John and Nancy Stone have many of those. The rest stems largely from factors of heredity or environment.

What *is* the heredity of John Owen Stone? He is not named Lewis or Davies or Jones, but his names, particularly Owen, do suggest Welsh blood. There was a Soviet attempt to set up a top secret spy ring in Wales which taught the Russians many lessons about the Welsh. A very senior KGB agent called Vladimir was told to go to Cardiff, and take a branch line to a small village. There he was to meet a man called Jones, and say: "The daffodils are blooming early this year". Jones was to say: "Yes, but the tulips are late". Jones would then tell Vladimir how to set up the spy ring in totally clandestine fashion.

When Vladimir arrived at the village station he said to the ticket collector: "I am looking for a man called Jones".

The ticket collector said: "Which Jones, bach? There is Jones the baker, Jones the grocer, Jones the milkman. And my own name is Jones, see". Vladimir said: "The daffodils are blooming early this year".

The ticket collector said: "Oh! It's Jones the spy you want".

John Stone's father was a wheat and sheep farmer in Western Australia. The family hailed from Victoria. John's father was the son of a farmer and one of ten siblings. His family was sufficiently prosperous to send him to Hale School, of which he was the dux.[1]

John Stone's mother was one of six siblings. Her father – John Owen Hunt – was a mine manager.[2] He left New South Wales to care for the family of his brother, who was killed in a bar brawl in Kalgoorlie soon after gold was discovered there. John Stone's grandmother eventually made her way with the six children to Kalgoorlie – John's mother being a babe in arms – but her husband died suddenly in 1905.[3] She managed to raise and educate the six children without the social security of later times. John's mother took up that most important and now wrongly neglected of occupations, school teacher.[4]

After their marriage, John's parents moved to a heavily mortgaged, run down and only partly cleared property near Korbel, a railway siding about 180 miles east of Perth.[5] The Great Depression, with its catastrophic effect on wheat and wool prices, was about to descend.[6] On the farm the sole heating was a wood stove. The sole lighting was by kerosene lamp, at least initially. There was no tractor until just before the Second World War. Before then the only horse power derived from the power of horses and human muscle.[7]

On 31 January 1929 John was born. Five years later his brother was born. Of his farm childhood, with its hot summers and cold winters, he has only happy memories. Like all farm children all over the world for thousands of years, he had to work on the farm – catching and feeding the horses, bringing in wood, driving the harvester. But, in his view, he was only lightly worked. An early memory is of going with his father by horse and cart to fetch a cow at dusk and, after the cow broke away and his father went to look for it, being taken home alone in the darkness by the horse, acting like a good barrister – knowledgeably but without instructions.[8] He retained happy memories of haymaking on warm days, dominated by "that lovely smell of freshly cut hay", followed a few weeks

later by building the sheaves into haystacks;[9] of playing with the farm dogs;[10] of building secret paths, forts and entrenchments in the bush adjoining his school, which were constructed to protect the Korbel children against the children from Belka, the next siding down the line, and which he still found in existence in 1974.[11] Many years later he wrote of the "marvellous" sound of the kookaburra. He went on: "I personally – perhaps because of childhood associations – feel an even greater fondness for the morning call of the magpie, than which I think there is no birdsong more glorious when heard in the open countryside when all else around is still".[12] All his life he has been like Kipling's Australian soldier in the Boer War, whose memories of home were stirred when he:

"smelt wattle by Lichtenberg

Riding in, in the rain".

On the questionable assumption that not having television programmes to watch is deprivation, it was a deprived existence. The gap was filled by the little family's participation in the social and sporting activities of the small communities nearby.[13] John read whatever there was to be read.[14] He saw his childhood as in a sense poor, but not deprived.

John was initially educated at a one teacher school at Korbel having between 14 and 22 children,[15] with an interlude at a Perth primary school in Victoria Park and two periods of correspondence teaching.[16]

In 1941 climacteric changes took place in his life. By competitive examination he obtained one of fifty scholarships available across the State entitling him to attend any government high school he chose. And his parents divorced. From then on he lived with his mother in Perth. Apart from occasional visits during school and university holidays, the farm days were over.[17]

What, at that stage, were John's assets? From his maternal forebears he had inherited the determination to triumph over misfortune. From his parents, he had gained an interest in public affairs. He had gained from them qualities of probity and morality which even his worst enemies have not credibly denied.[18] Above all, he had gained qualities which are perhaps much more common in those raised in the Australian bush than anywhere else – a capacity to detect the fake and pretentious, and a spirit of independence.[19] He has been marked by them for the last 70 years. It is hard to get a sense of the bush in many parts of Australian cities, but the house in which John and Nancy now live in Lane Cove used to be part of a farm, and retains that atmosphere. To that extent he has returned to his roots.

The success of a boy from a very small school in winning a scholarship was a tribute to the efforts of his mother and his teacher, and to his own natural ability. Like most other successful applicants, he chose to go to what was regarded as the best school, Perth Modern School.[20] In a war-time Perth where accommodation was very scarce, he and his mother and brother lived in a succession of houses. His mother resumed school teaching.[21] He liked, admired and did well at the school, which was competitive and respected academic excellence.[22] He made lifelong friends there – Lloyd Zampatti, Maxwell Newton, John Wheeldon.[23] He loved cricket as a game, partly because, as he rightly says, it is "more than a game", and played cricket for the First XI. But he achieved his greatest success in hockey. He captained the hockey team.[24] He represented the West Australian Colts in 1948 and 1949 (winning the national championships in both years).[25]

Perth Modern School was the only high school (apart from country high schools) which taught pupils for the Leaving Certificate, so that in the last two years a large influx of new pupils came in from other schools in order to study for that Certificate.[26] After the third form John chose to enter the science stream rather than the arts stream. The person who taught French, German and Latin was an Englishman who was respected for having played county cricket. But he looked like a frog and, with the genial malice of schoolchildren, was inevitably called "Froggy". "Froggy" Adlard initiated the following conversation with him: "Stone, I understand that you have decided to go into the science stream?" "Yes sir". "I think you are making a big mistake".[27] The thinking behind these

minatory words was evidently that even though John did very well in science and mathematics, his interests lay on the arts side – history and languages.[28] In one sense "Froggy" Adlard was right: John was taking a wrong turning, which was not corrected until Oxford. In another sense he was wrong: mathematical excellence is a huge intellectual asset, particularly for one who became an economist and a Treasury official.

In his Leaving Certificate examinations John Stone achieved a maximum result – seven distinctions. One of his teachers sent the news by telegram in these terms: "Congratulations. Seven distinctions. Only competition appears to be Hardwick, N E". By "competition" the teacher meant "competition for University Exhibitions". In due course John was given one of seven or eight Exhibitions awarded across the State – the physics/mathematics Exhibition. He was proxime accessit for a Gold Medal for English – and all his life he has certainly had at his command a muscular and clear prose style. Among the other candidates, "Hardwick, N E" obtained a general Exhibition.[29] Now coming events cast their shadows before. "Hardwick, N E" has entered the story for the first time, but not the last. That person will return a little later.

John Stone won a Winthrop Scholarship to St George's College at the University of Western Australia. He lived there while reading for a Bachelor of Science degree, which he took with first class honours. He shared rooms with Maxwell Newton.[30] He was Senior Student of St George's College in 1950. He served on the Council of the Guild of Undergraduates (that is, the Students' Representative Council) for about four years, in which he became Secretary and then Vice-President, and then defeated Bob Hawke for the Presidency.[31] He presided over a Guild Council Disciplinary Tribunal which fined a certain B M Snedden for breaking up a meeting of the Labor Club. He enjoyed university life.[32] He became the 1951 Rhodes Scholar for Western Australia.[33]

At Oxford he went to New College. New College, filled with products of an outstanding school, Winchester, had high academic standards. It stood in contrast with, for example, Christ Church, dominated by the sons of the aristocracy. The aim of Christ Church seemed to be not to produce scholars, but to produce gentlemen. The negative part of that ambition was amply achieved.

In those days famous historians were to be observed moving about the Oxford streets – A L Rowse, Hugh Trevor-Roper, Alan Bullock and A J P Taylor. Sightings of the last-named, of course, were a matter of chance. A J P Taylor spent much time away from Oxford, writing for *The Observer*, the *Daily Express* and the *Sunday Express*, staying in London or wherever else Lord Beaverbrook happened to be, going to television studios to lecture. He was a Fellow of Magdalen College. Graffiti could be seen there posing the following riddle: "What is the difference between God and A J P Taylor?" The answer was: "God is here but everywhere; A J P Taylor is everywhere but here".

There were great figures in other disciplines. A rising scholar of English Literature was Dame Helen Gardner. She was a lady of the most strait-laced and impeccable virtue, but she was soon to give evidence for the defence in the *Lady Chatterley's Lover* trial, as a result of which she was nicknamed "four letter Nell".

A new work ethic had been entering the University for some time. It began with the Oxford generation which had produced Roy Jenkins – a prodigious worker all his life, despite his affectations of aristocratic languor. In those days the leader of the Labour Left was a charismatic Welshman, Aneurin Bevan. Nye Bevan, on being told, after his fellow Welshman Roy Jenkins had entered Parliament, that he was lazy, said: "No boy from the valleys who has cultivated that accent could possibly be lazy!"

John began reading for the undergraduate degree in mathematics with a view to becoming a nuclear physicist. After one term he began to doubt the wisdom of this course. The Warden of Rhodes House, then near retirement, was a shrewd Australian lawyer, C K Allen, author of many fine but now regrettably little read books. He was a veteran of the First World War, and won the Military Cross on the Western Front. Although he spent the last 50 years of his life in England without returning to Australia, his biographer said of him: "That he was an Australian might be remarked

by the way he wore his hat".[34] He was a deeply conservative opponent of excessive bureaucracy. He declined ever to be treated by the National Health Service. He was also a vigorous controversialist in letters to the editor of *The Times*. In some of these ways he may have influenced John Stone. John has always seen Medibank and its later manifestations as a disaster, both in budgetary terms and because of the welfare dependency mentality it generated.[35] And John is the greatest controversialist of his generation.

Whatever C K Allen's longer term influence may have been, it was decisive in the short term. He suggested a change to economics – in particular the degree known as "PPE" – Politics, Philosophy and Economics.[36] After the second of John's nine terms at Oxford the change took place. His course involved working for eight papers, the two basic papers in philosophy, the two basic papers in politics, the two basic papers in economics, and in addition economic history and economic statistics. He regarded this as a "remarkably intellectually stimulating course".[37] He found it an "enormous educational experience".[38] With his questing combative mind, he relished the Oxford tutorial system. "I enjoyed meeting my tutors each week and talking with them and reading my essay to them and debating it with them and arguing with them".[39]

His primary tutors were H G Nicholas in politics, Peter Wiles in economics and Anthony Quinton in philosophy.[40] John was very grateful to Nicholas for admitting him to PPE, admired but did not like Wiles,[41] and admired Quinton.[42] Quinton became a famous philosopher, and Oxford at that time was passing through a golden age of a certain type of philosophy. John worked very hard at Oxford, partly to make up for the wrong turning which "Froggy" Adlard, now vindicated, had warned him against. He attended lectures – Isaiah Berlin, John Hicks, Tommy Balogh. The last named, who later became an economic adviser to Harold Wilson, he regarded as a charlatan – a view which other good judges would share. Balogh was socially somewhat aggressive, and it was said that there were three types of conversation in Oxford – dialogue, monologue, Balogh.

But it was not all work for John. He played for the university "Occasionals" in hockey and for the New College cricket team.[43] While he had neither the time nor the money for extensive drinking, he has recorded that he has "no objection to rather hearty beer drinking, quite the contrary",[44] and personal observation confirms this. He led the 1953 Australian cricket team – who lost the Ashes but won most of the non-Test matches – astray on the evening of 20 May 1953 by entertaining two of them in his rooms until 4 am.

Academically his change of course was a triumph. In 1953 he won the James Webb Medley Scholarship for being the best second year student in economics. He obtained First Class Honours after a formal viva on 13 July 1954 – that is, there was nothing marginal or doubtful about it. In Oxford, traditionally, the gaining of First Class Honours matters. The tale of Edward Jenks is a salutary one. In the years 1896 to 1903 he served as an examiner in Oxford for the degree of Bachelor of Civil Law – "BCL". Among the candidates in 1897 was F E Smith, who later held the office of Lord Chancellor as Lord Birkenhead. Among the candidates in 1898 was W S Holdsworth, who later became a highly respected legal historian and Vinerian Professor of English Law. In the 1920s Jenks applied to Lord Birkenhead, as Lord Chancellor, to be made a King's Counsel, on the ground that his high academic standing merited the honour. Lord Birkenhead's reply was, in its totality, as follows:

> "My dear Jenks,
> In 1897 you gave the present Lord Chancellor a second in the BCL. In 1898 you gave a second also to the [present] Vinerian Professor. These are, I think, sufficient honours for a single lifetime.
> Yours faithfully,
> B".[45]

The day after John's viva, on 14 July 1954, he married Nancy Stone.

John's first contact with Nancy was seeing her name in his school teacher's telegram giving the Leaving Certificate results, for she was the "Hardwick, N E" referred to. In his first year physics class in 1947 John saw a "stunning girl". This judgment is not surprising. She still is stunning. After inquiry, he found out that this was the celebrated "Hardwick, N E". For him it was love at first sight, but John showed uncharacteristic indecision, and they did not actually meet until a couple of years later, in the Guild Council. Like John, she had a farming background, hockey skills, and enjoyed success in science.[46] She obtained a BSc with First Class Honours. He invited her to the graduation ball in early 1951. Thereafter they became unofficially engaged. She obtained an MSc in biochemistry after John left for Oxford. She then obtained a Hackett Studentship and went to Cambridge.[47] That was a bit of bad luck, of course, but it could have happened to anyone.

Rhodes Scholars were in those days forbidden to marry. So the wedding was delayed, but only until the earliest possible moment – the day after John's viva. Nancy's PhD in biochemistry followed a few months later.

John has recorded that his marriage to Nancy was "by far the most important and by far the best" decision in his life.[48] No-one could possibly disagree with that proposition.

In August 1954 John began working as a Treasury official. Precisely 30 years later, he informed the then Treasurer, Mr P J Keating, of his decision to resign. Now, in general Treasury officials do not live public lives – or, at least, they did not then. Things have changed now, with Nicholas Stern's entry onto the world stage. British peers take up the appellation of some region with which they are supposedly associated as part of their title. English villages often have unusual names – Upper Slaughter, Lower Slaughter and so on – but it is a happy coincidence that Lord Stern evidently comes from a place called Global Warming. His ally, Al Gore, too, has been fortunate. They used to say that it took a lot of money to keep Gandhi in poverty, but Al Gore is the first climate change billionaire – appropriately for the user of so disproportionate an amount of the world's energy.

Since in John's day Treasury officials had no public life, and, since this address is devoted to the public life of the Stones, I shall skim over the next 30 years, which are so well covered by Des Moore in his chapter. The epigraph for those years can be put in his own words: "I think I probably was less like Sir Humphrey [Appleby] than most public servants in Australia".[49]

John spent about 16 months in assisting the Treasury representative at Australia House in London. There he learned a lot – dealing with the raising, paying off or refinancing of Commonwealth Government loans in the City,[50] working on the Sterling Area Statistical Committee,[51] reporting and liaising with various departments and agencies of the British Government.[52] He then spent six months seconded to the Economic Section of the British Treasury. He found it "very instructive" to see "the way in which a major civil service worked".[53]

On reaching Canberra, he began working in the General Financial and Economic Policy Division, headed by Richard Randall, later Secretary of the Department. His initial area of work related to the Budget and Commonwealth-State financial relationships.[54] Randall was a man whom John greatly admired for having overcome being orphaned and having risen from real poverty and educational deprivation through an extraordinary life as a wool classer, joyride pilot and journalist – and admired too for his "most beautiful English prose style".[55] But he was very small and scruffy looking. John was one day talking with a group of Treasury officers in a corridor of the old Parliament House when Artie Fadden, the Treasurer, a large, boisterous, jovial man, engaged them in convivial conversation. Dick Randall came shambling furtively past the group, clad in an ill-fitting suit, with a cigarette hanging out of the corner of his mouth. Fadden, who had many experiences in common with his fellow-Queenslander Randall, felt able to say to the group: "Flash bugger, Dick".[56]

In those days life was simpler in style. The Hyatt Hotel Canberra used to display the set menu from the Hotel Canberra for 1957. It consisted of soup, main course and dessert for 12s 6d, with

oysters 5s extra – excellent value. The main course offered an extraordinary breadth of world cuisine – roast mutton, roast beef, roast pork and roast chicken.

John at this time began a tradition he maintained whenever he was in Canberra – going on Friday evenings to the Hotel Canberra, just across Commonwealth Avenue from the Treasury offices in West Block, and having a few drinks with other Treasury people, economists from the Australian National University, and journalists. There John became famous for besting journalists in argument, a skill for which they have never forgiven him. In much later years, after Friday drinks with the Treasury-Department of Finance social club, the party would move to the National Press Club.[57] One Friday in the 1950s witnessed a celebrated bet as to which of John and two others could reach Lake George, 26 miles away, first. John went home to change into running gear and informed Nancy, who became alarmed that so large a sum as £50 was at stake – for that was, indeed, a large sum in the 1950s. John won the race by getting to Lake George about 5 am. The other gambler came second; the third dropped out. The loser never paid. John got a lift back to Canberra on a truck, crossing Nancy in the dark as she came out to get him.[58] It does not sound like an evening calculated to generate domestic harmony, almost infinitely kind and gentle though Nancy is.

This was the age in Canberra of Snow White and the seven dwarfs. Snow White was the silver haired Prime Minister, R G Menzies. While he lacked the slender daintiness of his namesake, he was certainly not dwarf-like. Who were the seven dwarfs? They were distinguished officials of large public but not physical stature: Sir Roland Wilson, Sir Richard Randall (successively Secretaries to the Treasury), Sir John Crawford (head of the Department of Commerce and Agriculture, then Trade), Dr H C Coombs (who held many important posts over 30 years), Sir Henry Bland (Secretary of the Department of Labour and National Service), Sir Harold White (head of the National Library) and Sir Allen Brown (Secretary of the Prime Minister's Department).[59]

In late 1957, at the young age of 28, John was appointed Treasury Representative in London – "a small fish among some very big fish".[60] He stayed until 1961.[61] A daughter (1959) and a son (1961) were born in London, where Nancy worked as a biochemist on cancer research at St Mary's Hospital, Paddington[62] – a reminder of the career eventually given up.

In 1961 he returned to Canberra, to the Fiscal and Monetary Policy Branch of the General Financial and Economic Policy Division. From 1962 he was Head of the Economic and Financial Surveys Branch[63] – a small internal think tank, or the "long hairs" as some others in the Treasury called them.[64] It produced various public documents[65] (and John Stone was later responsible for others in the years 1970-1973).[66] Here is an early emergence of what became a dominant desire of his later life: to get public debate going on matters which he thought called for discussion. He began to indulge it at this time in another way – contact with C D Kemp of the *IPA Review*, in which he later published an article (in 1969) on the international monetary system.[67]

Early in 1967 the Stones moved to Washington where John worked as Executive Director of the International Monetary Fund and Executive Director of the World Bank for Australia, New Zealand and South Africa (and, in 1969 and 1970, Swaziland and Lesotho)[68] – not an Australian public servant, but an international civil servant on leave from the Treasury. He recalls:

> The blessing of that was that I missed almost the whole of McMahon's period as Treasurer, except when he came through Washington for the IMF annual meetings.… However, one could always console oneself on those occasions with the thought that this terrible period could only last a week or so and he would be off again.[69]

During one of the executive board meetings discussing whether an American ban on members swapping gold for other currencies was in breach of the Articles, John informed the United States Executive Director that the United States was "a nation of lawyers without respect for the law".[70] This powerful home truth has more general application than the immediate context, and it would

have been interesting to observe the American reaction. He also formed an interesting impression of Robert McNamara, President of the World Bank.[71] There was one possible turning point in his career in this period at which he chose not to turn: he rejected Sir Lenox Hewitt's offer of the deputy secretaryship of the Prime Minister's Department in 1968.[72]

In 1971 he was Head of the Revenue, Loans and Investment Division of the Treasury, Secretary of the Loan Council and Secretary of the National Debt Commission. In late 1971 the Treasurer, B M Snedden, whom we last encountered being disciplined by John at the University of Western Australia, wanted him to succeed Randall as Secretary to the Treasury, but the Prime Minister, Mr McMahon, and the Deputy Prime Minister, Mr Anthony, favoured Sir Frederick Wheeler instead.[73] In November 1971 he became Deputy Secretary (Economic), a position he held until 1976.

These years included the economically difficult years of the Whitlam Government – the years when political staffers began to emerge as important, perhaps over-important, figures. Mr Whitlam's staff was headed by Dr P S Wilenski and Mr J J Spigelman, each the son of Polish migrants. Labor backbenchers would say: "If you want to see Gough, you've got to get from Spigelman to Wilenski – up the Polish Corridor".

In that masterly work, *Chinese Shadows* by Simon Leys (that is, Pierre Ryckmans), he claimed that the worst aspect of having to attend Chinese banquets in the years of Mao was that the band always played the same tune. Its title was: "The Production Brigade Celebrates the Arrival in the Hills of the Manure Collectors".[74] There were some similarities with this among the political staffers in the early 1970s in Australia.

In those Whitlam years, John was coming to be more widely known. Thus, on 7 June 1974, he attended a Premiers' Conference at which Mr Whitlam, no doubt correctly, resisted the usual Premiers' demands for more money. One does not normally associate the memory of Bob Askin, Premier of New South Wales, with either wit or scriptural allusion, but he was provoked to say to Mr Whitlam: "Well, Mr Prime Minister, we have come here today, and we have asked for bread, and you have given us a Stone".[75]

From 1976 to 1978 he was Deputy Secretary, and from 1979 to 1984 Secretary. On moving into the Secretary's office, he was asked what he was going to do. In the manner of a Renaissance Pope, he said: "I am going to have fun".[76] Indeed, he has had fun all his life. But we must pass over those years, save for noting three significant speeches he made.[77] By now he was a public figure. He was the subject of journalism comparing his power to that of the Prime Minister.

Just before John left the Treasury, on 27 August 1984 he delivered the Edward Owen Giblin Shann Memorial Lecture, *1929 and All That*. It burst like a thunderclap on public opinion. It impressed many in the business community. In it he raised concern about three things which had troubled Shann nearly six decades earlier – first, excessive debt produced by financial mismanagement; secondly, protectionism; and, thirdly, overregulated, ossified labour markets. While protectionism began to fade from the 1960s and is a much-reduced problem now, the first and third still have virulent power for harm.

The third theme was defined thus in the lecture: "The distortion of the markets for labour stemming from the interaction between trade union power, on the one hand, and, on the other, the framework of market regulation contained in the laws relating to arbitration of wages, hours and other working conditions".[78] This third theme, in particular, which hardly anyone had worried about since Shann's time until the Treasury began to do so in the 1970s,[79] was to dominate his public career which was now dawning. It rested on a concern with the "malignant influences" of "trade union monopoly power, self-serving arbitral bureaucracies and generally short-sighted governments".[80] On the one hand, jobs in the productive economy were lost – and, in particular, John warned, jobs for young people.[81] (As he later pointed out, to maintain a large proportion of young people chronically unemployed is to sow the seeds of social disaster[82] – for he regarded the growth in "direct welfare dependency" of all kinds as an evil.[83]) On the other hand, jobs in unproductive sectors grew – "the

arbitral regulators themselves, their bureaucracies, the trade union and employer negotiators and their bureaucracies, the swollen and unbelievably bureaucratic Departments of Labour at State and Federal levels, and so on".[84] He saw arbitral wage fixing as a "totally corrupted process".[85] These were concerns stimulated by events which had taken place a little earlier – the large wage rises gained by union pressure on some employers, like the wage rises gained by the Storemen and Packers Union, and then by the Amalgamated Metal Workers Union in 1981 of 23 per cent per hour, the automatic feeding in of these rises for other employees through centralised arbitral wage determination, and the consequences of such large wage rises on employment.[86] After Mr Keating became Treasurer, he publicly estimated that the metalworkers' pay rise had cost 100,000 jobs[87] – or, as he put it, created "100,000 dead men".

John lamented that Australians had allowed themselves to be put "in hobbles by unworthy men masquerading as leaders". On political leaders, he would have shared Lord Salisbury's view, perhaps to be confirmed in Australia in the near future: "The logic of elections is merciful and suffers the hallowed claptrap to figure as solid statesmanship. The logic of events is pitiless, and pierces the prettiest windbags without remorse".[88] He concluded the Shann Memorial Lecture by asking whether Australians still had the will to do great things together, and expressing the hope that they did.[89] With this outlook John ended the cloistered years of the Treasury and embarked on his public life.

At that stage John was 55 – an age by which opinions have usually become settled, and people rarely change much, except sometimes for the worse. Thirty years in the Treasury had matured his views. What were they?

He could fairly be described as being in some sense "conservative". He was conservative in believing that a successfully functioning capitalist economy depends on some framework of settled expectations and reasonable predictability. Suddenly to abolish property law, or a key aspect of it, would bring a great shock to the system with wide-ranging and unpredictable consequences.[90]

He was conservative in being an adherent of the rule of law. He was opposed, for example, to retrospective legislation, save for the one special instance of bottom of the harbour schemes.[91] One reason for his opposition to high marginal tax rates is their encouragement of tax evasion, which is damaging not only to the rule of law and to tax morality, but morality generally.[92]

He was conservative, too, in understanding that an institution is a hard thing to build, that it takes a long time to build it, but that it can be destroyed very quickly by folly or malice.[93] Thus he respected the institutions of Parliament, if not all its members.[94] He thought that the power of the Executive had risen too far, and would rise further – the power of the Ministry over Parliament, of the inner Cabinet over the outer Ministry, of the Prime Minister over the inner Cabinet.[95] This pessimistic prophecy has been amply fulfilled.

He was conservative in opposing what he saw as the corporatism of the Hawke Government, in which success was measured by the extent to which government, unions and certain businesses co-operated in a spirit of altruism. Some of those businesses had the altruism of the late Lawrence James Adler, head of FAI Insurance, who remarked that if his shares were affected by a stock market fall it was a major crash, but if someone else's were affected, it was a minor technical correction.

John was conservative in seeking to maintain standards of decency and courtesy in public life. For example, he saw the vilification of Sir John Kerr as "an example of what a despicable media we had, what a despicable academic community we had, what a despicable political community we had".[96]

But John was not what might be called a stationary conservative. He was a reactionary only in the sense of reacting against the folly, pretentiousness and arrogance of his time. He thought that in order to preserve it might be necessary to destroy. If received values were to survive, key changes were needed, particularly the reduction of institutional barriers to economic activity.[97] In this sense there was a radical element to his conservatism.

On various issues his views developed over time in the Treasury. When he entered the Treasury, although he was strongly opposed to totalitarian government, he thought that on the whole the

state in Australia was benevolent: the state in general, and its Public Service in particular, provided a public service. After he left the Treasury, he became an advocate of small government in the sense that he opposed a state run by bureaucrats whose appetite for power grew with what it fed on. He came to favour the state having minimal essential integers like defence forces against external threats, appropriate mechanisms for internal law and order and core public services. But he found it almost impossible to identify anything governments did which would not be done better if people were left to do it for themselves. This change in thinking was the product of his experience in Treasury.[98] As he told the Senate in his maiden speech, "in matters of government I have come increasingly to the view that small is beautiful".[99] He favoured government which was small, but strong. Thus he said: "whatever the role of government may be, it ought to carry it out firmly. Because if it does not, there is very little point in having it. In a sense that is almost a tautology".[100]

He had formed clear views on the role of public servants within the state. He saw Westminster democracy not as resting on public servants who got Ministers to accept their policies, but rather that it was for Ministers to choose, implement and defend their own policies. It was for public servants to advise them – offering, if appropriate, various choices.[101] It was important for Ministers to trust public servants, and this could not happen if public servants became engaged in public debate and if the advice public servants gave became publicly available.[102] It was wrong for public servants to get too close, personally, to Ministers.[103] It was wrong for Ministers to interfere in the actual running by Secretaries of their Departments.[104]

In John's farewell speech to Treasury staff, he said: "I know I will never again preside over a body of men and women of such exceptional talent".[105] He left the Treasury with admiration for the capacity and the work ethic of its officials, the quality of its internal debates, and its freedom of debate; the unity it showed the world regardless of internal disagreements; and its esprit de corps.[106] That latter virtue was well understood by Lord Palmerston. When he and Queen Victoria were inspecting troops on parade on a warm summer's day, she commented on how bad they smelt. Lord Palmerston replied: "Oh, Ma'am, that's what we call *esprit de corps*".

But it was not merely the approach of senior officials which John admired. He took as one "amazing example" of what the old Public Service could do the performance of a stenographer taking down his dictation of the Commonwealth's case opposing a wage claim in the Arbitration Commission in January 1976. He dictated from 2 pm until 10 pm. He then returned to his hotel. On waking at 5.30 am he found an almost flawless typescript in an envelope under his door.[107]

He said: "The Public Service is based upon a view about the public service and it is based upon an ethos of how to behave". That ethos does not include leaking so as to embarrass a government with which the public servant disagrees. It does not include "transformation of it into some kind of political hackery, where people . . . become judged upon whether or not they happen to have voted for the right party on the last occasion – or at least said they did".[108] Corruption of the public service began not through the taking of bribes but when public servants began to rise on the basis of their political affiliations, not their abilities.[109]

He had become very wary of centralism. It may have been a reaction to Mr Whitlam. But Prime Ministers Gorton and Fraser, who were centralist as well, may have played an equal role in developing this side of his thinking – one which is natural in a Western Australian. Its deep-rootedness was made clear to me some years ago when he asked me to describe the qualities and defects of some possible appointees to the High Court. Fearing an explosion, I inquired: "Do you have any particular points of disqualification in mind?" He said: "No! Just tell me about the best candidates. The appointment must be entirely on merit". I said: "Well, there are some good people in New South Wales". Quite sharply he responded: "I thought it would have been perfectly clear that on no account is anyone on your list to come from New South Wales". At all events, his opposition to centralism began to grow in the light of the High Court decisions of the mid-1980s.[110]

John's outlook in 1984 can be simplified in six propositions.

1. Governments had too much power in society.
2. The Federal Government had too much power in relation to other governments.
3. Within each government, a small core of Ministers had too much power compared to other legislators.
4. Within each executive, the public service was becoming too politicised to give independent advice.
5. Trade unions had too much power over governments and other social forces.
6. These evils could only be exposed and combated by vigorous debate, which he saw as the lifeblood of democracy.[111]

This summary suggests a gloomy, somewhat driven, personality. But he was a man of considerable wit. He has referred to a colleague as being "a product of that … lost generation, Australian academics who never really grew up".[112] Speaking of Mr Whitlam's visit to Greece when Cyclone Tracy struck Darwin, he said: "there are plenty of ruins to inspect in Greece, though not nearly as many as there were in Australia by that time".[113] He said that when interviewing job applicants, one had to ask: "Does this job applicant appear to be able to tell the time of day (an important attribute for those who are beginning to have to adhere to office hours for the first time)".[114]

A central characteristic of John is his assured mastery of language. In his hands it has been not only a trenchant weapon, but also a precise tool. He does not speak of carbon pricing, but carbon dioxide pricing. For him the pre-Euro currency in Germany was not the *Deutschmark*, but the *Deutschemark*.[115]

When he resigned from the Treasury, he had no post lined up; but opportunities presented themselves immediately.[116] In the latter part of 1984 he was Professor in the Centre of Policy Studies at Monash University. John has set several records, but this was a record for one of the shortest tenures of a Chair in Australian university history. He moved to Melbourne. From 1985 to 1987 he was a part-time consultant to Potter Partners; a Senior Fellow at the Institute of Public Affairs; a newspaper columnist; a director of Peko Wallsend Ltd and the Sperry Corporation; and a public speaker.[117]

In 1985 he became one of the four founding members of the Council for the National Interest, and served as a member of its Board of Management until 1994. It was then concerned with problems of foreign and defence policy.[118]

In 1986, his growing interest in labour market problems caused him to become a founding member (with Ray Evans, Barry Purvis and Peter Costello) of the H R Nicholls Society Inc. He served as President until 1989; Member of the Board of Management from 1990 to 1993; and Treasurer in 1994 and 1995. He delivered numerous addresses to that body. Its goals correspond with what John said in the Shann Memorial Lecture: labour market reform to increase productivity and average real incomes; the removal of arbitral tribunals to determine wages; the reduction of the ill effects of trade union power, operating through those tribunals, on the less fortunate in society; and the elimination of the widespread corruption and violence to which trade union privilege had given rise.[119] Peko Wallsend Ltd, during his directorship, experienced considerable industrial problems, and this sharpened the interest he had already shown in this area. He developed an admiration for Charles Copeman, the Chief Executive, who was, indeed, a hero of that time, and is here tonight, in his dealings with industrial trouble in the Robe River dispute in such a way as to save particular mines and make them productive and profitable.[120] He fought against the greedy and work-shy habits of some employees at that time. It was reminiscent of the introduction of the three-day week in Britain in 1974 during the Miners' Strike – to the rage of some, like Denis Compton, famous

English batsman and journalist, who said: "I am not going to work an extra day for anyone".

In 1987 he was elected to the Senate, and elected as Leader of the National Party in the Senate. He was the only former permanent head ever to have become a member of Parliament.[121] He served as Shadow Minister for Finance – at least until September 1988, when he was dismissed by the National Party Leader, Ian Sinclair, at the request of the Leader of the Opposition, John Howard, for declining a request to speak only about matters relating to the Finance portfolio and settled Coalition policy.[122] He bore no ill will – he now views John Howard as rivalling R G Menzies as our greatest Prime Minister. In the 1987 election campaign the National Party promised large cuts in public expenditure. The atmosphere of the time is captured in the following riddle around Canberra: "What's John Stone's response to 5000 public servants at the bottom of Lake Burley Griffin?" to which the answer was: "A start".[123]

He informed the National Press Club in 1987 that he proposed to pursue his political career in "boots and all fashion, as I've tried to do most things in life".[124] He made good that promise, as can be seen from his speech to the National Press Club on 6 September 1989[125] and his numerous Senate speeches. In his maiden speech, after making a few trenchant points about economic policy, he said: "I hope that I have not transgressed unduly on the accepted canons of debate on such occasions as this, and I hope also that in sedulously seeking not to transgress them I have not erred on the other side by being dull. If so, perhaps I can be more lively next time".[126] He certainly was. Five days later he told the Government that "in the past four years we have been like locusts eating the seed corn".[127] Standards of parliamentary debate in Australia have not been uniformly high. But John's Senate speeches were of the highest class. They were flawless in form. And they were powerful in substance, for no other Senator has ever had the expertise which he could bring to bear on questions of economic policy and public administration, and he made himself very familiar with the background to questions on which he had had less experience, such as war crimes legislation. His speeches revealed another trait, and an unusual one: he was prepared publicly to express esteem for those of his Labor opponents whom he did esteem, like Senator Tate,[128] Senator Button,[129] Senator Ray,[130] and the capable but cantankerous Western Australian, Senator Walsh.[131]

In the Shadow Cabinet at the time, according to John Spender, Shadow Minister for Foreign Affairs, he revealed himself to be "a man of extraordinarily entrenched views, but highly intelligent, and great fun". That should be qualified in only one respect: the views are entrenched, but they are open to reason, and some of them have changed over time. John Spender did also say, and rightly, that it was good that people like John Stone, Nigel Bowen and Bob Ellicott went into politics, and a pity that no-one like that – people with significant professional success outside politics – does now.

He resigned from the Senate in order to run for the House of Representatives in 1990, but was defeated. This was a real loss to the Parliament. But it was a gain to public debate. He was Senior Fellow of the Institute of Public Affairs until 1995. He was Chairman of J T Campbell & Co Ltd from 1994 to 1996. He was a member of the Committee to inquire into the Efficiency and Effectiveness of the Australian Defence Force in 1996 and 1997. He had engaged in journalism even while in the Senate, and he has continued to make voluminous contributions both in newspapers and periodicals – for example, *Quadrant*, the *National Observer* – until the present day.

The topics, both before and after 1990, extend way beyond arbitral wage fixation,[132] economics[133] and taxation policy.[134] They include the environment,[135] federation,[136] the structure of the public service,[137] the course of government policy,[138] the quality of national leadership,[139] immigration, citizenship policy and multiculturalism,[140] Aboriginal policy,[141] cultural and social issues,[142] an Australian republic,[143] national sovereignty,[144] and "climate change" controversies.[145] They also include memoirs and obituaries[146] and observations of contemporary events.[147] All his work is full of force, dash and vitality. The themes are treated in a sombre, tragic and impressive way. They reveal a dedicated patriot worried about the potential decline of his country – a highly cultivated thinker worried about the decay of his culture. These writings also reveal a paradox, a sort of creative tension

– for the descriptions and predictions of feebleness, decline and decay are to some degree falsified by the vigour, the intellectual powers and the cultural quality their author manifestly possesses. No-one can be right all the time, particularly in relation to prophecy, but John has been uncannily prescient on many questions. Take just one topical example. In early 2008 it was expected that Mr Rudd would be Prime Minister for at least a decade before taking on a leading role on the world stage. Almost all journalists were fawning and abasing themselves before the titanic statesman they thought they perceived or had created. If memory serves, John at that very early stage was almost alone in foreseeing that Mr Rudd would not lead Labor to the next election. This forecast was made in an article on Mr Rudd's future in spring 2008, which concluded – a long two years ago: "Enter Julia, stage Left".[148]

The principal activity of John's last 20 years, however, has been his founding and fostering of The Samuel Griffith Society in 1992. In 1992 he began to edit and publish the volumes recording the proceedings of each annual conference under the title, "Upholding the Australian Constitution". As we all know, the primary goal of the Society is to promote wide debate on issues to do with the Constitution and the country's political and legal institutions, emphasising federalist views and the decentralisation of power.[149] In the foreword to the first volume, John praised the quality of the papers and the enthusiasm they generated. Taken as a whole the series is an immensely rich resource of materials for thinking about our Constitution. Not least of those are John's own contributions. The value of the series will endure well past our lifetimes. But praise for that success should not be laid at John's feet alone.

Throughout John's life he has had to make important decisions, some of them potentially catastrophic from a personal financial point of view, like possible resignation from the Treasury in 1982,[150] actual resignation in 1984, and standing for the Senate in 1987.[151] Every one of them was shared with Nancy. The work of a senior Treasury officer and Permanent Head over two decades, involving long hours, relentless, grinding pressures and no gratitude, allowed no leisure. It was Nancy who must have borne the main and doubtless heavy burden of raising their daughter and their four sons. It was not an existence sustained by Lucullan wealth. Nor could it be said of John and Nancy Stone that in his Treasury days they had their snouts in the public trough. Nancy only twice travelled with John on his numerous trips abroad – for the first time in 1982, to IMF and World Bank meetings in Toronto,[152] and for the second time in April 1984 to Amsterdam, for the Annual General Meeting of the Asian Development Bank.[153] The quality of life within the Stone family depended much on the domestic labours of Nancy.

The health of The Samuel Griffith Society depended on her labours too. Running a substantial organisation like The Samuel Griffith Society calls for a lot of painstaking administrative and clerical work. Speakers must be organised, venues booked, meetings arranged, subscription reminders sent out. Tardy authors must be harried; their papers must be improved; proofs must be corrected; printers must be pacified. The greater the efficiency with which such a society runs, the more fully concealed is the dedicated and conscientious labour of those who run it. The Society could not have prospered as it has without Nancy Stone's tireless activity in most of these respects.

But Nancy Stone's contribution to public life is greater and more profound than that. It lies in this: she was the complement to John, and without her he would have achieved much less.

John is peppery and pugnacious. He does not shy away from a fight. He can take it, but he can certainly dish it out. Many a speaker at a *Quadrant* dinner or a Samuel Griffith Society conference or an H R Nicholls Society meeting will take to their graves the vivid recollection of the puzzled and frowning face of John, advancing towards the podium in order to extirpate the speaker's fallacies with the intellectual equivalent of fire and sword. He is a modern Dr Johnson – the Dr Johnson who said: "Well, Sir, we had a good talk", to which Boswell replied: "Yes, Sir, you tossed and gored several persons". The daily follies of our rulers vex him considerably. It used to be said of R G Menzies that he could not suffer fools gladly. On an occasion late at night a bibulous backbencher

poked him in the stomach and said: "The trouble with you, Bob, is that you can't suffer fools gladly". With commendable calmness, Menzies replied: "What do you think I'm doing now?" John prizes frankness over hypocrisy, bluntness over Olympian detachment.

It is true that the angry moods can pass quickly. First, there is the storm, then the calm. John very rarely forgets slights, but he more commonly forgives them. Even where he has not forgiven a slight, he nurses no desire for revenge against the person responsible. He does not allow grievances to accumulate indefinitely at compound interest. Thus, on receiving an offensive question from Mungo MacCallum at the National Press Club on 9 July 1987, during the election campaign, he responded:

> Mungo, I've always felt a certain affection for you because … you were the first, and indeed, one of the only two journalists whom I've ever issued a writ against for libel. But … I have never held grudges about that or indeed any other matter, and particularly since you apologised and paid my costs.[154]

A little later he used of Mr MacCallum the expression: "gentlemen or people like yourself – I should correct myself".[155]

John had much in common with Joseph Chamberlain. To John can be applied the luminous words Asquith used in the House of Commons on 6 July 1914 on Chamberlain's death: "In that striking personality – vivid, masterful, resolute, tenacious – there were no blurred or nebulous outlines, there were no relaxed fibres, there were no moods of doubt and hesitation, there were no pauses of lethargy".[156] Even those unsympathetic to John concede the penetration of his intellectual power and the formidable force of his character.[157]

Now the role of Nancy has been to soften these asperities. She has been a sympathetic sounding board, a source of serenity, a calming influence, a soothing presence, and, with her high intelligence, a stimulant to further thoughts. John's extraordinary career has been fuelled by a fiery energy. Ideas crackle from him like an exploding firework. But that energy may have burnt itself and him up without Nancy's complementary qualities. For that her country owes her an immense debt. While John has many enemies – and we love him for those enemies – Nancy has none.

There have been troubles in John's life. His parents divorced.[158] His brother died in early adulthood.[159] His father died relatively young, aged 57.[160] Among John's attractive qualities are stoicism in relation to disappointment and gratitude for the good things life has given. They include his happy country childhood,[161] the self-reliance which life on isolated farms can bring to young children,[162] intelligent parents, the quality of his Korbel schoolteacher, Mrs Gwen Munyard,[163] the quality of his education at Perth Modern School,[164] his Oxford education and his lifelong good health.[165] Modern politicians, or their press secretaries, tend to urge on the public reciprocal claims that "my father's log cabin had a lot more holes in the roof than your father's log cabin". John never saw his own youth in that way. Another happy characteristic is his lack of regret for what he has done in life[166] – but it is coupled with a lack of vanity and arrogance.

When the Stones arrived in Canberra in 1956, John was at once impressed by the Secretary to the Treasury, Sir Roland Wilson. He has described him as "perhaps the most distinguished public servant in many ways that Australia has ever had, with the possible exception of Garran" – a high tribute, coming as it does from one who would himself have high claims to be short listed for that position.[167] He described Wilson as "an extraordinarily lucid thinker and writer and … speaker",[168] a man held in "high respect" around Canberra,[169] "a very stimulating person; to talk to he was so sharp and so quick";[170] "[h]e had a somewhat mordant wit";[171] he had "a very supple and subtle mind, and he had a rich vocabulary and an excellent command of English, and a force of personality … which simply was impossible to dismiss".[172] So spoke John on Wilson. Every expression is equally applicable to the speaker.

John and Nancy Stone share one quality he admired in E O G Shann – an "abounding love of Australia".[173] They share others: complete independence of spirit, total integrity, acute mental

powers, precision, lucidity, great selflessness, warm friendliness. Theirs are two great Australian lives. Their public activities since 1984 amount to a shared and intertwined odyssey. In the last three decades John has become the greatest Australian polemicist, publicist and controversialist of our time – perhaps of any time. Nancy made that career possible. When you think of the Stones, you think of the young Robert Cecil, later Marquess of Salisbury, Walter Bagehot and James Fitzjames Stephen in the Victorian era. You think of George Orwell in 20th century England. You think of William F Buckley in America. They were the consciences of their age. The task which those writers performed for their generation in their time is the task which the Stones have performed for our generation in our time. Ionesco said: "To think against one's age is heroism, but to speak against it is folly". In that sense John is the most heroic of fools. He is a prophet too little honoured in his own country. His voluminous writings, with their dramatic and pungent style, are too little known. Those who have ears, let them hear. Those who have eyes, let them read.[174] We must wish the Stones many more years of good health and vigour, from which will come many more speeches to hear and articles to read.

In 1984, in his Shann Memorial Lecture, John Stone informed his audience at the University of Western Australia that although he had not lived in Western Australia after 1951 he had continued to think of himself, and had always been proud to describe himself, as a Western Australian.[175]

That is true of Nancy, too. Here they are in a room full of friends, although some of us may occasionally have tested the friendship. It is entirely appropriate that here, tonight, in the capital city of the State in which they were brought up, friends pay tribute to this couple. They have made collectively one of the greatest contributions to Australian public life in their time – or any time. They are the greatest Western Australians of their time.

Select Bibliography

This is not a complete bibliography of John Stone's articles, notes and speeches. It is only a selection of the more accessible.

National Observer

"The Debates We Have to Have", (2002) No 51, 15
"Constitutional Lies, Damned Constitutional Lies and Plebiscites", (2004) No 61, 54
"The 2004 Federal Election", (2004) No 62, 56
"What Mr Howard's Government Needs to Do", (2005) No 63, 54
"Michael Crichton on 'Global Warming'", (2005) No 64, 25
"The Future of Mr Peter Costello", (2005) No 65, 44
"Solutions to the Muslim Problem in Australia", (2005) No 66, 14
"Mr Mark Latham and the Labor Party", (2006) No 67, 40
"The Howard/Costello Decade", (2006) No 68, 12
"Mr Peter Costello's Wasted Opportunities", (2006) No 69, 22
"The Unmentionable Problem of Australian Citizenship", (2006) No 70, 12
"'Global Warming' Scare Mongering", (2007) No 71, 29
"'Global Warming' Scare-Mongering Revisited", (2007) No 72, 19
"Mr Costello's Repeated Budget Failure", (2007) No 73, 13
"Australia's New Government Should Understand the Following", (2007) No 74, 9
"Kyoto the Fraud: How Australians Are Being Conned", (2008) No 75, 9
"'Reshaping Australia': 2002 and All That", (2008) No 76, 56
"The Future of Mr Kevin Rudd", (2008) No 78, 8
"Defective Analysis and the 'Never Never Budget'", (2009) No 80, 8

Quadrant

"1929 and All That", October 1984, 9.

"Hawke's Next Budget: the Prime Minister's 'Trinity'", April 1985, 16
"Deregulate or Perish: Signs of a Society in Decay", October 1985, 19
"The Future of Clear Thinking: A Response to Robert Manne", January-February 1992, 56
"When the Hissing Has to Stop: Reform of the Australian Taxation System", November 1985, 61
"There are Two Views About H W Arndt", June 1986, 52
"Do We Need a Consumption Tax?", June 1990, 9
"The Australian Economy: What Is To Be Done?", May 1991, 26
"Does History Have A Future?", October 1991, 72
"Michael Pusey's *Economic Rationalism In Canberra*: Two Views", July-August 1992, 57
"Yes, Minister? Politicians and Bureaucrats in Canberra", October 1992, 14
"Two Views of Thatcherism", May 1993, 53
"Black Africa and Australia", September 1999, 41
"Does Australia Need A Racial Vilification Law?", November 1994, 10
"The Muslim Problem and What to Do About It", September 2006, 11
"The Dismal Beginning to the Fraser Years", July-August 2007, 12
"Our Greatest Prime Minister", March 2008, 12
"Time to Stop the Dreaming", April 2008, 48
"Inflation: Who's To Blame?", May 2008, 58
"Liberty, Productivity and Jobs: Workplace Relations under the Howard Government", July-August 2008, 67
"Aboriginal Employment and the CDEP", September 2008, 72
"Growth, Jobs, and Prosperity", January-February 2009, 14
"The Origins of the Crisis in Immigration Policy", December 2009, 6
"Eleven Decent Years", January-February 2010, 28
"Immigration Policy: Our Self-inflicted Wounds", September 2010, 30

The Adelaide Review

"Skullduggery", July 1999, 8
"The republic: facing defeat in all six States", August 1999, 10
"Six painful truths", October 1999, 8
"Gloom over the succession", March 2000, 12
"An opening salvo on immigration", April 2000, 16
"Murphy's Law in reverse", July 2000, 10
"Serious questions", December 2000, 10
"Whose ABC?", February 2001, 6
"Eating Crow", March 2001, 12
"Attention: Peter McGauran", June 2001, 10
"Beazley's the Problem", August 2001, 9
"The New Terrorism", November 2002, 9

The Age

"Wrong story on mining, protection", 18 October 1991. 13
"Time for a culture of cooperation", 19 May 1992, 11

The Australian

"Former Chief Justice keeps fine company", 4 November 1997, 12
"Yes, Prime Minister, you're in a bind", 4 June 1998, 11
"Howard must court One Nation voters", 19 June 1998, 13
"A leader with his head in the sand soon loses it", 24 June 1998, 15

"Hanson infighting buoys doomed PM", 1 July 1998, 13
"Careful, double standards are showing", 10 July 1998, 13
"Howard's date with fool's place in history", 17 July 1998, 13
"Send Liberals, Nationals and Labor to the political knackery", 31 July 1998, 13
"Opposition loses on economic credibility", 1 October 2001, 13
"Untruths for Howard's own ends – the cultural divide", 13 May 2002, 11
"Who led us to court disaster?", 24 June 2002, 11
"Boring and stupid in succession", 20 September 2002, 11
"Something real to pique our interest", 26 September 2002, 11
"Costello as PM just won't do", 3 January 2003, 11
"In uncertain times, we have nothing to fear but media chatter", 24 January 2003, 11
"ID could guard against sleepers in our midst", 28 February 2003, 11
"Full steam ahead, but the creep's a sleeper", 15 May 2003, 13
"Plenty of precedent to go on and on", 4 June 2003, 15
"Trouble in the water for Abbott's centralist agenda", 3 July 2003, 11
"Public service rot started with Labor", 19 August 2004, 15
"Grow up and change jobs, Mr Costello", 15 October 2004, 15
"Haunted by spirit of Gough", 13 December 2004, 7
"Archives distortion demands remedy", 17 January 2005, 9
"Howard's great betrayal", 18 April 2005, 15
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"Old formulas don't fit when factors are unknown", 28 May 2009, 12
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"You never know just who may turn up", 3 September 1986, 6
"Mr Hawke gropes for his security blanket", 10 September 1986, 14
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"Halfpenny's changed his spots, and pigs may fly", 24 September 1986, 10

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"The eve of trade union reform", 24 December 1986, 6
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"Sir Joh and the power of honest policies", 18 February 1987, 12
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"Why our new house casts a long shadow", 11 March 1987, 14
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"Cynicism beyond contempt", 1 April 1987, 14
"Stop all the creative accounting, Mr Keating", 8 April 1987, 14
"It's time Japan started to play fair", 15 April 1987, 16
"Keating can't have it both ways", 22 April 1987m 12
"Better a 'sweated' job than no job at all", 29 April 1987, 18
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"The industry that's trying to pull all of us down", 13 May 1987, 16
"Keating has won a great illusionist's victory", 20 May 1987, 16
"Power to the people not the public servants", 27 May 1987, 14
"The outlook is poor and it will get poorer", 3 June 1987, 10
"An election all about records and somersaults", 10 June 1987, 20
"Why I am standing for the Senate as a National", 17 June 1987, 20

Endnotes

1. Schedvin at 1:1-3.
2. See further, John Stone, "The Muslim Problem and What to Do about It", *Quadrant*, September 2006, 11 at 14 for his religious background.
3. Commonwealth Parliamentary Debates, Senate, 6 December 1988 at 3609.
4. Schedvin at 1:2-3 and 5.

5. Schedvin at 1:5-7.
6. The price of wheat fell from five shillings per bushel in 1929-30 to less than two shillings and six pence in 1930-31: John Stone, "1929 and All That", *Quadrant*, October 1984, 9 at 12.
7. Schedvin at 1:6-7.
8. Schedvin at 1:13-14.
9. Schedvin at 2:2.
10. Schedvin at 2:2.
11. Schedvin at 2:6.
12. *The Environment in Perspective* (Institute of Public Affairs Ltd, 1991) at 1.
13. Schedvin at 1:8, 2:5.
14. Schedvin at 2:7.
15. Schedvin at 2:5.
16. Schedvin at 1:15-16, 2:6.
17. Schedvin at 1:16-17, 2:8.
18. Schedvin at 1:9-1:10.
19. Schedvin at 2:1.
20. Schedvin at 2:8.
21. Schedvin at 2:9.
22. Schedvin at 2:11-2:14, 3:1.
23. Schedvin at 3:3-3:4.
24. Schedvin at 2:15.
25. Schedvin at 3:3.
26. Schedvin at 3:2.
27. Schedvin at 2:13.
28. Schedvin at 2:14.
29. Schedvin at 3:7 and 5:5.
30. Schedvin at 3:7-3:9.
31. Schedvin at 1:12, 3:11-3:12.
32. Schedvin at 3:13-3:14, 15:11.
33. Schedvin at 3:15.
34. E T Williams, "Sir Carleton Kemp Allen", in E T Williams and C S Nicholls (eds), *The Dictionary of National Biography*: *1961-1970*, Oxford University Press, 1981, 24 at 26.
35. Schedvin at 28:10.
36. Schedvin at 4:3-4:4.
37. Schedvin at 4:5.
38. Schedvin at 5:1.

39. Schedvin at 5:1.
40. Schedvin at 4:4.
41. Schedvin at 4:8-4:9.
42. Schedvin at 4:4.
43. Schedvin at 5:3-5:4.
44. Schedvin at 4:12.
45. John Campbell, *F E Smith: First Earl of Birkenhead* (Jonathan Cape, 1983) at 479, quoting Mark de Wolfe Howe (ed.), *Holmes-Laski Letters*, vol. 2 (Harvard University Press, Cambridge, Mass, 1953) at 1231. There must be a question mark over the veracity of this anecdote in view of its source in H. J. Laski; on the other hand, it rings true and was probably beyond even Laski's powers of invention.
46. Schedvin at 5:7.
47. Schedvin at 5:6.
48. Schedvin at 5:7-5:8.
49. Schedvin at 6:4.
50. Schedvin at 6:5.
51. Schedvin at 6:2.
52. Schedvin at 6:2, 6:10.
53. Schedvin at 5:12.
54. Schedvin at 6:10-6:11.
55. Schedvin at 7:10-7:11.
56. Schedvin at 8:10-8:11.
57. Schedvin at 42:5, 42:7.
58. Schedvin at 6:13-7:1.
59. Schedvin at 7:8-7:9.
60. Schedvin at 9:12-9:13.
61. Schedvin at 8:6.
62. Schedvin at 10:12-10:13.
63. Schedvin at 5:15, 11:1; Hyslop at 15.
64. Schedvin at 11:9.
65. For example, *The Meaning and Measurement of Economic Growth*.
66. Hyslop at 22-23. For example, *Economic Growth: Is It Worth Having?*, Treasury Economic Paper No. 2, AGPS, Canberra, 1973.
67. Schedvin at 43:5-43:6.
68. Schedvin at 6:1 and 12:10-12:13, 13:3.
69. Schedvin at 12:10.
70. Schedvin at 13:5.

71. Schedvin at 13:12-14:5.
72. Schedvin at 14:8.
73. Schedvin at 13:2, 15:13 and 16:1.
74. Simon Leys, *Chinese Shadows*, Viking Press, New York, 1977 at 29.
75. Schedvin at 22:1.
76. Schedvin at 32:15.
77. Hyslop at 13-14 and 24. One was "Australia in a Competitive World – Some Options", delivered to the 21st General Management Conference of the Australian Institute of Management in Sydney on 19 November 1979. The others were to the Victorian Branch of the Economic Society in November 1981 ("Australia in a Competitive World – Some More Options" and the Agriculture Economic Outlook Conference in 1981.
78. "1929 and All That", *Quadrant*, October 1984, 9 at 13.
79. Schedvin at 7:6-7 and 32:10-11.
80. "1929 and All That", *Quadrant*, October 1984, 9 at 15. He devoted much attention to trade union power in his Senate speeches, for example, Commonwealth Parliamentary Debates, Senate, 20 November 1987 at 2133-2135.
81. "1929 and All That", *Quadrant*, October 1984, 9 at 18-19.
82. "The Scandal of the Young Unemployed", *Quadrant*, August 1985, 21 at 24.
83. Schedvin at 28:15.
84. "1929 and All That", *Quadrant*, October 1984, 9 at 16.
85. Schedvin at 20:10.
86. "1929 and All That", *Quadrant*, October 1984, 9 at 16-17.
87. National Press Club 1987, questions, at 4.
88. Quoted by Robert Taylor, *Lord Salisbury*, Allen Lane, 1975, at 79.
89. "1929 and All That", *Quadrant*, October 1984, 9 at 19.
90. Schedvin at 39:2.
91. Schedvin at 35:12-35:14.
92. John Stone, "When the Hissing Has to Stop", *Quadrant*, November 1985, 61 at 67.
93. Schedvin at 42:3-42:4.
94. Commonwealth Parliamentary Debates, Senate, 7 October 1987 at 809-810.
95. Commonwealth Parliamentary Debates, Senate, 29 August 1988 at 405.
96. Schedvin at 30:14.
97. Schedvin at 42:12-42:13.
98. Schedvin at 37:13.
99. Commonwealth Parliamentary Debates, Senate, 16 September 1987 at 169.
100. Schedvin at 13:10.
101. Schedvin at 39:6; Hyslop at 53.

102. Hyslop at 28-31.

103. Hyslop at 33.

104. Hyslop at 34-36; Schedvin at 42:5.

105. Schedvin at 15:2.

106. Hyslop at 52-53.

107. Schedvin at 28:6- 28:7.

108. Schedvin at 30:12. See also John Stone, "There are Two Views About H. W. Arndt", *Quadrant*, June 1986, 52 at 53.

109. Schedvin at 39:8.

110. See Hansard (Senate) 17 May 1988.

111. John Stone, "Deregulate or Perish: Signs of a Society in Decay", *Quadrant*, October 1985, 19 at 21.

112. Schedvin at 22:12.

113. Schedvin at 22:14.

114. John Stone, "Does History Have a Future?", *Quadrant*, October 1991, 72 at 73.

115. John Stone, "Deregulation or Perish: Signs of a Society in Decay", *Quadrant*, October 1985, 19 at 25; Schedvin at 10:9.

116. Schedvin at 43:1.

117. Hyslop at 4-5; Schedvin at 43:2-44:1. Among the notable addresses of the period are those published as "Hawke's Next Budget: The Prime Minister's 'Trinity'", warning of the economic difficulties which became evident in 1986, delivered in December 1984 (*Quadrant*, April 1985, 16) and "Deregulate or Perish: Signs of a Society in Decay", delivered on 24 May 1985, urging a deregulation of the labour market (*Quadrant*, October 1985, 19).

118. Schedvin at 44:15-45:1. John Stone has since written extensively in *National Observer*, a periodical it publishes.

119. Schedvin at 44:10-14. See also John Stone, "Let's Start All Over Again: The Origins and Influence of the H. R. Nicholls Society" (2006) http://www.hrnicholls.com.au/archives/vol27/vol27-3.php at 1.

120. Schedvin at 43:7-15. See also John Stone, "Liberty, Productivity and Jobs: Workplace Relations Under the Howard Government", *Quadrant*, July-August 2008, 67 at 68-69.

121. Hyslop at 5-9 and 12.

122. Commonwealth Parliamentary Debates, Senate, 27 September 1988 at 749-750.

123. National Press Club 1987, questions, at 7.

124. National Press Club 1987, questions, at 3.

125. National Press Club 1989.

126. Commonwealth Parliamentary Debates, Senate, 16 September 1987 at 172.

127. Commonwealth Parliamentary Debates, Senate, 21 September 1987 at 392.

128. See, for example, Commonwealth Parliamentary Debates, Senate, 24 September 1987 at 681.

129. See, for example, Commonwealth Parliamentary Debates, Senate, 17 November 1987 at 1862.

130. See, for example, Commonwealth Parliamentary Debates, Senate, 25 August 1988 at 346-347 and 22 December 1989 at 5122.

131. See, for example, Commonwealth Parliamentary Debates, Senate, 26 October 1987 at 1213, 17 November 1987 at 1861-1862 and 4 April 1989 at 855. See also John Stone, "The Future of Clear Thinking", *Quadrant*, January-February 1992, 56 at 60.

132. "What Kind of Country?", *Quadrant*, December 1984, 9; "Liberty, Productivity and Jobs: Workplace Relations Under the Howard Government", *Quadrant*, July-August 2008, 67. He delivered many speeches to the H. R. Nicholls Society on this topic.

133. "Hawke's Next Budget", *Quadrant*, April 1985, 16; "The Australian Economy: What is to be Done?", *Quadrant*, May 1991, 26; "The Future of Clear Thinking", *Quadrant*, January-February 1992, 56; "Two Views of Thatcherism", *Quadrant*, May 1993, 53; "Inflation: Who's to Blame", *Quadrant*, May 2008, 58.

134. "Political 'Trade-Offs'", *Quadrant*, January-February 1985, 29; "Putting Australia Right", *Quadrant*, September 1985, 10; "When the Hissing Has to Stop", *Quadrant*, November 1985, 61; "Do We Need A Consumption Tax?", *Quadrant*, June 1990, 9; "Skullduggery", *The Adelaide Review*, July 1999, 8.

135. See also *The Environment in Perspective*, Institute of Public Affairs Ltd, Melbourne, 1991.

136. "Our Greatest Prime Minister", *Quadrant*, March 2008, 12 at 16-17. He made many contributions to The Samuel Griffith Society conferences on this subject.

137. "Yes, Minister? Politicians and Bureaucrats in Canberra", *Quadrant*, October 1992, 14.

138. For example, "The 2004 Federal Election", *National Observer*, (2004) No 62, 56; "The Future of Mr Peter Costello", *National Observer*, (2005) No 65, 44; "The Howard/Costello Decade", *National Observer*, (2006) No 68, 12; "Mr Costello's Repeated Budget Failure", *National Observer*, (2007) No 73, 13; "Australia's New Government Should Understand the Following", *National Observer*, (2007) No 74, 9; "Defective Analysis and the 'Never Never Budget'", *National Observer*, (2009) No 80, 8.

139. "Gloom over the succession", *The Adelaide Review*, March 2000, 12; "Mr Mark Latham and the Labor Party", *National Observer*, (2006) No 67, 40; "'Reshaping Australia': 2020 and All That", *National Observer*, (2008) No 76, 56; "The Future of Mr Kevin Rudd", *National Observer*, (2008) No 78, 8.

140. "Black Africa and Australia", *Quadrant*, September 1999, 41; "Solutions to the Muslim Problem in Australia", *National Observer*, (2005) No 66, 14; "The Muslim Problem and What to Do about It", *Quadrant*, September 2006, 11; "The Unmentionable Problem of Australian Citizenship", *National Observer*, (2006) No 70, 12; Immigration Policy: Our Self-Inflicted Wounds", *Quadrant*, September 2010, 30.

141. "Our Greatest Prime Minister", *Quadrant*, March 2008, 12 at 18-19; "Time to Stop the Dreaming", *Quadrant*, April 2008, 48.

142. "Our Greatest Prime Minister", *Quadrant*, March 2008, 12 at 19-20.

143. "The republic: facing defeat in all six States", *The Adelaide Review*, August 1999, 10; "Constitutional Lies, Damned Lies and Plebiscites", *National Observer*, (2004) No 61, 54.

144. "The Debates We Have to Have", *National Observer*, (2002) No 51, 14.

145. "Michael Crichton on 'Global Warming'", *National Observer*, (2005) No 64, 25; "'Global Warming' Scare-Mongering", *National Observer*, (2007) No 71, 29; "'Global Warming'

Scare-Mongering Revisited", *National Observer*, (2007) No 72, 19; "Kyoto the Fraud: How Australians are being Conned", *National Observer*, (2008) No 75, 9.

146. He wrote on H. W. Arndt in "There are Two Views About H. W. Arndt", *Quadrant*, June 1986, 52; on Sir Harry Gibbs in *The Australian*, 1 July 2005; and on the Treasury in the mid 1970s in "The Dismal Beginning to the Fraser Years", *Quadrant*, July-August 2007, 12.
147. For example, his account of the celebration of the centenary of the original sitting of the Commonwealth Parliament: "Attention: Peter McGauran", *The Adelaide Review*, June 2001, 10.
148. "The Future of Mr Kevin Rudd", *National Observer*, (2009) No 78, 8 at 16.
149. *Upholding the Australian Constitution: Proceedings of The Samuel Griffith Society Inaugural Conference*, The Samuel Griffith Society, Melbourne, 1992, at 272-276.
150. Schedvin at 36:1.
151. Schedvin at 45:11.
152. Schedvin at 35:12.
153. Schedvin at 39:12.
154. National Press Club 1987, questions, at 2.
155. National Press Club 1987, questions, at 3.
156. United Kingdom, House of Commons Parliamentary Debates (Hansard), 6 July 1914 at 848.
157. See Malcolm Fraser and Margaret Simons, *Malcolm Fraser: The Political Memoirs*, The Miegunyah Press, Melbourne, 2010, at 352-354 and 526.
158. Schedvin at 2:10.
159. Schedvin at 2:1.
160. Schedvin at 2:3.
161. Schedvin at 2:5.
162. Schedvin at 2:5.
163. Schedvin at 2:6-7.
164. Schedvin at 2:11.
165. Schedvin at 2:3.
166. Schedvin at 42:10.
167. Schedvin at 5:15.
168. Schedvin at 7:3.
169. Schedvin at 7:3.
170. Schedvin at 7:4.
171. Schedvin at 7:4.
172. Schedvin at 7:5.
173. "1929 and All That", *Quadrant*, October 1984, 9 at 9.
174. See the attached select bibliography.
175. "1929 and All That", *Quadrant*, October 1984, 9.

Chapter Nine

Some Words of Thanks

John Stone

I should begin by thanking our Conference Convenor, Julian Leeser, for granting me the privilege of these few minutes before our Conference proper resumes, to say a few words in response to the two papers you heard yesterday in the *festschrift* segment of our program.

In doing so I speak not only on my own behalf but also on Nancy's.

Those of you who were at our Adelaide conference a year ago, or who have since read the relevant portions of the Proceedings of that conference – Volume 21 of *Upholding the Australian Constitution* – will know who we have to blame for the idea of this *festschrift*. I refer to the same man whom I have just thanked for allowing me this privilege – namely, Julian Leeser. As he said when announcing it in Adelaide, he "had done the numbers" among the Board of Management, and there was no way I could hope to reverse their decision.

That did not stop me from trying, subsequently, to do so. But Julian, who is an infinitely better politician than I could ever hope to be, continued to "have the numbers".

Having said that by way of preface, let me now strike a different note.

However little I may have welcomed this development, it would be nothing short of churlish if I were to fail to acknowledge the generous sentiments that I know inspired it – not only on Julian's part, but on the part of all the other members of the Board of Management.

And it would be worse than churlish – it would be downright ill-mannered – if I were not also to acknowledge the time, and effort, that both Des Moore and Mr Justice Heydon clearly devoted to their respective efforts yesterday.

Des Moore, of course, is one of my oldest friends. In 1958, when, as a rather junior Treasury officer, I had been sent to London to serve as the Australian Treasury Representative in Australia House, and he was studying at the London School of Economics, he came to see me. I soon thereafter recommended his appointment to the Treasury – from which, 28 years later, he resigned his Deputy Secretary position. His whole life, both up to that time and ever since, has been one of public service.

Dyson Heydon, if I may be so familiar, is a friend of much shorter standing. We only met in Sydney seven or eight years ago after our move there from Melbourne, and not long before his elevation to the High Court bench of which he is now such an adornment. To have enjoyed his friendship since that time has been both an honour and a privilege.

Other than in one particular, I have no intention this morning of commenting on the substance of what Des said yesterday afternoon or what Dyson said at dinner last night. That exception is to express my gratitude to Dyson – and here I speak on my *personal* behalf – for the fact that he chose to entitle his address *The Public Life of John and Nancy Stone*. I repeat, "and Nancy" Stone.

It will not surprise anyone in this room, I think, when I say that I could speak volumes about the loving support I have been so fortunate to receive from Nancy throughout the now 56 years of our married lives. Whatever small things I may (or may not) have achieved along that road, the one thing that I do know is that none of them could have been achieved without her. So thank you, Dyson, for what you had to say last night in gracious recognition of that undeniable fact.

At this point of my remarks I confess to harbouring, for once, a fellow feeling for Kevin Rudd. You will remember that, during the course of his farewell remarks outside the Prime Minister's office in

Canberra to the assembled media, he admitted at one point that he was "on the point of blubbing". His understandable emotional stress then was evident, and I fear that mine may be equally so now.

Now let me conclude by saying a few things, briefly, about this Society. It does not seem like more than 18 years since we began. Our only asset then was the fact that the Rt Hon Sir Harry Gibbs – not long retired as Chief Justice of the High Court – had accepted my invitation to become our inaugural President. A few months later he was to deliver (albeit, as it turned out, vicariously) a superb inaugural address to our first Conference, in July 1992, at the Hilton Hotel in Melbourne.

There have been times, throughout those years, when Nancy and I have looked at each other and wondered whether, in reality, anything at all was being accomplished. But I hope we are not deceiving ourselves – or you – when I say that today, small though the achievements may have been within the great totality of things, nevertheless something *has* been achieved. And now that the running of the Society is in much younger – and so much more capable – hands, we feel that even more strongly.

Throughout those 18 years we have enjoyed not merely the intellectual stimulus of all the speakers – including the two I have already mentioned – who have given so generously of their time to come and grace our meetings, but also – and even more lastingly – the wonderful company of like-minded people who have made up our membership. Not a few of the people in this room today were "present at the creation", and Nancy and I have enjoyed their friendship, and that of all those who came later, to a degree that has enriched our lives.

So thank you, Des; thank you, Dyson; and even – though perhaps somewhat grudgingly – thank you, Julian! And last, but not least, thank you all.

Chapter Ten

Kirk: Newton's apple fell

Justice J. Gilmour

Introduction

I have been asked to speak to you today about the High Court's recent judgment in *Kirk v Industrial Court (NSW)* (hereafter: *Kirk*).[1]

The rather obscure title to this paper is an allusion to what Chief Justice Spigelman wrote in a paper he delivered on *Kirk* during 2010.[2] His Honour had on a previous occasion described the "gravitational pull" which the Constitution exerts in the field of administrative law at the State level. Referring to *Kirk*, his Honour said:

> The gravitational force has done its work. Newton's apple is on the ground . . . I wish to pick it up, polish it a little and check it for worms.

I will not attempt to do any of those things. Rather I propose to do no more than share the apple with you and perhaps find at its centre some seeds of promise for the future in this important area of the law.

Kirk is a significant decision recognising, as it does, the constitutional entrenchment of supervisory powers of State supreme courts over inferior courts and tribunals. Against the background of a greatly expanded fleet of such courts and tribunals, *Kirk* firmly delineates a check upon State legislatures from attempting to put the decisions of those bodies beyond the review of their respective supreme courts.

It is a powerful authority in the constitutionally sourced legal constraints to unlimited executive power. Absent such constraint, in the words of Lord Denning, ". . . the rule of law would be at an end".[3] More recently, Chief Justice French, in his paper entitled "Executive Power"[4], called to mind Andrew Inglis Clark, one of the drafters of the Constitution, who was a great believer in legal limits on official power enforced by the judiciary. In an article published in the *Harvard Law Review* in November 1903, Clark wrote:

> The supremacy of the judiciary, whether it exists under a federal or a unitary constitution, finds its ultimate logical foundation in the conception of the supremacy of law as distinguished from the possession and exercise of governmental power.[5]

Indeed, the High Court has been concerned of late with a number of cases involving issues as to executive power which have not gone unnoticed in the press. *The Australian*, in an article on 25 June 2010, referred to these cases as the "French Court reclaiming judicial power".[6]

In *Pape*[7], French CJ referred approvingly to what Sir Owen Dixon had said in the *Communist Party case:*

> History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by

> those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.[8]

Kirk is deceptively simple in its analysis but clearly sits in a complex area. This paper attempts no more than a general overview. I have deliberately put introductory explanations in the broad. Time does not permit detailed analysis.

I will explain, in overview, the concept of judicial review for those of you who are not lawyers, or who have not had occasion to practice or study in the field. Judicial review is an ancient common law process. Certainly it predates federation in Australia – it was part of the law of England and spread from there to other common law jurisdictions, including the United States and Australia.

When a superior court conducts a review of, for example, an administrative decision made under statute, the process is in some respects akin to an appeal against the decision; the key words here being, "in some respects": because, in other respects, the process is not at all akin to an appeal, but is instead far more limited than an appeal typically is.

It is in these similarities and differences that lie the issues that should interest this Society. Because the similarities and differences mark out a boundary – not always or, perhaps, even typically, a clear boundary, but a boundary nonetheless – between, on the one hand, executive decisions with which the judiciary will interfere, on grounds of perceived error; and, on the other hand, executive decisions with which the judiciary will not interfere in spite of perceived error.

The principles that govern, or should govern, the drawing of this boundary reflect a conception of the proper roles assigned by our system of government to the three arms of government: that is to say, to the executive, the judiciary and to the legislature. The concept sounds reasonably simple at this level of abstraction, but in Australia things are a little more complicated.

Australia is a federation of States. This means that we do not have a unitary government, with one executive arm, one judicial arm and one legislative arm. Between the States and the Commonwealth, we have, like some mythical creatures, many arms, in fact 21 of them: seven executive arms, seven judicial arms and seven legislative arms, one of each kind comprising the Commonwealth government and one of each kind comprising the government of each of the six States. (I say nothing of the territories.)

So, in Australia, analysing the proper roles of the three traditional arms of government is a process that involves levels and overlays. At the Commonwealth level, one needs to ask: what functions and powers does the Federal Constitution vest in the federal executive, in the federal judiciary and in the federal legislature? And what are the limits of their respective functions and powers? At the level of each of the States, one needs to ask the same question, in the context of each State constitution: that is to say, what functions and powers does the State constitution vest in the State executive, in the State judiciary and in the State legislature? And, then, one has to address the overlay issue: to what extent have the State's constitutional arrangements been modified by the Federal Constitution; because the Federal compact has its implications for what the States can and cannot do, irrespective of their constitutional arrangements.

It is in relation to this overlay issue that the judgment in *Kirk* does its defining work. At its core, the question for the Court in *Kirk* was whether the Federal Constitution requires that there be, in each of the States, judicial control of executive decision-making. An important question, to be sure, for reasons I will return to; and the answer to the question, given in *Kirk*, is, yes.

In arriving at this answer, and especially in identifying the irreductible level of judicial control that the Federal Constitution demands, the Court drew heavily on the legacy of the past; but it also left open for the future some important questions. There are two of those questions which I would particularly like to touch upon in this paper. The first is whether it is now beyond the power of the States to restrict in any significant way the scope of judicial review: to restrict in significant ways the kinds of error that will justify supreme court interference with a decision on review.

The second question relates to judicial review of fact-finding errors. As to that, let me just make this observation to bring this introduction to a close. Defining the extent to which fact-finding errors can be the subject of judicial review is surely one of the most important practical tasks facing Australian courts today.

The Rise of Tribunals

The importance of *Kirk* in the jurisprudence of Australia is measurable, in one sense, by the burgeoning growth of administrative tribunals across the country. I now describe the Victorian context but its example is broadly replicated across the country.[9]

The significant expansion of administrative tribunals in Victoria prior to 1998 was pointed to by Chief Justice Warren in a 2004 paper.[10] Her Honour described the encroachment of tribunal power within the Victorian legal landscape from 1984 as "the tiger in the jungle". The Victorian Administrative Appeals Tribunal, the "infant tiger", was born in that year, as her Honour put it, "under the dual veil of expediency and efficiency", reaching maturity, in the form of the Victorian Civil and Administrative Tribunal. Appropriately the "tiger" is referred to as V-CAT.

V-CAT assumed the jurisdiction of the Victorian Administrative Appeals Tribunal[11] and later a range of new jurisdictions.[12] Most of these jurisdictions have been exclusive to V-CAT and not concurrent with court jurisdictions. The Supreme Court of Victoria is, thereby, often deprived of jurisdiction in the absence of an error of law. The bar to review in the Supreme Court is high.[13]

Morris J, the then President of V-CAT, in "The Emergence of Administrative Tribunals in Victoria", observed that there was a change in the relationship "between the State and the individual".[14] President Morris was taken by Warren CJ, correctly I think, to be referring to the role of V-CAT. According to the V-CAT 2009 Annual Report there were approximately 86,000 cases with 225,000 parties involved in matters before it that year. This, it explains, in turn, affected the interests of about one million Victorians. It now has three divisions: Human Rights; Civil; and Administrative. There were, during that year, six judicial members, 41 full-time members, 180 sessional members and 196 staff. Although a direct comparison might be misleading, it is still worth noting that the Supreme Court of Victoria comprises 36 judges including members of the Court of Appeal with a Registry staff of 45.

Judicial Review

Judicial review is not an appeal. Appeal is a statutory process, one put in place by the legislature; and thus capable of removal by the legislature. It is a process by which decisions of government are referred to a higher government authority for reconsideration. Appeals can take place wholly within the judicial arm of government: that is, appeals from one court to a higher court; or within the executive arm of government: that is, appeals from one administrator to a higher administrator, or administrative body; or from the executive arm to the judiciary: for example, appeals from an administrative body, such as a tribunal, to a court.

Appeals heard by courts typically have as their purpose the correction of errors: errors of law and errors of fact. Much depends on the particular context, especially the statutory context, but broadly speaking this remains true. And error in this sense is demonstrated whenever the appeal court concludes that the position taken below was wrong – wrong because it involved a misapprehension of what the law is; or wrong because it involved findings of fact that were not justified by the evidentiary material. The important point of principle here is that the appeal court, broadly speaking, engages in a reconsideration of the merits of the original decision, and will substitute its own decision when it is satisfied that the original decision was wrong.

Judicial review at common law is, by contrast, a process by which superior courts exclusively exercise control over the decisions of inferior courts and executive decision-makers, not by reconsidering

their decisions on the merits, so as to correct their errors at large, or even to prevent substantial injustice; but only so far as is necessary to ensure that decision-makers respect the legal limits of their functions and powers. Accordingly, judicial review is for the correction of errors only if correction is necessary to ensure that decision-makers respect the legal limits of their functions and powers. What this entails, I will come to.

Traditionally, the review process was engaged by application for one or more of the common law, or prerogative writs: *certiorari* (to call in a decision for quashing); *prohibition* (to prevent a person or body from proceeding to or under a decision); and *mandamus* (to compel a person or body to do that which it is legally obliged to do).

The power to review judicially is a facet of the judicial power of government. It has long existed as a facet of the judicial power of each of the States and of the Commonwealth. At the Commonwealth level, it has been since Federation a facet of judicial power set apart by this consideration: its existence is expressly mandated by section 75(v) of the Constitution which vests the High Court with original jurisdiction in all matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth. These writs have been described by the High Court as "constitutional writs".[15] The grant of *certiorari* against an officer of the Commonwealth, though not expressly provided for in section 75(v) of the Constitution, is regarded as available as an incidental or ancillary authority to the effective exercise of the jurisdiction to issue writs of prohibition and mandamus.[16]

Section 75(v) thereby serves a basic element of the rule of law.[17] Indeed, adopting what had been said by Sir Owen Dixon in the *Communist Party case*[18], Chief Justice Gleeson of the High Court said that the Australian Constitution is framed upon the assumption of the rule of law. His Honour also recalled what had been stated by Brennan J, as his Honour then was, in *Church of Scientology Inc v Woodward*:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[19]

"Jurisdictional error"

The Court in *Bodruddaza* referred to "jurisdictional error" which "might arise from a want of legislative or executive power as well as from decisions made in excess of jurisdiction itself validly conferred".[20] Accordingly, the control mechanism emanating from section 75(v) for restraining officers of the Commonwealth from exceeding Federal power is the identification of jurisdictional error. A decision affected by jurisdictional error is, as a matter of law, no decision at all.

It is instructive to consider briefly the history of jurisdictional error within the Australian context.

As the Solicitor-General for the Commonwealth pointed out in 2009, there was notably absent from any significant administrative law decision of the High Court or the Federal Court during the 1980s any reference at all to a notion of "want" or "excess" of jurisdiction or the use of the language of "jurisdictional error".[21]

This, it seems, was the result of the passage of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (ADJR Act) which introduced by section 5(1)(f) the ground of "error of law" which did not depend for its availability on the need to show that the error appeared "on the face of the record".

The concept of jurisdictional error was well known to the law going back at least to the late nineteenth century in Australia which was co-extensive with the like power of the Court of Queen's Bench in England.[22] In England, the distinction between jurisdictional and non-jurisdictional error was effectively abandoned in *Anisminic Ltd v Foreign Compensation Commission*[23] as construed in later cases such as *O'Reilly v Mackman*.[24]

During the 1980s in Australia the distinction was not operative in the face of the ADJR Act. Later, however, the distinction was not to be discarded in this country for reasons embedded in the constitutional limitations arising from the doctrine of separation of judicial and executive powers which are not present in the United Kingdom: *Craig v South Australia.*[25]

Ultimately the different position as between this country and England concerning this distinction was described by the joint judgment in *Kirk*[26] as follows:

> In England, the difficulties presented by classification of some errors as jurisdictional and others as not were ultimately understood as requiring the conclusion that *any* error of law by a decision-maker (whether an inferior court or a tribunal) rendered the decision ultra vires.[27] But that is a step which this Court has not taken.[28] [Emphasis in original]

The usage in the 1990s of jurisdictional error as a concept, though not in terms, can be traced to the following well-known statement by Brennan J in *Attorney-General (NSW) v Quin*[29], later approved in the joint judgment of four members of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang:*

> The duty and jurisdiction of the court to review administrative action *do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power*. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[30] [Emphasis added]

The year before (1995) five members of the High Court in a joint judgment in *Craig v South Australia*[31] had directly employed the term "jurisdictional error" to describe an administrative tribunal falling into error which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion resulting in it exceeding its authority or powers.

Errors that can be redressed on review are not limited to errors about the existence of jurisdiction to make a decision, or exercise some power. Of course they include those kinds of errors; but they also include certain kinds of errors that are made in the course of exercising a jurisdiction that has undoubtedly been engaged.

Errors of this kind are reviewable as jurisdictional errors because they go to the existence of jurisdiction. But the courts have recognised other kinds of errors as "jurisdictional", errors typically committed even where jurisdiction properly exists, including:

a. failure to make a genuine attempt to evaluate evidentiary material;

b. failure to consider relevant material or factors;

c. importantly, failure to accord procedural fairness, that is, to afford a fair hearing, and an unbiased determination; and

d. in the area of discretions, exercising a discretionary power so unreasonably that no reasonable repository of the power could exercise it in that way – this is the so-called "*Wednesbury* unreasonableness".

All these kinds of errors are regarded as jurisdictional because they are perceived as fundamentally undermining the decision-making process in a way that is incompatible with the true scope of the decision-maker's functions and powers.

Therein lies the touchstone of what constitutes jurisdictional error. And it is important. The High Court put it this way in *Kirk*[32], citing what an earlier High Court had said, in 1995, in *Craig*:

> . . .The Court [in Craig] stated, as a general description of what is jurisdictional error by an inferior court, that an inferior court falls into jurisdictional error "if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions* or *powers* in a case where it correctly recognises that jurisdiction does exist". [33]

The Court, in *Kirk*,[34] gave three examples, referred to in *Craig*,[35] of an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of that court's functions or powers:

(a) the absence of a jurisdictional fact;[36]

(b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and

(c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing.

However, the Court was quick to emphasise that the reasoning in *Craig* is not to be seen as providing a rigid taxonomy of jurisdictional error and that the three examples given above as to the ambit of jurisdictional error by an inferior court are just that – examples.[37] They are not to be taken as marking the boundaries of the relevant field. This reinforced what their Honours said before that it was neither necessary nor possible to attempt to mark the metes and bounds of jurisdictional error.[38]

Both the errors in *Kirk* fall into the third category: the misconstruction of section 15 of the *Occupational Health & Safety Act* 2000 (NSW) (OH&S Act) and then permitting Mr Kirk, in contravention of section 17 of the *Evidence Act* 1995 (NSW), to give evidence for the prosecution at his own prosecution. This was an error of law, because Mr Kirk was not and could not be made competent to give evidence for the prosecution under the applicable State legislation. The Industrial Court misapprehended the limits of its functions and powers. It conducted the trial of Mr Kirk and the Kirk company in breach of the limits on its power to try charges of a criminal offence.

Overview

Stepping back, one can see the logic in this branch of the law. Decision-makers can go beyond their true functions and powers by exercising or, rather, purporting to exercise, a function or power that they do not have, or that has not yet arisen – for example, because some essential precondition, such as a jurisdictional fact, has not occurred. But they can also be taken beyond the true functions and powers by things that they erroneously did, or failed to do, in attempting to discharge functions or powers that have been enlivened in them. Here, the question is whether the thing that they have erroneously done violates some essential attribute of the functions or powers; or whether the thing that they have failed to do constitutes an essential attribute of those functions or powers.

It is inherent in this logic that not all errors will have the essential character that makes them liable to be corrected on review. Those that do not are not jurisdictional errors, and they are not capable of review. That remains so, at least in theory, even if they are errors which cause substantial injustice: that is to say, even if they are the kind of errors that an appeal court, in an appeal, would reverse in its reconsideration on the merits. On review, as opposed to appeal, that kind of treatment is reserved only for jurisdictional errors; because only jurisdictional errors are seen as affecting the legality of a decision, as opposed to, or as well as, its correctness.

It is the focus on legality that distinguishes judicial review from a typical appeal. An appeal is typically concerned with whether a decision is correct; or whether it is affected by errors that lead

to injustice. Judicial review is concerned with legality: namely, whether a decision, be it correct or otherwise, was made within the essential scope of the decision-maker's true functions and powers. As Chief Justice French of the High Court put it in his recent paper on Executive Power,[39] the application of jurisdictional error in relation to administrative decisions today is concerned with the limits of executive power exercised under statute or directly under the Constitution.

By keeping the executive within the limits of the law – or at least that part of the law which defines the executive's essential functions and powers in a given context – and by not otherwise adjudicating on the correctness of executive decisions, the courts have sought to balance their role, as the judicial arm of government, with the role of the executive under legislation.

In striking this balance, it falls to the courts to identify, from time to time, what the essential functions and powers of decision-makers are, under law. It is a pivotal task, one that I want to return to later, in connection with judicial review of fact-finding errors. But first let me outline the impact of *Kirk* in the context of the law as I have described it.

Kirk

Mr Kirk was a director of the "Kirk" family company. A farm manager employed by the company was killed while working on a farm owned by the company. The daily operations of the farm had been his responsibility.

The company was charged under sections 15 and 16 of the *OH & S Act*. Section 15(1) provided that every employer should ensure the health, safety and welfare at work of all the employer's employees. Section 16(1) provided that every employer should ensure that persons not in the employer's employment were not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they were at the employer's place of work. Mr Kirk was charged with the same offences, pursuant to section 50 of the Act, which prima facie deemed each director of the company to have contravened the provisions contravened by the company. The charges were required to be heard by the Industrial Court of New South Wales. On 9 August 2004, Walton J convicted Mr Kirk and the company of the offences charged.

As one avenue of review Mr Kirk and the company unsuccessfully applied to the NSW Court of Appeal for orders in the nature of *certiorari* and prohibition. They then applied to the Full Bench of the Industrial Court against the trial judge's decisions. A limited leave was granted but the appeal was dismissed.

Next they applied to the Court of Appeal, again without success, for orders in the nature of *certiorari* quashing the decisions of the trial judge and the Full Bench.

The Court of Appeal held that neither decision disclosed jurisdictional error. Special leave to appeal from this decision was granted by the High Court. The application for leave to appeal from the decision of the Full Bench was referred to an enlarged Bench of the High Court.

The High Court unanimously allowed the appeal from the judgment of the Court of Appeal. Six members of the Court delivered a joint judgment. Heydon J, in a separate judgment, dissented only as to the form of the orders. The orders of the Court of Appeal were set aside and substitute orders were made quashing the relevant orders of the Industrial Court as well as the Full Bench.

The Industrial Court is subject to the supervisory jurisdiction of the Supreme Court of New South Wales. Orders in the nature of prohibition, *certiorari* and *mandamus* may be directed to the Industrial Court.[40]

However, section 179(1) of the *Industrial Relations Act* 1996 (NSW) read with section 179(5) provides, in effect, that a decision of the Industrial Court is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal, (whether by order in the nature of prohibition, *certiorari* or *mandamus*, by injunction, declaration or otherwise).

This strongly worded privative clause stood in the path to the grant of relief by writ of *certiorari* quashing the orders of the Industrial Court and the Full Bench.

That the clause failed to have that effect was at bedrock for constitutional reasons, which I will now explain.

The High Court found jurisdictional error at the instance of the Industrial Court. First, because it had no power to convict and sentence Mr Kirk and the Kirk company because at no point in the proceedings had any particular act or omission or set of these been identified as constituting the offences for which they were convicted and sentenced which followed its misconstruction of sections 15 and 16 of the *OH&S Act*. By misconstruing section 15, the Industrial Court convicted Mr Kirk and the Kirk company of offences when what was alleged and what was established did not identify offending conduct.[41] Second, the breach of the rules of evidence by permitting Mr Kirk, as a defendant, to give evidence as a witness for the prosecution when, in contravention of section 17 of the *Evidence Act* 1995 (NSW), he was not competent to do so. This provision may not be waived.

It followed, as the joint judgment said, that the error made by the Industrial Court was not only an error about the limits of its functions or powers but was also an error in that it made orders beyond its powers to make.[42]

As was pointed out in *Plaintiff S157/2002 v The Commonwealth*[43] and referred to in *Kirk*[44] in considering Commonwealth legislation, account must be taken of two fundamental constitutional considerations. The first, which is relevant here, is that the jurisdiction of the High Court to grant relief under section 75(v) of the Constitution cannot be removed by or under a law made by the Commonwealth Parliament. Specifically, the jurisdiction to grant section 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed.

So far as concerns the judicial power of the States, with one exception[45], the position under the various State constitutions is different. Under these, no State court, other than in Victoria, has a constitutionally mandated jurisdiction; and there is no constitutional requirement that the judicial power of the State be exercised by a court only, however defined. Subject to the Victorian exception, there seems to be no obvious reason why the parliament of a State could not abolish some or all of the jurisdiction of the State courts, and, for example, vest the jurisdiction that they formerly exercised in an administrative tribunal. As a matter of State law, there seems to be no obvious reason why the State parliaments could not abolish the State supreme courts' judicial review jurisdiction altogether.

But the Commonwealth Constitution exerts what, as I mentioned, Chief Justice Spigelman of New South Wales has characterised as a gravitational pull on State law in this regard.[46] The fact is that the network of State courts including State supreme courts are a platform upon which the Commonwealth Constitution partially rests, and through which federal judicial power is distributed and exercised. The Constitution presupposes the existence of State supreme courts.

The reasoning in *Kirk* gave expression to that gravitational pull in this way. Chapter III of the Constitution by section 73 provides that "The High Court shall have jurisdiction . . . to hear and determine appeals from all judgments, decrees, orders, and sentences . . . (ii) . . . of the Supreme Court of any State". As Gummow J said in *Kable*:

> The meaning of the term "Supreme Court" in s 73 is to be determined in the process of construction of the Constitution and is not to be governed merely by legislation of the relevant State. It is, in this sense, a constitutional expression. The phrase identifies the highest court for the time being in the judicial hierarchy of the State . . .[47]

This was adopted in the joint judgment of Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission*[48] where it was said that "Chapter III [of the Constitution] requires that there be a body fitting the description 'the Supreme Court of a State' ", and "that it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description". Earlier, in *Fardon v Attorney-General (Qld)*[49] Gummow J observed that the "institutional integrity of the State courts … bespeaks their

constitutionally mandated position in the Australian legal system". His Honour was there referring to the Commonwealth Constitution.

Thus, whilst not having an expressed constitutionally mandated jurisdiction, the State supreme courts do have under the Constitution a position as necessary institutions within the federal compact.

The accepted doctrine at the time of federation was that the jurisdiction of the colonial supreme courts to grant *certiorari* for jurisdictional error was not denied by a statutory privative provision. At Federation, each of the supreme courts referred to in section 73 of the Constitution had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England.[50] Thus, each court had "a general power to issue the writ [of *certiorari*] to any inferior Court" in the State.[51]

That supervisory jurisdiction has continued since Federation and constitutes the means for defining and enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role, exercised through the grant of prohibition, *certiorari*, *mandamus* and *habeas corpus*, was and remains a defining characteristic of the supreme courts of the States.[52]

Importantly, by virtue of the appellate jurisdiction of the High Court, the exercise of the supervisory jurisdiction of the State supreme courts is ultimately subject to the superintendence of the High Court as the "Federal Supreme Court" in which section 71 of the Constitution vests the judicial power of the Commonwealth.[53] There being but one common law of Australia, the exercise of supervisory jurisdiction exercised by the State supreme courts proceeds according to principles established by the High Court. As the joint judgment noted:

> To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of "distorted positions".[55] And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.[54]

Ultimately, section 179 of the *Industrial Relations Act* 1996 (NSW) was not declared invalid in *Kirk*. Rather, it was read down, as was the case in *Plaintiff S157*. The expression, "a decision of the Commission", in section 179 was construed to mean, "a decision of the Industrial Court that was made within the limits of the powers given to the Industrial Court to decide questions".[56] Put another way, section 179 was construed so as not to include a decision of the Industrial Court[57] made outside the limits of its power. In other words, its "decision" infected by jurisdictional error was not "a decision of the Industrial Court".

It seems clear enough that, in a case where a privative clause to the same effect cannot be read down, it will likely be declared invalid as being unconstitutional. It seems unlikely that section 179(4) which extends the reach of the privative clauses to "purported decisions" would escape the same result as section 179(1). Section 179(4) was not engaged in *Kirk* but it was discussed in the joint judgment at [103]-[105] where the conclusion in *Batterham v QSR Ltd*,[58] that the addition of the word "purported" did not extend the scope of section 179 beyond the word "decision", was approved. The conclusion that a decision was properly understood to be only a "purported decision" would be arrived at for the very reason that it was tainted by jurisdictional error. Viewed in that way, a "purported decision" is synonymous with an "invalid decision", that is, one which, by force of the reasoning in *Kirk*, is constitutionally invalid.

Accordingly, at least five important propositions emerge from the judgment in *Kirk*.

1. Chapter III of the Commonwealth Constitution requires that in each State there be a body fitting the description of "the Supreme Court of (a) State".[59]

2. A defining characteristic of such a body is its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power.[60]

3. A privative provision in State legislation which purports to strip the Supreme Court of the State of its authority to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error is beyond the powers of the State legislature. This is because such a provision would remove from the relevant Supreme Court one of its defining characteristics.[61]

4. Not every privative provision will be invalid. Rather, the constitutional significance of the supervisory jurisdiction of the State supreme courts underpins the need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power.[62]

5. The categories of jurisdictional error are not closed.[63] It is therefore for the supreme courts and, ultimately, the High Court, to determine, on a case-by-case basis, the limits of the supreme courts' irreductible powers to prevent and correct errors by inferior courts and tribunals.

Jurisdictional Error – The search for certainty

The reasoning of the Court in *Kirk* is at one level uncomplicated. The distinction between jurisdictional error and non-jurisdictional error, in the Australian constitutional context, marks the relevant limit on State legislative power. Importantly, *Kirk* reiterated what had earlier been said in cases such as *Craig*, that, unlike the position in the United Kingdom where any error of law by a decision-maker, whether an inferior court or a tribunal, rendered the decision *ultra vires,* the distinction between these two kinds of error remains central to this part of the Australian legal landscape.

However, hidden beneath lies a conceptual difficulty long recognised by academic writers and judges: the not-infrequent difficulty in discerning between the two. It is well recognised that the lines, not necessarily straight lines, which divide jurisdictional error from non-jurisdictional error are blurred.

Professor Aronson put it this way:

> For some time now, academic literature has been looking for overarching general principles which might help explain the grounds of judicial review. We refer here not to the debate as to how tightly or loosely the review grounds might be linked to theories of statutory interpretation or to parliamentary sovereignty … Rather, we refer to the debates flowing from the sheer number and fluidity of judicial review's grounds.[64]

And again:[65]

> Judicial review's expansion into qualitative review has been hesitant, inconsistent, patchy, and theoretically troubled. Academic commentators have suggested for some time now that there must be underlying principles.[66]

However, the real problem it seems to me is in applying the principles when the case does not fall into one of the established species of jurisdictional error. This necessarily involves case-by-case judgment, but perhaps no more than does, for example, application of the principles that govern the law of negligence.

The joint judgment in *Kirk*[67] restated what had earlier been said in *Craig*, that "the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern" and gave examples of such difficulties.[68] Their Honours referred approvingly, I think, to what

Professor Sawer has said in relation to *certiorari* about the difficulties in articulating a singular unifying principle. This concerned "the unresolved competition between the two purposes for the grant of *certiorari*", namely, on the one hand, keeping the inferior tribunal within its jurisdiction and, on the other hand, to give the inferior decision some degree of finality or, as is often said, some jurisdiction to go wrong. Their Honours adverted to the difficulty in the application of the principles:[69]

> Those two purposes pull in opposite directions. There being this tension between them, it is unsurprising that the course of judicial decision-making in this area has not yielded principles that are always easily applied. As Sawer wrote, 'it is plain enough that the question is at bottom one of policy, not of logic'.[70]

The intriguing question then is, just how far policy will go, and in which direction. The joint judgment in *Kirk*[71] also referred with apparent approval to what Professor Jaffe said that "denominating some questions as jurisdictional … is almost entirely functional: it is used to validate review when review is felt to be necessary. … If it is understood that the word 'jurisdiction' is not a metaphysical absolute but simply expresses the gravity of the error, it would seem that this is a concept for which we must have a word and for which use of the hallowed word is justified".[72]

As Finn postulated:

> As a result of *Kirk,* it seems that the boundary of reviewability will be marked out, wholly and solely, by the notion of 'jurisdictional error'. This remains a difficult notion.
>
> First, the court has evidently endorsed the long-held suspicion that labelling an error as 'jurisdictional' is simply a functional post hoc classification. It reflects the court's view that the identified error or errors, the 'distorted positions' as identified in *Kirk*, are sufficiently serious to warrant intervention.
>
> This means that the predictive power of that label is limited. It will be difficult, or perhaps more difficult, to formulate in advance clear analytic categories of jurisdictional error. At best, intuitive assessments will need to be made of the extent to which a decision-making body is straying from its statutorily assigned functions or beyond its associated powers.[73]

These observations highlight the difficulties confronting clients and practitioners in this field, let alone judges. Finn suggests options for a pragmatic search to find the required guidance:

> Such a search might focus on the commonalities between the occurrences of 'jurisdictional error' in the decided cases and the indicia to be drawn from those cases of the level of seriousness which is seen by a superior court as requiring its intervention by means of supervisory review. Aronson's own listing of 'categories' of jurisdictional error may be one starting point for this more pragmatic search. Another may be McDonald's suggestion that one touchstone for judicial intervention may be interference with long-established and deep-rooted common law rights, such as property rights, and perhaps procedural fairness requirements, or with rights which can be shown to have some constitutional basis. [74]

Hayne J said in *Ex parte Aala:*

> The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error.[75]

Nonetheless, the difficulty remains.

Ramifications for State Courts and Tribunals

The reach of *Kirk* will extend beyond section 179 of the *Industrial Relations Act* (NSW) which is a very strongly-worded privative clause. As Chief Justice Spigelman said of section 179, it is difficult to know what more the Parliament could have done to signal an intention to insulate the Industrial Commission from review for jurisdictional error.[76] Privative clauses in State enactments, however worded, will not be effective to denude the State supreme courts of their jurisdiction to review for jurisdictional error although review for error of law on the face of the record may still be excluded. This limited exclusory power is unlikely to be of great import.

The important ramifications, potentially, emanate from questions left open in *Kirk.* They are important questions in modern Australia with the major expansion of tribunals and their jurisdiction.

I have already mentioned the trend towards legislative transfer of subject-matter jurisdiction from State courts to tribunals, with appeal rights to the court system existing only for so long as, and to the extent that, State legislation allows.

The first question

I now turn to the first of the two questions mentioned in the introduction as left open for the future: whether it is now beyond the power of the States to restrict in any significant way the scope of judicial review. Can they restrict in significant ways the kinds of error that would otherwise justify supreme court interference with a decision on review. Put another way, are there recognised and yet to be recognised categories of jurisdictional error constitutionally entrenched to give necessary content to the constitutional entrenchment of the right of review itself.

Kirk establishes that State parliaments cannot strip the supreme courts of the power to review for jurisdictional error. But does that mean that they cannot curtail by legislation any aspect of that jurisdiction? For example, procedural fairness is typically required of primary decision-makers. Failure to accord procedural fairness, where required, is a well-established species of jurisdictional error. Is it now beyond the competence of State parliaments to provide that decisions made under an enactment will be valid for all purposes even if made without according procedural fairness?

The issue has parallels at the federal level. The writs mentioned in section 75(v) of the Constitution – *mandamus* and prohibition – are now described as constitutional writs, which they are. They used to be called prerogative writs, after the traditional title given to their common law counterparts. The change in terminology does not just reflect semantics. It reflects the recognition that when the High Court issues those writs, under the Constitution, it is engaged in a constitutional process, not just a common law process. Common law processes can be adapted by legislation. Constitutional processes cannot.

When a State supreme court issues a prerogative writ based on jurisdictional error, is it, in light of *Kirk*, engaged in a constitutional process? Does the answer depend on what kind of jurisdictional error is being reviewed? *Kirk* establishes that the power to review jurisdictional error is a defining attribute of the State supreme courts, as comprehended by the Constitution. However, the joint judgment, significantly, did not close the door on privative clauses. Their Honours admitted to the possibility of legislation which might affect the availability of judicial review in the State courts[77]. No hint of what that might be was given.

At issue in *Kirk* was a privative clause purporting to repeal the entirety of the NSW Supreme Court's review jurisdiction in respect of one of the inferior courts of that State. Is it to be assumed that every facet of a supreme court's review jurisdiction must enure if that court is to continue to answer to its constitutional description? Can the States legislate away grounds for review presently available? Such questions were not posed, or answered, in *Kirk*. They are vital questions. The power to review requires that grounds of review are available; otherwise it is a power without substance.

It is perhaps most intriguing in the context of review based on procedural fairness, because procedural fairness is a requirement traditionally regarded as excludable; but a similar question could

be framed in respect of, for example, bias. Absence of bias is typically required of primary decision-makers, and its presence is a recognised species of jurisdictional error. Would State legislation purporting to selectively repeal the jurisdiction to review decisions affected by bias offend the principle recognised in *Kirk*?

Whether procedural fairness is to be seen as a common law duty or an implication from statute is an open question.[78] The position is the same in respect to *Wednesbury* unreasonableness in respect to a discretionary power statutorily conferred.[79]

Gaudron and Gummow JJ in *Ex parte Aala*[80] implicitly acknowledged that such obligations might upon the proper construction of the relevant statute be limited or excluded. This would, however, require "plain words of necessary intendment".[81] The same position, in light of *Kirk*, will, it seems, attach to State legislation.

This is not the position at the Commonwealth level where the Commonwealth officer is a member of a federal court or is one who executes an executive power, not one conferred by statute, where a question will arise whether that element of the executive power of the Commonwealth found in Chapter II of the Constitution includes a requirement of procedural fairness. If the answer is that it does, then prohibition will lie to enforce observance of the Constitution itself.[82] In those instances procedural fairness is a constitutional obligation.

Justice Hayne, in *Ex parte Aala*,[83] observed that the Constitution is silent about the circumstances in which constitutional writs under section 75(v) may issue and that "(w)hat is constitutionally entrenched is the jurisdiction of this Court when the writs are sought, rather than any particular ground for the issue of writs".

Jeremy Kirk in a 2004 paper suggested that the principle of legality offers the surest foundation for establishing the constitutionally entrenched minimum provision of judicial review.[84] This analysis turns on the statement of the joint judgment in *Plaintiff S157/2002 v Commonwealth*[85] that "s 75 introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review". Jeremy Kirk's paper explored the question, as do I, of what guiding principle or doctrine may determine just what judicial review is entrenched. Kirk writes: "The principle of legality requires, at its core, asking the following questions: 'What does the law authorise?' and 'What does the law require?' " The answers will require consideration of the relevant statute(s).

Whatever the answer as a matter of law informed by policy, it would be very difficult perhaps at a political level for the States to legislate away any of the long accepted grounds of jurisdictional error. As Chief Justice French put it:

> Executive power is essential to the functioning of government. Judicial power is essential to the rule of law. Ultimately the judicial power relies not only upon the confidence of the people but also upon the power of the State to make its exercise effective. Importantly, it is not the only constraint, nor always the most significant constraint upon the abuse of executive power. In a responsible government where ministers are truly answerable to the parliament and where there is a vigorous, sceptical and well-informed media, political realities can impose their own limits upon what even a powerful executive can do.[86]

The second question

The second question is more difficult. Despite this, it is a question worth exploring. What is or may be the extent to which fact-finding errors can be the subject of judicial review? This is, in my opinion, an important practical question facing Australian courts in the development of administrative law.

As the law presently stands, errors in fact-finding are treated differently according to the basis upon which they are said to be jurisdictional errors. If the fact in question is a jurisdictional fact, or is determinative of a jurisdictional fact, a review court will undertake a merits review of that

finding: that is to say, it will substitute its own finding of fact for that of the primary decision-maker if it is satisfied that the decision-maker was wrong. The position is the same, for example, if the jurisdictional error complained of is bias. On the factual question – or, more precisely, on the factual aspects of the question – whether the primary decision-maker was affected by bias, the review court will make its own findings.

The High Court has rejected the notion that jurisdictional error is confined to error of law.[87] Yet uncertainty pervades this aspect of the law when it comes to errors of fact; or, more precisely, errors of fact-finding. The issue is whether the notion of jurisdictional error embraces minimum standards of fact-finding; or, put another way, whether competent fact-finding is legally essential in some, or in most, or in all statutory contexts. From the point of principle, the issue is one of defining, typically under statute, the function and power that has been vested in the decision-maker. Just as the courts developed the notion that procedural fairness is essential to performance of function and exercise of power, so, too, the question is whether competent fact-finding is essential in administrative decisions.

Review in England is now available for fundamental error of fact.[88]

Traditionally, in this country, the courts have set their face against any kind of "merits review" and that factual matters (other than jurisdictional facts) were always in that category. Professor Aronson has said the net result until recently was an uncertain equilibrium between the common law's general refusal to contemplate factual review, counterbalanced by more or less covert ways around that refusal by resort to other grounds of review.[89]

The High Court, although not unanimously, has consistently declined review for substantive unfairness.[90] Moreover, *Wednesbury* unreasonableness is not established merely because a tribunal gives inadequate weight to certain matters and undue weight to others.[91]

The High Court, in *Ex parte Applicant S20/*2002,[92] recognised, it is argued by some and doubted by others, a separate ground of review of "serious illogicality or irrationality" separate from, but no less demanding than, that of *Wednesbury* unreasonableness which is now limited to supervising discretionary outcomes from administrative decision-making.

The sense one has is that a significant proportion of executive decisions that are wrong are wrong because of reasons to do with fact-finding; and that many of these find their way to the review courts on the back of some attempt to fit the case into a better-established head of jurisdictional error.

Historically, deference has been paid by reviewing courts to findings of a "specialist tribunal" by reason of its presumed qualifications and expertise in the area of jurisdiction conferred upon it.

In *Kirk,* in effect, this was brought into question. Justice Heydon was forthright, observing that setting up a specialist court presents the difficulty that such court "tends to lose touch with the traditions, standards and mores of the wider profession and judiciary".[93]

The joint judgment in *Kirk*[94] referred to what Jaffe had said more than 50 years ago:

> Jaffe[95] expressed the danger, against which the principles (of jurisdictional error) guarded, as being that "a tribunal preoccupied with special problems or staffed by individuals of lesser ability is likely to develop distorted positions. In its concern for its administrative task it may strain just those limits with which the legislature was most concerned.

The joint judgment then generously observed that it was not useful to examine whether Jaffe's explanation as to why distorted positions arose was correct but rather to see that distorted positions do not arise. It is that quest, at the level of fact finding, which presents a real challenge. Specialist tribunals may often have the expertise in making evaluative or discretionary decisions once relevant primary facts have been found. The same, certainly when compared to the experience of the judiciary, cannot necessarily be said as to their fact-finding ability. There are recognised but limited exceptions where the Court will perform a factual merits review. Nonetheless, it might be asked why a superior court should in the main pay complete deference to findings of fact by a tribunal. Administrative law

countenances the authority of inferior courts and tribunals to go wrong, that is, to decide matters within jurisdiction incorrectly.[96] This concept is a difficult pill to swallow for a party on the wrong end of a decision arrived at "incorrectly", particularly when it involves incorrect findings of fact. Are there any seeds of promise in *Kirk* that this might one day change? Time, no doubt, will tell.

Endnotes

* I gratefully acknowledge the assistance of Mr John Manetta, Barrister, Melbourne, in the preparation of this paper.

1. *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.
2. "The Centrality of Jurisdictional Error", Keynote address delivered by Chief Justice J. J. Spigelman to the AGS Administrative Law Symposium: Commonwealth and New South Wales, Sydney, 25 March 2010.
3. *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 586.
4. A paper delivered by Chief Justice R. S. French, *The Executive Power*, Sydney University, Inaugural George Winterton Lecture, 18 February 2010.
5. A. Inglis Clark, "The Supremacy of the Judiciary under the Constitution of the United States and under the Constitution of the Commonwealth of Australia" (1903) 17 *Harvard Law Review* 1 at 18-19.
6. *Pape v Commissioner of Taxation* (2009) 238 CLR 1; *Lane v Morrison* (2009) 239 CLR 230; *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319.
7. (2009) 238 CLR 1 at [10].
8. *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 187.
9. Administrative Appeals Tribunal (Cth) established 1976

   ACT Civil & Administrative Tribunal established 2009

   Administrative Decisions Tribunal (NSW) established 1998

   Victorian Civil & Administrative Tribunal established 1998

   Queensland Civil & Administrative Tribunal established 2008

   State Administrative Tribunal (WA) established 2005.

   The Tasmanian Administrative Review Advisory Council recommended the establishment of a Tasmanian Civil & Administrative Tribunal in 2003 but has not been established as yet.

   The Magistrates Court of Tasmania has an administrative appeals division

   There is no administrative tribunal in the Northern Territory

   In South Australia there is no administrative tribunal. They have various small subject based tribunals and the District Court hears administrative appeals.
10. M. Warren, "The Growth in Tribunal Power", paper delivered to the Council of Administrative Tribunals, 7 June 2004.
11. Victorian Administrative Appeals Tribunal; Anti-Discrimination Tribunal; Credit Tribunal; Domestic Building Tribunal; Estate Agents Disciplinary and Licensing Appeals Tribunal;

Guardianship and Administration Board; Residential Tenancies Tribunal; and the Small Claims Tribunal. It also took on a range of licensing appeals functions as well as inquiry and disciplinary functions.

12. Retails tenancies, and significantly, fair trading and domestic building disputes: *Retail Leases Act* 2003 (Vic) ss 89 and 98; *Fair Trading Act* 1999 (Vic) ss 11, 112 and 164; *Domestic Building Contracts Act (Vic)* 1995 ss 57 and 134.

13. *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331.

14. Paper delivered at the Annual General Meeting of the Victorian Chapter of the Australian Institute of Administrative Law Inc on 13 November 2003 at Parliament House, Melbourne.

15. *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

16. *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [14] per Gaudron and Gummow JJ, Gleeson CJ concurring; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at [165] per Kirby J.

17. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 per Gleeson CJ at [5].

18. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.

19. (1982) 154 CLR 25 at 70.

20. (2007) 228 CLR 651.

21. S Gageler, "Impact of migration law on the development of Australian administrative law" (2010) 17 *Australian Journal of Administrative Law* 92 at 95-96.

22. *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417.

23. [1969] 2 AC 147.

24. [1983] 2 AC 237 at 278; *R v Greater Manchester Coroner; Ex parte Tal* [1985] QB 67 at 81-83.

25. (1995) 184 CLR 163 at 179. (However, as Keane CJ noted recently:

    … but in that case, the High Court's refusal to abandon the distinction was explicitly pronounced only in relation to the position of an inferior court: administrative agencies and tribunals were expressly put to one side for the purposes of the court's decision: *Craig v South Australia* (1995) 184 CLR 163 at 178. Further, the High Court referred with apparent approval to the statement in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171 by Lord Reid in relation to administrative tribunals: "[T]here are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

    P. A. Keane, "Legality and merits in administrative law: an historical perspective", (2009) 1 *Northern Territory Law Journal* 117 at 118.

26. *Kirk* (2010) 239 CLR 531 at [65].

27. *R v Hull University Visitor; Ex parte Page* [1993] AC 682 at 696, 702; Lord Diplock, "Administrative Law: Judicial Review Reviewed", (1974) 33 *Cambridge Law Journal* 233 at 242-243.

28. *Houssein v Under Secretary Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 92-95; *Hockey v Yelland* (1984) 157 CLR 124 at 130; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371-372, 377; *Public Service Association (SA) v Federated Clerks' Union(SA Branch)* (1991) 173 CLR 132 at 141, 149, 165; *Craig v South Australia* (1995) 184 CLR 163 at 178-179; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208-209 [29]-[32], 226 [78]; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 439-440 [173], 462-463 [253]-[254]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 507 [79]-[81]; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 675 [70].

29. (1990) 170 CLR 1 at 35-36.

30. (1996) 185 CLR 259 at 272.

31. (1995) 184 CLR 163 at 179.

32. *Kirk* (2010) 239 CLR 531 at [72]

33. (1995) 184 CLR 163.

34. *Kirk* (2010) 239 CLR 531 at [72]-[73].

35. (1995) 184 CLR 163.

36. A jurisdictional fact has been variously characterized as "a condition of jurisdiction": *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 429-430; "a preliminary question on the answer to which … jurisdiction depends": *The Queen v Judges of the Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 125; "the criterion, satisfaction of which enlivens the power of the decision-maker: *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [43]; an "event or requirement" constituting "an essential condition of the existence of jurisdiction": *Craig v South Australia* (1995) 184 CLR 163 at 177. What facts are jurisdictional is fundamentally a matter of statutory interpretation.

37. *Kirk* (2010) 239 CLR 531 at [73].

38. *Kirk* (2010) 239 CLR 531 at [71].

39. RS French, above n 4.

40. *Kirk* (2010) 239 CLR 531 at [102].

41. *Kirk* (2010) 239 CLR 531 at [73].

42. *Kirk* (2010) 239 CLR 531 at [75].

43. (2003) 211 CLR 476 at 512 [98].

44. *Kirk* (2010) 239 CLR 531 at [95].

45. Part III s 85(1) of the *Constitution Act 1975 (*Vic) confers unlimited jurisdiction upon the Supreme Court of Victoria as the superior Court of that State. It is open to amend that section upon a vote of both Houses of the Victorian parliament.

46. JJ Spigelman, above n 2.

47. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 141-142.

48. (2006) 228 CLR 45 at 76 [63].

49. (2004) 223 CLR 575 at 617.

50. *Kirk* (2010) 239 CLR 531 per majority at [97]; *Australian Courts Act 1828 (Imp)* (9 Geo 4 c 83), s 3, which conferred jurisdiction on the Supreme Court of New South Wales and the Supreme Court of Van Diemen's Land; *Supreme Court Act 1890 (Vic)*, s 18; *Supreme Court Act 1867 (Qld)*, ss 21, 34; *Act No 31 of 1855-56 (SA)*, s 7; *Supreme Court Act 1880 (WA)*, s 5, picking up *Supreme Court Ordinance 1861 (WA)*, s 4.

51. *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 440. Despite the submissions of Victoria and South Australia, intervening, that colonial legislatures had enacted statutory privative provisions in order to deny the remedy of certiorari, the joint judgment in *Kirk* pointed out that the Privy Council in *Colonial Bank of Australasia v Willan* said of such provisions, that there are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari.

52. *Kirk* (2010) 239 CLR 531 at [98].

53. *Kirk* (2010) 239 CLR 531 at [98].

54. *Kirk* [2010] 239 CLR 531 at [99].

55. Professor Louis Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact", *Harvard Law Review*, vol 70 (1957) 953 at 963.

56. *Kirk* (2010) 239 CLR 531 at [105].

57. The Industrial Commission became the Industrial Court during the pendency of the proceedings in *Kirk*.

58. (2006) 225 CLR 237.

59. *Kirk* (2010) 239 CLR 531 at [96].

60. *Kirk* (2010) 239 CLR 531 at [98].

61. *Kirk* (2010) 239 CLR 531 at [99].

62. *Kirk* (2010) 239 CLR 531 at [100].

63. *Kirk* (2010) 239 CLR 531 at [73].

64. Aronson, Dyer & Groves, *Judicial Review of Administrative Action*, 4th ed., 2009 at [5.65].

65. *Ibid.*, at [5.70].

66. Kirby J expressed the same view in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [122].

67. *Kirk* (2010) 239 CLR 531 at [72].

68. *R v Dunphy; Ex parte Maynes* (1978) 139 CLR 482, *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371 and *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132.

69. *Kirk* (2010) 239 CLR 531 at [57].

70. G. Sawer, "Error of Law on the Face of an Administrative Record", *University of Western Australia Annual Law Review,* vol 3 (1956) 24, at 34-35.

71. *Kirk* (2010) 239 CLR 531 at [64].

72. L. Jaffe, above n 55, at 963 (footnote omitted).

73. C. Finn: "Constitutionalising supervisory review at State level: The end of Hickman?" (2010) 21 PLR 92 at 103.

74. C. Finn, above n 73, at 104.

75. (2000) 204 CLR 82 at [163].

76. J. J. Spigelman, above n 2.

77. *Kirk* (2010) 239 CLR 531 at [100].

78. *Abebe v The Commonwealth* (1999) 197 CLR 510 at 553 [112] per Gaudron J; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 100 per Gaudron and Gummow JJ.

79. *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36; *Ex parte Aala* (2000) 204 CLR 82 at [40] per Gaudron and Gummow JJ.

80. (2000) 204 CLR 82 at [41].

81. *Annetts v McCann* (1990) 170 CLR 596 at 598; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [126] per McHugh J.

82. (2000) 204 CLR 82 at [42] per Gaudron and Gummow JJ.

83. (2000) 204 CLR 82 at [166].

84. Jeremy Kirk, "The entrenched minimum provision of judicial review" (2004) 12 *Australian Journal of Administrative Law* 64.

85. (2003) 211 CLR 476 at [103] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; as well as *Re Minister for Immigration and Multicultural Affairs; Exparte Applicant S20/2002* (2003) 198 ALR 59 at [27].

86. R. S. French, above n 4, at 17.

87. (2003) 198 ALR 59.

88. *R v Criminal Injuries Compensation Board; Ex parte A* [1999] 2 AC 330; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at 321 and 355; *Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430 at 451.

89. Aronson, Dyer & Groves, *op. cit.*, at [4.405].

90. *Attorney-General (NSW) v* Quin (1990) 170 CLR 1 at 36 per Brennan J; *In Re Minister for Immigration and Multicultural* Affairs; Ex parte Lam (2003) 214 CLR 1 at 9-10 and 34.

91. *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

92. (2003) 198 ALR 59.

93. *Kirk* (2010) 239 CLR 531 at [122].

94. *Kirk* (*2*010) 239 CLR 531 at [64].

95. Jaffe, *op. cit.*, at [64].

96. (2000) 204 CLR 82 at [163] per Hayne J.

Chapter Eleven

Parliamentary Democracy, Criminal Law and Human Rights Bodies

Christian Porter

There are an increasing number of very important public policy issues in Australia subject to consideration and determination by quasi-judicial international bodies on the basis of how, in their view, a particular result of legislative action or administrative decision-making does or does not conform with a "human right", which may be elsewhere defined in an international human rights document.

This paper seeks to make several related points regarding the determinations by these international arbitral bodies. The first relates to the nature of the determinations, considered in light of prevailing standards that are relevant to the public policy areas under consideration.

The second point relates to the legal quality of the decisions, considered by way of a comparison between the determinations reached by international human rights bodies in question and decisions made by domestic Australian courts. Central to this part of the analysis will be an observation that there are emerging instances whereby the "non-binding" decisions made by international human rights bodies have reached entirely different conclusions to domestic courts, including the High Court of Australia, in circumstances where the factual and legal questions under determination are very similar or, indeed, precisely the same.

The third and final point relates to a possible consequence of a divergence of authority between domestic courts and human rights bodies considering very similar issues relating to specific legal questions dealing with human rights issues. With respect to this issue, it is a point sometimes made that the determinations of human rights bodies (both domestic and international) are non-binding; and that, as a consequence, these decisions are merely educative or advisory, such that a divergence in the conclusions that they reach, either from prevailing community opinion or Australian courts is not an issue which is not problematic. This argument proposes that divergent outcomes do not mean, in practice, that domestic legislators and administrators are subject to separate and different standards. This paper will consider whether and to what extent a divergence in legal standards on key issues relating to public policy and public administration may come to affect the practical operation of Australian governments (both State and Commonwealth) and their constitutional interaction.

Human rights decisions as public policy outcomes

There are two broad ways in which the quality of decision-making by human rights arbitral bodies might be assessed. Firstly, the legal quality of the decision-making of different bodies can be assessed where an Australian appellate court has reached conclusions on the same series of facts and is applying those facts to similar legal tests and principles. Cases are now starting to emerge that allow for such a comparison and some of those cases will be examined in this paper. To anticipate one of the conclusions of this analysis, there is cause to conclude that when considered alongside decisions of Australian domestic courts, international human rights bodies are making determinations which are wrong at law.

The second means of assessing the quality of decisions made by human rights bodies is inherently more subjective. In this regard, this analysis contends that determinations made by human rights

bodies involve considerations about appropriate public policy outcomes where different interests are being balanced against each other. And, further, that it is the case that the determinations of human rights bodies as to what is the appropriate balance between competing interests or values in a given public policy area is often inconsistent with determinations made on the same topic by courts who ultimately owe their decision-making authority to democratically-elected parliaments.

I have elsewhere set out the way in which the types of decisions being made pursuant to human rights documents or provisions are more in the nature of balancing exercises between competing rights in a select area of public policy than they are decisions which can be properly characterised as decisions protecting and preserving fundamental and consensually agreed rights against state action.[1]

It is not the purpose of this paper to restate those arguments. However, by way of summary, these arguments rest on the fundamental descriptive proposition of value pluralism; being a contention that values (or rights) exhibit one central feature. Notably, that they cannot be simultaneously obtained but, rather, that values (or rights) are in constant conflict with each other and that choices between different and thereby competing values is agonistic in the sense that choosing more of one value (or right) invariably means accepting less of another. In turn, the idea of value pluralism is fundamental to a descriptive view that decisions as between competing rights are fundamentally decisions reaching appropriate public policy outcomes and is also fundamental to the allied philosophical view that elected representatives are best placed to make determinations of public policy.

In short, if the descriptive concept of value pluralism is accepted, it can be seen as the reason why it is that what courts are most often called upon to do when determining questions arising under rights documents or human rights provisions is, fundamentally, to engage in setting public policy outcomes.

While not the only focus of this paper, it is useful to provide one example of this phenomenon as a means of placing the points made later in context.

Aurukun Shire Council v Chief Executive, Office of Liquor Gaming and Racing in the Department of Treasury (2010) 265 ALR 356 (*Aurukun*) is squarely a case dealing with determinations arising under statutory provisions which are commonly considered to establish and protect human rights. Indeed, it is instructive that the head note describing the case simply commences with the capitalised words, "HUMAN RIGHTS".

Aurukun dealt with an appeal by the Aurukun Shire Council (a shire with residency rights largely restricted to aboriginal residents). The issue which arose for consideration in *Aurukun* was whether amendments made in 2008 to the *Liquor Act* 1992 (Qld) (the Liquor Act) were inconsistent with s. 10 of the *Racial Discrimination Act* 1975 (Cth) (the RDA). The relevant amendments had the effect of ensuring that the general liquor licence held by each of the appellant shire councils was brought to an end on 1 July 2008. And, further, that the appellants, as well as all other local government authorities in Queensland, were barred from applying for or holding such a licence in the future.

The appellants were local government authorities constituted under the *Local Government Act* 1993 (Qld) for a local government area within Queensland. Prior to 1 July 2008 each of the appellants held a general liquor licence under the Liquor Act whereby it was authorised to sell alcohol from premises within its local government area.

It was then the case that the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act* 2008 (Qld) (the amending Act) amended s. 106 of the Liquor Act by the introduction of s. 106(4) which was is in the following terms: "(4) Also, a local government, corporatised corporation or relevant public sector entity may not apply for or hold a general licence".

The amending Act also introduced into the Liquor Act certain transitional provisions, where the effect of s. 278 of the Amending Act was to cause the general licences held by "a local government, corporatised corporation or relevant public sector entity, other than the Torres Strait Island Regional Council" to lapse at the beginning of 1 July 2008. The operation of s. 278 was, by virtue of ss. 278(2)

and 279, subject to the decision of the Chief Executive, to continue the licence in force until 31 December 2008 but no later.

In consequence of these legislative changes, a central argument raised by the appellants was that the amending Act was calculated to affect only "Indigenous councils". This term, the appellants argued, meant local authorities governing local government areas with mainly indigenous residents. The argument in essence was that the appellant local authorities were said to be the specific target of the amending Act because they were the only "local government, corporatised corporations or relevant public sector entities" in Queensland which actually held general licences under the Liquor Act prior to the amending Act.

His Honour Justice Keane noted that s. 10(1) of the RDA did establish rights to property including indigenous forms of property holdings but that, to the extent that the legislation sought to advance or protect a specified right, the right of the kind protected was not absolute and would be subject to other legislative provisions. And, further, that these other legislative provisions may well have the effect of cutting across the right established by the RDA and could do so if these provisions were themselves seeking to advance or protect other legitimate rights.

His Honour Justice Keane further observed that that the Queensland Legislature was entitled, if not obliged, to address the claims of women and children in Aurukun and Kowanyama communities pursuant to Article 5(b) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD)[2]. Article 5(b) of CERD seeks to advance and protect a right, being, "[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution". A finding of fact made in *Aurukun* was that there existed an undisputed connection between alcohol consumption and what was described as the notorious domestic violence in Aurukun and Kowanyama. The conclusion was then drawn that domestic violence against women and children is an issue of fundamental concern in terms of human rights, involving, as it does, concerns as to human dignity and freedom from fear and that the amending Act was a legislative expression of the right referred to in Article 5(b) of CERD.

His Honour Justice Keane then went on to say:

> It may be said immediately that it is difficult to accept that the opportunity to buy alcohol from a licensed local government authority can rationally be placed on the same level of importance in any frame of reference with the right of women and children to live free of alcohol-fuelled violence. But even if one assumes that the appellants are able to point to a fundamental freedom or human right with an equal claim to protection with the fundamental human right of women and children to be protected against personal violence, the striking of the balance between these competing human rights is, as *Bropho v Western Australia* (2008) 169 FCR 59 shows, a matter for the legislature.[3]

The value pluralist conception of ethics proposes that, while some degree of commonality in human nature can provide support for the idea of a stable pool of objectively good ends or values (sometimes characterised as rights), reason cannot function as a perfect arbiter in conflicts among good ends or universally accepted values. Translated to the *Aurukun* circumstances, this idea holds that the right of freedom of choice embodied in the opportunity to buy alcohol from a licensed local government authority is a validly, agreed-upon value, just as is the right of women and children to live free of alcohol-fuelled violence. But, also, each of these rights is clearly in conflict in the relevant circumstances.

Justice Keane's observation that it is difficult to accept that the opportunity to buy alcohol from a licensed local government authority can rationally be placed on the same level of importance in any frame of reference with the right of women and children to live free of alcohol-fuelled violence

is an interesting one. Certainly, in the particular circumstances relevant to *Aurukun*, a difficulty in considering the right to buy alcohol as deserving precedence is readily understandable. It is not impossible, however, to envisage a circumstance where a freedom of choice represented by an opportunity to purchase alcohol might be considered of a higher order; much would depend on the particular facts and circumstances. If denial of a choice to purchase alcohol was systematic, thorough-going and indicative of other deficiencies in one particular group's freedom of choice to purchase goods and services, this might change the calculus between the two rights in question. The central point being made by Justice Keane is, nevertheless, perfectly correct and highly reflective of a value pluralist conception of decisions pursuant to rights documents.

This point aside, what Justice Keane recognises is that the amending Act represents an attempt by the legislature to strike a balance in a particular public policy problem which accords primacy to the reduction of alcohol-related violence to women and children in the community in question.[4] The situation was described in the following terms:

> Nothing in s. 10 of the RDA or, for that matter, in CERD or the UDHR or the ICCPR, is apt to deny the legislature of the State the power and responsibility to strike the balance of priority between human rights and freedoms where those rights are in competition with each other. That this should be so is hardly surprising given that, if the setting of the balance of priority between human rights where those rights are in conflict in any given situation was intended to be a matter for the exercise of judicial judgment, then the instruments or statutes which establish the content of human rights or provide for their enforcement might have been expected to provide a hierarchy of these rights. Absent some statement of priority in the instruments which establish the rights and freedoms protected by s. 10 of the RDA, a decision-maker forced to choose between right and right must make an intuitive value judgment between incommensurable values.[5]

This case well reflects the difficult practical operation of judicial decision-making in rights cases in the light of the theory of value pluralism.

The case illustrates that value pluralism finds its inevitable manifestation in the realm of rights documents in a way that means judicial decisions consequent upon such documents are rarely determinations about singular rights themselves but are rather determinations about public policy outcomes where one or more rights are in conflict. In this sense, it can be perceived that what is actually contained within rights documents is not much more than various lists and reformulations of those things that Isaiah Berlin, in his theory of value pluralism, considered might be identifiable agreed values.[6] If this is the case, and it can be accepted that what Berlin says about values is correct, then rights documents simply contain values in inevitable conflict and what invariably occurs in decisions arising from rights documents are simply determinations about what mix of values is to be preferred over another mix. Which is to say that, judicial decisions consequent on rights documents are most often simply public policy outcomes to which there may exist several equally justifiable positions or commensurate outcomes.

Indeed, in the *Aurukun* decision, Justice Keane uses the description of incommensurability. Incommensurability is the concept at the heart of Berlin's theory of value pluralism. It is the idea that there exist multiple commensurate outcomes to public policy decisions about values which lends power to the philosophical suggestion that judicial decision-making amongst commensurate outcomes is politically illegitimate for the reason that it subverts democratic values by privileging the views as to the appropriate public policy outcome of a small number of unelected decision-makers over those of elected representatives and that, in so doing, it disenfranchises ordinary citizens.

To restate this argument – it is certainly the case that views may rationally differ as to whether the balance between competing values has been well struck in any particular public policy problem. It is

precisely this point that makes rights documents so controversial because they exhibit the potential to elevate the view of the judiciary, or small parts of it, above the view of past, present and future democratically elected parliaments.

It should be noted that to argue that domestic courts which are arbitrating matters pursuant to human rights provisions are ultimately making determinations of public policy (and that they are ultimately not best placed to so) is not a criticism of Australian courts in the sense of any accusation that this a role which the judiciary has coveted. Many sensible judicial officers understand that advancing the role of the courts in public policy decision-making is to engage in inherently political (and controversial) decisions which would likely serve only to diminish the well deserved reputation of Australian domestic courts for independence, political impartiality and excellence. So it was that in *Aurukun* that there was a recognition by Justice Keane that a judicial decision in the matter in question would have had the effect of denying the legislature of the State the power and responsibility to strike the balance of priority between human rights and freedoms where those rights are in competition with each other.

Rather than there necessarily being a pull from the judiciary to make such decisions, it has been a cumulative push effect of a range of human rights type provisions. Whether the provisions are in domestic legislation or international rights documents, the provisions have resulted in elected parliaments at the State and federal level siphoning off difficult decisions to courts that should properly have been made by executive governments and legislatures. This phenomenon, of courts making decisions which are inherently determinations of public policy, would have been radically accelerated if the High Court were called upon to assess the validity of legislation based on the provisions of a statutory human rights document or, indeed, a constitutionally-entrenched Bill of Rights. Both of these possibilities have thankfully been rejected by the two mainstream Australian political parties at least for the foreseeable future. However, as this analysis will argue, when considering the public policy decision-making role of bodies arbitrating on human rights provisions, domestic Australian courts are only a small part of the story.

A central contention of this paper is that the determinations being made pursuant to provisions purporting to enshrine or advance a particular human right in legislation or some other document are increasingly being made not merely by domestic Australian courts but also by quasi-judicial bodies, both domestic and international. And, further, that these determinations are both out of step with accepted judicial precedent as well as public opinion as to what is the appropriately balanced public policy outcome.

Making any point which involves an assessment of a public policy outcome against prevailing community standards relevant to the public policy area in question is necessarily a subjective process. It is to be expected that some argument may arise as to the central features of what may be a general public view as to a particular public policy outcome. The very process of formally expressing that any particular outcome is widely held by a majority of the public is a reductive process attempting to put in short summary form the common elements of a wide range of individually held views.

Elected public policy-makers invariably claim insight into community sentiment. Those claims are often subject to overstatement and disagreement. Notwithstanding the difficulties associated with reaching a determination of general public sentiment, there is good reason to believe that key determinations being reached by human rights bodies significantly diverge from the public policy outcomes that are likely desired by the majority of electors if for no other reason than that the former decisions often override the legislative decisions of parliaments or administrative decisions of elected executive governments.

One recent decision of the Australian Human Rights Commission that can be argued to demonstrate such a divergence is *Mr KL v State of NSW (Department of Education) (KL)*[7].

The complainant in *KL* had been charged and convicted with a number of offences committed between 1983 and 1992. These charges included "the possession and use of amphetamines, illegal

use of a motor vehicle, break and enter offences, dishonesty offences and stealing".[8] Of particular importance was the fact that some of these offences were committed after a term of imprisonment in 1991. In total, KL served eight months imprisonment.[9] Upon completing a Bachelor of Music Education in 2003 and a Graduate Diploma in Education in 2006, KL then applied for a teaching position with the NSW Department of Education through its graduate recruiting program. After reviewing his application, including his previous criminal convictions, the Department refused KL a position. KL's application was later reviewed by an independent reviewer engaged by the Department who recommended that KL be granted limited casual teacher approval for a period of 12 months with the opportunity for his application to be reviewed after this period. The Department, having considered this recommendation, continued to uphold its original decision.

KL further complained to the Australian Human Rights Commission on the basis that his exclusion from teaching amounted to discrimination under the definition in s. 3 of the *Australian Human Rights Commission Act* 1986 (Cth). The definition of discrimination under s. 3 of the Act outlines that an exclusion which would otherwise amount to discrimination is not properly characterised as discrimination if it is based upon the inherent requirements of the job. The President of the Australian Human Rights Commission, the Hon Catherine Branson, concluded that, even though, "at first blush, it may appear difficult to see how a person with the criminal record held by Mr KL could meet [the inherent job] requirements",[10] the Department had failed to "demonstrate a sufficiently 'tight correlation' between the decision not to offer Mr KL employment and the inherent requirements of the job".[11] Her decision was based upon KL's current involvement with his community and the changes he had made to his life as well as the length of period since his last offence.[12]

President Branson was satisfied on all the circumstances that there were no additional steps that KL could have undertaken over the period of time to support "the evidence of his rehabilitation and his commitment to making a contribution to society and to the education system".[13] Along with this, President Branson recommended that the Department pay to KL $38 500 in compensation for hurt, humiliation and distress; loss of earnings; and loss of opportunity.[14]

This paper will return to this decision below. Here, however, it is useful simply to note that it can be readily contended that the outcome determined by the Department under instruction from the executive government was an administrative decision which would be preferred by an overwhelming majority of citizens. It is based on a strict ban on serious offenders (and, thereby, sacrificing their rights to teach) in favour of a further value producing a policy outcome which weighs the protection of children as paramount.

The legal quality of international human rights decisions

There is an issue further to the necessarily subjective analysis regarding whether the decisions of quasi-judicial human rights bodies reach conclusions that strike the same balance between competing values as would be produced by the democratic parliamentary process. This is the question of the legal quality of the decisions.

With an increasing number of decisions being made by quasi-judicial human rights bodies at the international level an opportunity is presented to compare the legal reasoning between these bodies and Australian domestic courts.

Before proceeding to examine the matters of *Fardon* and, later, *Tillman*,[15] it is necessary to consider briefly the international agreement that is the genesis of these two decisions.

The *International Covenant on Civil and Political Rights* (the ICCPR),[16] which is monitored by the United Nations Human Rights Committee (the UNHRC), was signed by Australia on 18 December 1972 and ratified on 13 August 1980. The ICCPR seeks to protect certain rights that have been deemed by signatories as necessary for enforcement. The ICCPR commits signatories to protecting the civil and political rights of its citizens in a manner consistent with the covenant. Relevant to this paper are articles 9 and 14:

> Article 9 recognises the right to liberty and security of protection, as well as protection for citizens from being subject to arbitrary arrest or detention.[17] Article 14 relates to the right of equality before courts and tribunals.[18]
>
> Specifically, Article 14, paragraph 7 protects citizens from double punishment, notably from being 'tried or punished again for an offence for which he has already been finally convicted or acquitted.'

In Communication No. 1692/2007, the UNHRC considered the matter of Robert John Fardon. Mr Fardon's criminal history dated back to the age of 16 involving mostly minor property and other non-violent offences. His first sexual conviction was in 1967 when he was convicted of attempted carnal knowledge of a girl under the age of 10 years. In 1979 he was convicted of indecent dealing with a female under 14 years, rape and unlawful wounding. Within a month of his release from prison in 1988 he raped and sodomised a woman and was later sentenced to another 14 years imprisonment. The legislation at issue was the *Dangerous Prisoners (Sexual Offenders) Act* 2003 Qld (the DPSOA), which came into force on 6 June 2003. Before Fardon's anticipated release pursuant to the expiry of his final 14-year term of imprisonment, the Queensland Attorney-General filed an application under the DPSOA for an order that Fardon be detained for an indefinite period pursuant to s. 13 of the DPSOA.

On 27 June 2003 the Queensland Supreme Court ordered the interim detention of Fardon until 4 August 2003. This date was subsequently extended until 3 October 2003 and then again until further order.

Fardon's detention continued until the 8 November 2006 when the Supreme Court, after two preceding preliminary decisions, ordered his release subject to a conditional supervision order, which would end on 8 November 2016. Fardon was released pursuant to the conditional supervision order on 4 December 2006.

It should be noted that in July 2003 the Queensland Supreme Court held that the provisions in the DPSOA were constitutional.[19] This decision was upheld by the Court of Appeal in September 2003 and, later, by the High Court of Australia in *Fardon v Attorney-General (Queensland)* (*Fardon*) in October 2004 by a 6-1 majority (Kirby J dissenting).[20] Many of the bases upon which the validity of the decision in *Fardon* were considered by the High Court bear close resemblance to the issues considered in the UNHRC decision and allow for a direct comparison.

Fardon argued in his communication to the UNHRC that he has not been convicted of a crime since 29 June 2003 and that his continuing detention was a breach of his human rights. Specifically, that his detention under the DPSOA violated the ICCPR because his imprisonment was arbitrary and it punished him for an offence for which he had already been convicted and thus constituted double punishment without further determination of criminal guilt.[21]

As a part of his submissions to the UNHRC Fardon maintained that the DPSOA's objectives could have been achieved through detention in a rehabilitative or therapeutic facility and that the punitive character of his detention could not be rationally connected to the DPSOA's objective of facilitating rehabilitation. The state party (being Australia) argued that the detention of Fardon was lawful, reasonable and necessary in the circumstances. This was because he needed intensive counseling and rehabilitation that was not available in psychiatric facilities and, additionally, Fardon had refused to undertake any rehabilitation program during his initial sentence. While these arguments were accepted by a two-person minority of committee members, the UNHRC majority found in favour of Fardon and ruled that the relevant decision under the DPSOA breached the ICCPR.

The majority found that the central question arising for their determination was "whether, in their application to [Fardon], the provisions of the DPSOA under which the author continued to be detained after his 14 year term of imprisonment were arbitrary".[22] On this question, the majority

noted that each of their reasons, in itself, would have constituted a violation of the UNCCPR, article 9 and did not find it necessary to consider the matter separately under article 14, paragraph 7.[23]

In the summary of the reasons appearing at [7.4] of the decision, five key points may be made:

> The majority found that Fardon had "already served his 14 year term of imprisonment and yet he continued . . . to be subjected to imprisonment in pursuance of a law which characterises his continued incarceration under the same prison regime as detention". The majority contended "that this purported detention amounted, in substance, to a fresh term of imprisonment which, unlike detention proper, is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law".
>
> The majority also contended that imprisonment is penal in character and therefore "can only be imposed on conviction for an offence in the same proceedings in which the offence is tried". The majority in effect concluded that while the order was made in respect of predicted future criminal conduct, because this prediction had its "very basis" in the offence which he had served already, there was a new sentence in fresh proceedings for the same offence which constituted a breach of Article 15, paragraph 1, of the ICCPR. And, further, that the new proceedings also fell within the prohibition of Article 15, paragraph 1, against retroactive application of punitive legislation due to the fact that the DPSOA was enacted shortly before Fardon's term was to be completed for the offence for which he was imprisoned for 14 years in 1989. The conclusion was that because the detention was incompatible with Article 15 it was "necessarily arbitrary within the meaning of Article 9, paragraph 1, of the Covenant".
>
> The DPSOA procedure, which brought about the continuing detention, by being civil in character, did not meet the due process guarantees required under Article 14 of the Covenant for a fair trial in which a penal sentence is imposed.[24]
>
> The majority considered the fact the High Court of Australia had found that the detention order was not based on the author's criminal history and did not relate to the author's original offence but rather that it was preventative in character. Importantly (and to be referred to in detail below) the UNHRC noted that the prohibition against arbitrary arrest has limitations, particularly "where the procedures for doing so (detaining) are established by law". Critically, however, the majority considered that the "concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts". And, while the Court was required to take into account psychiatric expert advice as to Fardon's dangerousness, the Court also had to make a finding of fact on "the suspected future behavior of a past offender which may or may not materialise". Essentially, the majority in the UNHRC were considering "whether . . . the procedures for detaining a person deemed dangerous based on a domestic court's predictive assessment of future behavior were established by law" and found, in essence, that, being inherently problematic, they were not.
>
> The majority also concluded that, related to point 4 above, for the State to have avoided the arbitrariness of the DPSOA they should have "demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State Party had a continuing obligation under Article 10 paragraph 3 of the Covenant to adopt meaningful measures

for reformation, if indeed it was needed, of the author throughout the 14 years during which he was in prison".

In comparing the quality, in terms of legal correctness, of the UNCHR in *Fardon* to the High Court's consideration of the matter, it is obviously necessary to compare the reasoning and resultant determinations on like issues. On this point it is obviously the case that, ultimately, the UNHRC decision and the High Court decision in *Fardon* are offering judicial determinations of separate questions. The UNHRC decision related to whether the Queensland Supreme Court decision constituted a breach of the articles of the ICCPR detailed above, particularly whether the detention was arbitrary and thereby contrary to Article 9, paragraph 1.

By contrast, the High Court decision considered primarily a Chapter III constitutional question, notably, whether the Act *was* invalid in that it was contrary to the requirements of Chapter III of the Australian Constitution; the contention being that in involving the Supreme Court of Queensland in the process of deciding whether prisoners who have been convicted of serious sexual offences should be the subject of continuing detention orders, the Queensland Parliament conferred on the Supreme Court a function which is incompatible with the Court's position, under the Constitution, as a potential repository of federal jurisdiction. Restated, the point was that the conferred function was repugnant to the Court's institutional integrity. In essence, this was a question very similar to that identified in *Kable v Director of Public Prosecutions (NSW).*[25]

The Kable issue described above is distinct from the ultimate issue being decided by the UNHRC. However, in determining this ultimate issue the High Court had to make determinations on a range of sub-issues which were very similar to, if not precisely the same as, issues that the UNHRC was required to pronounce upon in order to make its own final determination. When the decision-making of the respective bodies is assessed on each of the three issues summarised below, the UNHRC reasoning is exposed as superficial, polemical and legally in error.

Predictive decision-making in criminal law

As noted above, the UNHRC majority at [7.2] and [7.3] considered the fact that the High Court of Australia had found that the detention order was not based exclusively on the author's criminal history and did not relate to the author's original offence but rather that it was preventative in character. The UNHRC also noted that the prohibition against arbitrary arrest has limitations "where the procedures for doing so (detaining) are established by law". Having properly recognised the clear limitations to rule against arbitrary detention in Article 9, it became necessary for the UNHRC to make a determination on the critical issue whether a preventative detention based on analysis that was predictive in character are "established by law".[26]

The UNHRC itself noted such procedures as legitimately including those employed for immigration control or the institutionalisation of persons suffering from a mental illness or other medical conditions which made them dangerous to themselves or the community. When the UNHRC chracterises the relevant question in terms of whether predictive procedures generally are "established by law," it was presumably meaning (as it later describes) that such procedures cannot be "lawful" if they themselves are arbitrary or "unreasonably or unnecessarily destructive of the right itself".[27] Based on this reasoning, the UNHRC had to make some determination as to the legitimacy of the predictive procedure at issue in the DPSOA, and its legitimacy, as well as making a determination about whether this was properly described as a civil or a criminal proceeding (this second issue is addressed below).

The best the UNHRC could do on this key question was to describe the procedure as *"problematic"*.[28]

The first problem with this depiction is that it is vague at least to the extent that it does not provide a conclusive answer to the question that required decision; notably, whether the process was "established by law" and was accepted as a lawful process. It is left to be presumed that "problematic" means unacceptable, improper or unlawful because of the proceeding description that the "concept

of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts".[29] And the further description that while the Court was required to take into account psychiatric expert advice as to Fardon's dangerousness, the Court also had to make a finding of fact on "the suspected future behavior of a past offender which may or may not materialize".[30]

Although vague, the UNHRC's position appears to be that a civil or criminal procedure that relies upon a predictive analysis of the likely nature of the subject's future criminal conduct based, in part, on their past history, but also on how this history and other matters such as the witness's mental condition are considered by expert witnesses as likely to affect the subject's future behavior is not a legitimate legal process. The conclusion by the UNHRC that the predictive process in *Fardon* is an illegitimate process not historically recognised at law and with no proper place in either the civil or criminal law is simply a wrong conclusion at law. Indeed, several of the judges of the High Court determined this issue specifically in their consideration of the *Kable* issue.

It is notable that Kirby J was the only judge that determined this issue in a substantively similar manner to the UNHRC. He held that:

> Imprisonment is not used as punishment in advance for crimes feared, anticipated or predicted in the future. To introduce such a notion of punishment, and to require courts to impose a prison sentence in respect of perceived future risks, is a new development. It is one fraught with dangers and "inconsistent with traditional judicial process".[31]

Indeed, Gleeson CJ considered the very same question but rather framed by Fardon's counsel as the point (going directly to the *Kable* issue) that the process was so devoid of content as to be meaningless and decided this question in the following terms:

> It was argued that the test, posed by s. 13(2), of "an unacceptable risk that the prisoner will commit a serious sexual offence" is devoid of practical content. On the contrary, the standard of "unacceptable risk" was referred to by this Court in *M v M* in the context of the magnitude of a risk that will justify a court in denying a parent access to a child.[32] The Court warned against "striving for a greater degree of definition than the subject is capable of yielding". The phrase is used in the *Bail Act 1980* (Q), which provides that courts may deny bail where there is an unacceptable risk that an offender will fail to appear (s. 16). It is not devoid of content, and its use does not warrant a conclusion that the decision-making process is a meaningless charade.[33]

Their Honours Callinan and Heydon JJ made this point very strongly in their joint judgment. They noted that "an unacceptable risk to the community, relevantly a risk established according to a high degree of probability, that the prisoner will commit another sexual offence if released, established on and by acceptable and cogent evidence, adduced according to the rules of evidence, is one which courts historically have had regard to in many areas of the law".[34]

In describing that this process is not a novel one, their Honours Callinan and Heydon noted the predictive exercise of an assessment of damages for future losses is also a daily occurrence in the courts and the prevalent use of predictive analysis in Family Court proceedings. They noted further that "section 13(6) of the Act uses the expression 'paramount consideration' which is similar to the expression 'paramount interests' referred to in *M v M*, and is one that is well familiar to, and regularly construed by family courts".[35]

These two judges also make the important point that, even in criminal proceedings, predictive analysis is a routine part of processes such as sentencing: "Sentencing itself in part at least may be

a predictive exercise requiring a court on occasions to ask itself for how long an offender should be imprisoned to enable him to be rehabilitated, or to ensure that he will no longer pose a threat to the community".[36]

Hayne J made a similar point in describing the sometimes lack of clarity in the distinction between civil and criminal proceedings and punitive and preventative detention:

> And once it is accepted, as it has been in Australia, that protection of the community from the consequences of an offender's re-offending is a legitimate purpose of sentencing, the line between preventative detention of those who have committed crimes in the past (for fear of what they may do in the future) and punishment of those persons for what they have done becomes increasingly difficult to discern.[37]

To have found, as they did, the UNHRC had to conclude that the type of predictive analysis inherent in the original decision to detain Fardon pursuant to the provisions of the DSOA was somehow a process foreign to the law or improper in either civil proceedings leading to preventative detention or criminal proceedings leading to punishment. What the judges of the High Court of Australia say above is that, while this analysis is not without its accompanying difficulties and one warranting cautious application, it is neither novel nor legally improper.

Indeed, as an aside on this point, the predictive analysis of the original decision of the Queensland court proved itself to be not entirely without merit. During his later release on strict supervision orders that was nominally to continue until 8 November 2016, Fardon breached his orders on two different occasions, one that resulted in three months imprisonment in 2007.[38]

At the time of the Human Rights Committee decision, Fardon had been in custody following sexual offence charges against an elderly woman in April 2008; at first instance in May 2010 Fardon was sentenced to 10 years imprisonment for that crime.[39] It should be fairly noted that, however, on appeal, the Queensland Supreme Court of Appeal upheld Fardon's second ground of appeal that the "verdict was unsafe and unsatisfactory in the sense that it was unreasonable, or cannot be supported having regard to the evidence' ".[40]

A civil process resulting in preventative detention or a criminal process resulting in punitive detention

As noted above, there is some considerable lack of clarity about whether the UNHRC actually made a determination as to whether the decision in question was the result of civil or criminal proceedings. It may be concluded on balance, however, that in finding that the "new sentence" was the result of new proceedings that fell within the prohibition of Article 15, par 1, that the UNHRC found that the outcome was punitive and likely the result therefore of non-civil proceedings. In any event, what can be seen from an examination of the High Court decision is that the description of the detention as punitive rather than preventative is, again, wrong at law.

Allowing for what Gummow J described as the sometimes considerable difficulty in distinguishing a civil from a criminal proceeding, the High Court determined by a clear majority that the detention was not punitive and did not amount to double punishment or a breach of the rule against double jeopardy.

Gummow J described the regime established by the Act as one of preventative detention and made the following comments with direct reference to the principle of double jeopardy:

> It is accepted that the common law value expressed by the term "double jeopardy" applies not only to determination of guilt or innocence, but also to the quantification of punishment. However, the making of a continuing detention order with effect after

> expiry of the term for which the appellant was sentenced in 1989 did not punish him twice, or increase his punishment for the offences of which he had been convicted. The Act operated by reference to the appellant's status deriving from that conviction, but then set up its own normative structure.[41]

And further: "The making by the Supreme Court of a continuing detention order under s 13 is conditioned upon a finding, not that the person has engaged in conduct which is forbidden by law, but that there is an unacceptable risk that the person will commit a serious sexual offence".[42]

This is very similar to the conclusion reached in the joint judgment of Callinan and Heydon JJ who characterised the relevant provision of the Act in the following terms:

> In our opinion, the Act, as the respondent submits, is intended to protect the community from predatory sexual offenders. It is a protective law authorising involuntary detention in the interests of public safety. Its proper characterisation is as a protective rather than a punitive enactment. It is not unique in this respect. Other categories of non-punitive, involuntary detention include: by reason of mental infirmity; public safety concerning chemical, biological and radiological emergencies; migration; indefinite sentencing; contagious diseases and drug treatment. This is not to say however that this Court should not be vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes.[43]

In reaching this conclusion their Honours highlighted that the DSOA's purpose was not to punish people for past conduct but, rather, it was a protective measure which nevertheless and desirably was attached to a process which exhibited many of the safeguards inherent in a judicial trial.[44]

In essence, the High Court had held that the detention under the DPSOA did not contain elements of his first offence and underlined the preventative character of his detention. The determination of preventative detention under the DPSOA was designed by the Queensland Parliament as a civil proceeding and was protective in character which therefore meant that it did not involve the question of a criminal offence. On precisely this same question the majority of the UNHRC appears to have reached a different legal conclusion. In a judgment where the minority of the UNHRC resembled closely the reasoning of the High Court, the quality of the judicial reasoning of the UNHRC is seriously in question when compared to the thorough and precise analysis of our own High Court.

Similarly, the vague assertion of the majority that predictive decision-making is "problematic" in one or either of criminal and civil processes, when compared to the reasoning on the same issue by the High Court, is neither correct nor even a particularly well argued piece of judicial reasoning. Were the decision of the UNHRC to have been binding, then Australia would have substituted an inferior quality legal analysis and an incorrect legal determination for the excellence of our own High Court on the same questions in dispute.

However, the decision is not binding, which raises the further question regarding what may be the eventual effect of the existence of international decisions that are potentially at odds with community sentiment on public policy issues or simply wrong at law or both.

Consequence of a divergence between domestic courts and international human rights bodies

The final observation of this paper concerns the notion that the decisions of quasi-judicial international human rights are non-binding and, therefore, an unproblematic addition to the Australian public policy environment.

The often put contention on this point is that, even if the determination being reached by such bodies diverges significantly from the outcome sought to be obtained by the domestic parliaments that have devised the legislation under consideration, this is not an inherently anti-democratic process because the human rights decision is not binding. While this analysis has focused on the human rights decisions of international bodies, it is obvious that, in consideration of decisions such as *KL*, the same criticism is applicable – the potentially undemocratic effect of the decisions made by domestic non-binding human rights bodies.

It seems likely that, if decisions such as that of the UNHRC in *Fardon* were binding and so resulted in the immediate release of a person deemed properly detained (by both domestic parliaments and courts) as a dangerous sex offender posing serious risk to the community, then the criticism that the process was undemocratic would be particularly acute.

As it presently stands, the standard response to the anti-democratic characterisation is that the non-binding nature of the decisions of human rights bodies is such that they do not, in practice, operate in a way which displaces an outcome previously reached by a democratically-elected parliament. The contention, that decisions which may be legally wrong by the standards set by the High Court, and contrary to the policy intent of a democratically-elected parliament, is one which deserves some scrutiny.

A central proposition of this paper is that, particularly in relation to international human rights bodies, to assume that, because their decisions are non-binding, that they are therefore of no consequence, is a superficial and incomplete analysis. The alternative probability is that such decisions, albeit non-binding, are likely to have a significant and practical effect on the capacity of domestic Australian legislatures and executives to effect outcomes that they consider represent those desired by the citizens they represent.

In this respect, the decision of the AHRC in *KL* is a useful starting point. That decision found that the Act complained of constituted discrimination in employment on the basis of criminal record. This was ostensibly a non-binding decision but it is instructive to note the terms of the letter, dated 15 April 2010, by which the subject department provided its response to the recommendations:

> The Department does not propose to take any action with respect to the recommendations of the President. Notwithstanding the President's findings, the Department, with respect, maintains its view that the refusal of Mr KL's application for employment in 2007 was not conduct that amounted to discrimination within the meaning of s. 3 of the *Australian Human Rights Commission Act 1986*. The Department notes that the President accepted the Department's characterisation of the relevant inherent requirements of the job of a teacher in NSW Government Schools and maintains its view that, at the relevant time, after careful consideration of the nature and extent of Mr KL's criminal record was regarded as inconsistent with those inherent requirements. Notwithstanding the above, the Department is prepared, in this case, to take into account the President's findings and to extend to Mr KL casual approval to teach in NSW Government Schools for an initial period of 12 months. Mr KL will nevertheless be required to undertake some administrative processes, which all applicants must satisfy, before the casual approval can take effect.[45]

Despite the assertion above that the relevant Department "does not propose to take any action with respect to the recommendations", in effect the relevant NSW Department did precisely what it asserted it was not doing. The Department reversed the most important and fundamental component of its original decision – to deny the subject employment as a teacher – and granted approval to teach in NSW.

In the matter of *KL* it can be reasonably argued that the public policy principle sought be imposed by the Department, that persons with serious criminal records (even where the offending occurred

sometime previously), should not be allowed to teach children, is a protective principle which would likely receive extremely strong community support. Further, the public policy outcome asserted as the correct one in these circumstances by the AHRC is essentially the opposite of that sought to be achieved by domestic parliaments and the State departments which they instruct. Notwithstanding this fact, and the fact that the AHRC decision is nominally non-binding, it is the outcome preferred by the AHRC which prevailed. What this situation demonstrates is that to describe a decision of a human rights body as incapable of affecting a democratically produced outcome ignores the fact that, even in their non-binding form, they have already been demonstrated as having the effect of substituting a democratically arrived at outcome for the non-democratic outcome.

Domestically, this is a process of dubious legitimacy. The process becomes seriously questionable if it is considered as a mechanism of international lobbying by which a particular minority view as to a desirable outcome can apply pressure to democratically legitimate decision-makers in a particular area of public policy to reverse their original decision. Often this non-binding process is described as an educative, "dialogue"-based process.

There should, however, be seen to exist a distinction between an educative process and a process which seeks directly to apply pressure to reverse a specific public policy decision. Upon examination there is good reason to consider that the term, "educative process", is a euphemism to describe what is more accurately a process of direct and anti-democratic lobbying by a quasi-judicial body attempting to substitute its decision for that of parliaments and departments already subject to domestic judicial review of legislative and administrative action. And, further, when this process of lobbying emanates from a non-elected quasi-judicial body which is non-domestic, the process becomes even more questionable.

The process that applies to the UNHCR is very similar to that applying in the case of *KL*, relating to the AHRC.

Using *Fardon* as an example, although non-binding, the decision by the UNHRC requires that the Australian Government prepare a response within 180 days outlining how it plans to give effect to the United Nation's decision. This process of lobbying has an impact not only on the New South Wales and Queensland versions of preventative detention but also on those in Western Australia and Victoria as well as any other State that may wish to introduce such legislation. By this process, the Australian Commonwealth is told that State legislation is non-compliant and is obliged to provide a positive response regarding what it intends to do to address that non-compliance. As will be noted in the conclusion to this analysis, what the response in *Fardon* will be remains to be seen.

While the decision of the UNHRC is not binding, simply put, the point of the decision is to make doing nothing in response an increasingly difficult option for any domestic government. While non-binding, the very point of the process to which the Commonwealth Government has subjected itself and all State governments is one whereby pressure from a non-elected, quasi-judicial non-domestic body is applied to our own domestic governments to change the outcome at issue so that it conforms to the outcome desired by the UNHRC.

The disapproval and opprobrium of the "international community" is clearly meant to be a mechanism, the object of which is to try and supplant an outcome determined as appropriate by an unelected international body for an outcome determined as appropriate by a democratically elected domestic parliament (already scrutinised by a robust domestic system of courts with a reputation for judicial excellence). This is a remarkable process at least insofar as it demonstrates an unwarranted lack of confidence in the ability of Australian parliaments to generate representative and balanced public policy outcomes. It also demonstrates a lack of confidence in the Australian court system and other domestic review mechanisms which have a long and successful history in the Australian political system of providing sound review of legislation and administrative decision-making.

The fact is that for more than a hundred years, since federation in Australia, democratically-elected parliaments have produced legislative outcomes and democratically-elected executive governments

have made administrative and budgetary decisions which these bodies have considered represent public sentiment as to desired outcomes. These decisions have been, in turn, reviewed and often modified (sometimes very substantially) by domestic courts and other bodies of administrative review to produce an outcome which is the product of an intricate system of checks and balances. This system of checks and balances is Australian and the ultimate product of Australian citizens' choices expressed through their elected parliaments. The bodies of review have been created by those parliaments and the original Constitution which was democratically agreed upon by a majority of electors in a majority of States.

Indeed, it is instructive to recall that, as a nation, Australia placed great importance on the notion that our system of judicial review should end with an Australian court. Thus, through the mechanism of the *Australia Acts* 1986 (Cth)[46], Australia ended the previous practice of allowing an appeal against a decision of the High Court of Australia to the Privy Council.

It is instructive to note the similarity between the process by which the decisions of quasi-judicial international rights bodies seek to supplant outcomes (and which this paper depicts as a process of lobbying) with the "dialogue" process that accompanies statutory bills of rights. In considering the dialogue process attaching to a statutory bill of rights, Professor James Allan has noted that in the United Kingdom, wherever there has been a declaration of incompatibility, the outcome sought to be achieved by courts has always prevailed: "It is a remarkable and relevant fact that since the enactment of the United Kingdom's statutory bill of rights the Parliament there has never once stood up to judges when a Declaration of Incompatibility has been issued – not one single time ever in dozens of cases!".[47]

Allan considers that the reason why a non-binding declaration which is legally non-binding has, in the statutory bill of rights context, become binding in practice in the United Kingdom is due to the fact that the declarations are worded "so as to make it near on impossible for Parliament to stand up to the judiciary". And, further, "The wording implies that judge's decisions about rights – how they apply, when limits are reasonable, what to do when different ones conflict, and much more – are to be treated as somehow indisputably correct and certainly authoritative".

This paper joins issue with Allan in his depiction of why the lobbying exercise inherent in declarations of incompatibility with statutory bills of rights has proven very successful if not irresistible. But it is also worth adding that much of the moral and intellectual authority of the courts that mends what to the idea judicial views on these matters are somehow superior emanates, ironically, from the fact that courts in Australia and, until recently, the United Kingdom, have not traditionally been required to make such decisions and thereby have not been the focal point for public resentment to given outcomes on public policy issues.

It might be expected, however, that respect for judicial authority and decision-making prowess will rapidly diminish in Australia if it were the case that the public came increasingly to recognize the courts as being the ultimate decision-makers on divisive public policy issues related to immigration and border protection, free speech and racial vilification, and the lines to be drawn between these and other conflicting rights, as well as influencing or directly controlling spending decisions in these or other public policy areas.

Interestingly, what is complained about in decisions under the *Kable*[48] principle in Australia is that if a court is, in reality or appearance, directed to a certain result by the executive as to the content of judicial decisions, that process gives "the neutral colour of a judicial decision to what will be, for the most part in most cases, the result of executive action".[49] As stated by Justice McHugh in *Kable*, "At the time of its enactment, ordinary reasonable members of the public might reasonably have seen the Act as making the Supreme Court a party to and responsible for implementing the political decision of executive government …".[50]

This was said to have the potential or likely effect of impairing impartial administration of the judicial functions of the Supreme Court. In effect, what Australian courts are seeking protection against by the *Kable* decision is the borrowing of their longstanding and hard earned reputation

for an impartial ability to make decisions which, rather than being political decisions, are simply intellectual applications of prevailing law to known facts. It is not too difficult to conceive that the reputation for non-political impartiality which the *Kable* decision seeks to prevent the executive from appropriating is a reputation which will be swiftly and irretrievably lost if a reverse process occurs whereby courts increasingly make what are inherently political decisions under rights documents and cloak those decisions in the guise of impartial application of law to facts.

As noted above, the Commonwealth Government is required to respond to the UNHRC's decision. What lends weight to the characterisation of the process as one of lobbying is that if the Commonwealth in *Fardon* fails to acquiesce in the UNHRC requests to reverse the decision, this "failure" is unlikely to stop similar prisoners arguing almost identical cases before the UNHRC. Robert Fardon's detention under the Queensland *DPSOA* came before the Human Rights Committee only after Mr Fardon exhausted his domestic avenues of appeal.[51]

In a later and very similar matter a prisoner, Kenneth Davidson Tillman,[52] made an identical application to the UNHRC.

Tillman had been convicted of two counts of sexual intercourse with a child under the age of 10 years and one count of attempted sexual intercourse with the same child. He was sentenced in NSW to concurrent terms of 10-years imprisonment.

In April 2007, one week prior to the applicant's release from prison, the Attorney-General of NSW filed an application under s. 17(1)(b) of the *Crimes (Serious Sex Offenders) Act* 2006 (NSW) (CSSOA) requesting that the applicant be detained for a further five years. The objective of the CSSOA, as stated in s. 3(1), "is to provide for the extended supervision and continuing detention of serious sex offenders so as to ensure the safety and protection of the community". On 18 June 2008, after a series of hearings and judgments, the NSW Supreme Court held that the applicant be detained for a further period of one year.

The applicant alleged that this detention, imposed by civil proceedings and without the determination of guilt or punishment, amounted to double punishment and undermined the principle that deprivation of liberty must not be arbitrary. The applicant, on this basis, applied to the UN Human Rights Committee, alleging that the actions under the CSSOA violated Article 9, para 1 and Article 14, para 7 of the ICCPR.

This paper will not set out in detail the result of the UNHRC decision in *Tillman* other than to note that the majority reasons were very similar in reasoning and effect to the majority decision in *Fardon*. On the issue of jurisdiction, it was relevant that Tillman, unlike Fardon, had not taken his matter to the High Court. The UNHRC held at [6.3] that the state party questioned the admissibility of Tillman's communication. The state party had submitted that Mr Tillman had not exhausted all avenues of appeal within Australia, namely appealing to the High Court of Australia. Tillman had argued that any appeal to the High Court would not have been successful due to the decision in *Fardon* that the Queensland legislation equivalent to the CSSOA was constitutional. Tillman was almost certainly correct on this point. The Committee agreed with Tillman on the basis of UNHRC jurisprudence which states in effect that an author is not required to exhaust domestic remedies, if the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts. Thus Tillman was determined to meet the requirements of Article 5, paragraph 2(b), of the Optional Protocol.[53]

Ultimately the UNHRC found that Tillman had served his 10-year imprisonment and that his further imprisonment amounted to a continuation of incarceration under the same prison regime as detention which, in substance, amounts to a fresh term of imprisonment "which, unlike detention proper, is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law".[54] Further, the UNHRC found that Tillman's further term of imprisonment was the result of court orders that were made "in respect of predicted future criminal conduct which had its basis in the very offence for which he had already served his sentence".[55]

In both the *Tillman* and *Fardon* decisions the UNHRC outlined that Australia's signing of the ICCPR means that Australia has "recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to Article 2 of the ICCPR, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised by the Covenant".[56] This, in the view of the UNHRC, requires that Australia provide an effective and enforceable remedy to any violation. What is most instructive with respect to the idea that the decisions are not anti-democratic because they are non-binding is that even when the Australian Commonwealth government fails to provide an effective and enforceable remedy (as it has yet to do in *Fardon*), this does not prevent precisely the same argument being put to the UNHRC by another prisoner. The view clearly being taken by domestic applicants to the UNHRC is that, while non-binding, the decisions are a powerful tool utilized with the clear purpose of creating a cumulative source of lobbying pressure designed to have the Australian domestic decision reversed.

What is observable is that recourse to the UNHRC is increasingly being utilized by domestic Australian litigants to pressure a reversal of the outcome reached by Australian legislation interpreted and reviewed by Australian domestic courts.

A recent matter arising in Western Australia provides a further example of this lobbying process. On 27 September 1995 Kurt Russel Seel was convicted of wilful murder for the stabbing death of a manager of a Perth hotel. The victim was stabbed in the chest and had his throat slit three times on 10 November 1994. From the evidence presented to the court at trial, it appears that this act was made after Seel accused the man of assaulting a female acquaintance. The force of the attack not only severed the victim's trachea but severed the major muscles that held the deceased's head to his body. Seel was sentenced to life imprisonment with a non-parole period of 17 years under s. 40D(2d) of the *Offenders Community Corrections Act* 1963 (WA) which required that a person sentenced to life imprisonment without parole must serve between *15 and 19 years* before being eligible for parole [emphasis added].

Section 40D(2d) was introduced in an amendment which came into effect on 20 January 1995, after the offence had been committed but before sentencing. Prior to the introduction of this amendment, the equivalent section in the previous Act provided that for persons charged with wilful murder, they would be considered for parole after a period of only 12 years.[57]

As the offence was committed prior to the amendments taking place, Seel, in 2006, relied on s. 10 of the *Sentencing Act* 1995 (WA). It provided that if a penalty changes after the commission of the offence, then the lesser statutory penalty shall be applied. Seel thus applied to the Supreme Court to correct the sentence to 12 years. Both the Director of Public Prosecutions (DPP) of Western Australia and Legal Aid, erroneously, supported the application. Miller J of the Supreme Court, in 2006, allowed the application and replaced it with a sentence of life imprisonment with a non-parole period of 12 years as per s.34(2)(d) *Offenders Community Act* 1963 (WA) (prior to 20 January 1995).

However, neither the DPP nor Legal Aid realised that s. 40D(2d) applied retrospectively by virtue of the s. 40D(2f). Section 40D(2f) stated that subsection (2d) applied irrespective of whether the offence concerned was committed before, on or after the commencement of the amending provisions. Accordingly, once the DPP realised this error, the DPP applied to the Full Court in 2007 to have the original sentence restored under s. 40D(2d).[58]

Seel has petitioned the UNHRC alleging that the operation of s. 40D(2f) is in breach of Article 15 of the ICCPR in that it allows the amendment to act retrospectively and thus allows the court to impose a heavier penalty than one that was applicable at the time when the criminal offence was committed.

In this situation it may be seen that one possible view is that the legislation in effect in Western Australia intentionally and diametrically opposes Article 15 of the ICCPR. This view would hold that section 40D(2f) demonstrates an intention of the Western Australian legislature that the relevant sentencing regime is to operate retrospectively, whereas Article 15 requires that more retrospective sentencing regimes should be avoided.

The primary question is whether the outcome democratically determined and judicially reviewed in the domestic Australian jurisdiction should be subject to pressure to be reversed by what is simply a preference for a different public policy outcome preferred by non-elected international jurists who (unlike their domestic counterparts) do not possess the important quality of being appointed by Australian executive governments responsible to domestic parliaments.

It is also notable that it is not merely the decisions of the UNHRC which are presenting as a mechanism designed to supplant domestic Australian public policy outcomes with those preferred by an international body. A further and powerful mechanism designed to replace domestic Australian public policy outcomes with a standard or outcome devised and preferred by an international body appears in the mechanisms arising out of the signature of optional protocol documents. One such example is known as OPCAT.

Australia signed the Optional Protocol to the Convention against Torture (OPCAT)[59] on 19 May 2009. When ratified, OPCAT places clear requirements on state parties to ensure that the Convention against Torture[60] is not breached by detention institutions within states.

After ratification, OPCAT requires that Australia establish, fund and staff a national preventative mechanism (NPM) and extend to the NPM powers necessary to achieve the functions set out in Articles 19 and 20 of OPCAT.[61] The NPM must be independent, impartial and expert, and be able to carry out visits without warning to all places of detention.[62]

Australia must also allow the International Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the sub-committee), a UN body comprised of a range of international experts, to visit places of detention within Australia.

Not only will the NPM have powers to inspect detention institutions, it will also have the power to develop standards, to critique and assess domestic legislation and examine compliance of all Australian places of detention with respect to what are rather vaguely described as "UN norms".[63]

What is inevitable is that the OPCAT will provide a mechanism for far greater levels of intrusion by international bodies and domestic bodies applying "UN norms" into State laws, administration, and policy relating to prison facilities. These are all areas of public policy that have been the traditional and exclusive constitutional responsibility of Australian State parliaments.

By giving the NPM the power to make recommendations and, in effect, develop standards to meet unspecified international and national expectations obviously means that prisoners and other detained persons in Australia will be accorded treatment under standards not determined nor agreed to by State parliaments informed by State communities but rather as fixed by the NPM under the watchful supervision of the UN Sub-committee. At the present time, before legislation which will bring the NPM into effect, it is very difficult to determine with any precision what actually are the UN norms or standards that will sought to be applied.

There are notable cases determined under international human rights documents which are suggestive of the likelihood that, with respect to the administration of State prisons, the standards required by "UN norms" may well diverge from the standards of administration determined as appropriate by Australian domestic governments.

One notable case which indicates a high possibility of divergence between international standards informed by quasi-judicial bodies' interpretations of human rights documents and domestic administrative standards prevailing in sovereign national jurisdictions is the case of *Van der Ven v The Netherlands*[64] before the European Court of Human Rights.

In that case, the applicant, Mr Van der Ven, a Dutch national, brought a case to the European Court for Human Rights alleging that his detention whilst on remand constituted inhuman and/or degrading treatment, a violation of Article 3 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*.

The applicant was remanded on charges including murder, manslaughter, grievous bodily harm, rape and narcotics offences in Maastricht, the Netherlands, from 11 September 1995 until 2002

when he was sentenced to 15 years imprisonment in strict confinement at the discretion of the Dutch government.

During the applicant's time in remand, he was considered by Dutch authorities to be a prisoner warranting special security precautions. Information from Dutch intelligence services indicated that there was a significant likelihood that he was intending to escape, with help from others, and would pose an unacceptable risk to society. From October 1997, at the request of Dutch prosecutors concerned about the applicant's escape risk, the Dutch prison authorities remanded the applicant in the maximum security EBI.[65]

The EBI regime was introduced in the Netherlands after public and prisoner officer concern over a large spate of highly publicised and violent breakouts using knives and firearms, and often taking of hostages. In one case an attempted escape by a helicopter resulted in a helicopter crash within the prison grounds. The EBI is intended for prisoners who pose an unacceptable risk to society if they escape from detention, but priority is given to prisoners who are extremely likely to attempt to escape.[66]

Detainees in the EBI are subjected to a rigorous security regime where all contact, including by telephone and correspondence, is screened.[67] At the time of the applicant's detention, detainees were permitted to have one visit per week for one hour behind a glass partition and one visit per month with immediate family or spouses without a partition; physical contact was limited to a handshake at the beginning and end of the meeting. Detainees could never be in contact with more than three other inmates at a time and could only be in contact with staff individually. Cells were subjected to a thorough search weekly, at which time a detainee was to be frisked and strip searched regardless of whether or not they had left their cell. Strip-searching included external viewing of the body's orifices and crevices including an anal inspection. Strip-searching also took place on entrance and exit from the EBI, before and after open visits, and after visits to the clinic, dentists or hairdressers. The EBI governor or, if urgent, a prison guard, could subject a detainee to an internal body inspection if that was deemed necessary.[68]

The EBI was inspected by the UN Committee for the Prevention of Torture (CPT) between 17 and 27 November 1997. The CPT report suggested that prison authorities try and create a "good internal atmosphere" within EBI units, yet the CPT found that the detainees were subject to a "very impoverished" regime creating feelings of helplessness, powerlessness, anger and communication difficulties in detainees.[69]

In response to suggestions to improve these conditions, the Dutch Government re-affirmed its stance that the strict measures were needed to ensure a secure environment and that their first priority was to create "fail safe security" arrangements. The Government stressed that the detainees were predominantly hardened criminals, members of extremely dangerous criminal organisations or previous detainees who had taken staff hostage in attempts to escape. The Government made clear that the EBI was a last resort and sanctioned its use only for a very small number of very dangerous persons.

The applicant was held in the EBI from October 1997 to May 2001. During that period he alleged that Article 3 had been breached. Article 3 provides: "No one shall be subjected to torture or inhuman or degrading treatment or punishment".

The applicant claimed that the psychological effects of the EBI manifested psychological and physical complaints even when he had not left his cell, and that he felt feelings of powerlessness, loneliness, tension and frustration due to reduced contact with other persons. The lack of human contact was a fundamental tenet of the applicant's argument as he only had contact with medical professionals behind a glass partition. The applicant claimed this "inhuman" treatment fostered psychological conditions and alleged that the Dutch Government had failed to strike a fair balance between the security within the EBI and his wish for physical contact.[70]

The Dutch Government vehemently denied the allegations and cited the need for strong security measures because of the serious risks posed by the class of persons the applicant was a member of. It maintained it had adequately provided for psychological and psychiatric medical examination and care and that the applicant never suffered from any serious psychopathology.[71]

The Court found in favour of the applicant, stating: " . . . the Court concludes that the combination of routine strip-searching and the other stringent security measures in the EBI amounted to inhuman or degrading treatment in breach of Article 3 of the Convention".[72]

The Court emphasised that weekly strip searches degraded the applicant's human dignity and gave rise to "feelings of anguish and inferiority capable of humiliating and debasing him".[73] Although stressing that high security remand or detention does not necessarily breach Article 3, the Court emphasised that Article 3 is an absolute provision, rather than a proportionate provision.[74] Therefore, torture, or inhuman or degrading treatment which goes beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, will violate Article 3.

Ultimately, the Dutch Government was required to pay Euro €3000 damages to the prisoner in question.

In this case a specific outcome in respect of a specific prisoner was reached which represented the domestic state's preferred balance between competing public policy principles. That preferred outcome was relevantly substituted for the outcome preferred by the ECHR and the domestic government penalised and the prisoner monetarily benefited in the process.

Two results may follow if a similar process of substituting a divergent international standard in the administration of correctional facilities occurs in Australia under the requirements of OPCAT. First, there may be significant public disquiet, Second, the safe running of Australian prisons may well become practically more difficult, particularly if the most dangerous prisoners in the system – imprisoned accordingly in special handling units – cannot be subject to intensive security regimes including regular and random strip-searches.

Conclusion

This paper has not sought to argue that Australian legislative outcomes or executive and administrative decisions should not be the subject of robust judicial review.

Clearly, a properly functioning democracy must subject the outcomes produced by its parliaments and executives to close and ongoing scrutiny. What this paper argues is simply that this review should be conducted by Australian courts pursuant to Australian precedent and Australian legal standards. Indeed, in the course of this paper several examples have been given which indicate the robust system of judicial review already existing in Australia.

Further, the primary focus of this paper was not to make the argument about why the substantive decisions to create and implement public policy should lie with democratically elected legislatures and executive governments. Rather, if the primacy of democratic institutions in public policy determinations is accepted as proper, the point of this paper is to highlight a means by which there is presently occurring, and will continue to occur, a diminution of the sovereignty of Australia's domestic democratic institutions through the procedures enlivened by the continuing signature of international documents.

The analysis examined a number of decisions of international human rights bodies and contends that these decisions are often at odds with accepted judicial principle prevailing in Australia as well as prevailing public opinion. If these types of decisions were binding in the sense that they automatically substituted the public policy determinations and preferred outcomes of unelected international bodies for those devised by democratically elected domestic legislatures and executives (properly reviewed by domestic courts), then criticism of these decisions would likely be intense. However, the concern about the determinations of these international bodies is, at present, somewhat muted,

perhaps because their decisions, no matter how divergent from Australian standards, are perceived as harmless because they are "non binding".

Indeed, the very nature of the assertion that decision-making by such bodies is not anti-democratic because it is non-binding gives rise to the obvious question as to what is the point of Australia succumbing to the process at all. Sometimes the answer to this question is framed in terms of some educative value attaching to the existence of this level of decision-making which is said to promote a "dialogue" regarding rights. But even if such a value were accepted as possible, it is timely to consider who is intended to be educated, and what particular education is required. Accepting the value pluralist position described at the commencement of this paper, which position holds that equally valid public policy outcomes may exist in any given and specific area of public policy, an answer emerges. The answer would appear to be that the majority of electors that have elected a parliament to effect that majority's preferred and rational outcome (already subject to domestic judicial review) must now be educated as to an alternative minority view held by international jurists and expressed through dialogue emanating from a human rights decision-making body which is unelected and which is often legally wrong by Australian legal standards. The results of this approach will almost certainly be the greater likelihood of public policy outcomes being supplanted for the outcomes actually desired by Australian electors.

Endnotes

1. C. Porter, "Pluralism, Parliamentary Democracy and Bills of Rights", in J. Leeser, J and R. Kaddrick, (eds), *Don't Leave us with the Bill: The Case Against an Australian Bill of Rights*; The Menzies Research Centre, 2009, chapter 10.
2. *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
3. *Ibid.,* [161].
4. Keane J described at [162] that "The legislative policy judgment which informs the amending Act is that, without the amending Act, the fundamental human right of women and children in these Indigenous communities to protection against violence will continue to be enjoyed by them to a lesser extent than this right is enjoyed by residents of other parts of Queensland".
5. *Ibid.,* [162].
6. I. Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas*, John Murray, 1990, 70.
7. [2010] AusHRC 42.
8. *Ibid.*, 18 [70].
9. *Ibid.*, 3 [5].
10. *Ibid.*, 18 [72].
11. *Ibid.*, 18 [75].
12. *Ibid.*, 18 [73].
13. *Ibid.*
14. *Ibid.*, 4 [11].

15. Human Rights Committee, *Decision: Communication No. 1629/2007*, 98th sess, CCPR/C/98/D/1629/2007 (18 March 2010, adopted 10 May 2010) ('*Fardon v Australia*') and Human Rights Committee, *Decision: Communication No. 1635/2007*, 98th sess, CCPR/C/98/D/1635/2007 (18 March 2010) ('*Tillman v Australia*').

16. *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*International Covenant on Civil and Political Rights*').

17. *International Covenant on Civil and Political Rights*, art 9, para 1. Article 9, paragraph 1 states 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.

18. *International Covenant on Civil and Political Rights*, art 14, para 1. Article 14, paragraph 1 states 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.

19. *A-G (QLD) v Fardon* [2003] QSC 200.

20. (2004) 223 CLR 575.

21. *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 1642 UNTS 414 (entered into force 23 March 1976).

22. *Fardon v Australia,* [7.4].

23. *Ibid.*, [7.5].

24. It is interesting to note that the UNHRC decision had in the previous paragraph referred to the procedure under the DPSOA as being 'nominally characterised as "civil proceedings", at [7.4(2)].

25. *Fardon,* per Gleeson CJ, [1].

26. *Fardon v Australia*, [7.3].

27. *Ibid.,* [7.4].

28. *Ibid.,* [7.4(4)].

29. *Ibid*.

30. *Ibid*.

31. *Fardon* (2004), [163].

32. [1988] HCA 68.

33. *Fardon* (2004), [22].

34. *Ibid.,* [225].

35. *Ibid.,* [228].

36. *Ibid.,* [226].

37. *Ibid.,* [196]. See also *Veen v The Queen* (1979) 143 CLR 458 at 463-465 per Stephen J and at [70] per Gummow J.

38. *A-G (Qld) v Fardon* [2007] QSC 299, 3-4.

39. Referred to in *R v Fardon* [2010] QCA 317, 2.

40. *Ibid.*

41. *Fardon* (2004), [74].

42. *Ibid.*, [76].

43. *Ibid.*, [217].

44. *Fardon* per Callinan and Heydon JJ at [219].

45. *KL,* [114].

46. Appeals to the Privy Council from the High Court and all federal courts were severed in two stages, in 1968 and 1975. Appeals from State courts were ended by the Australia Acts 1986 (Cth) noting that these were acts of the Commonwealth of Australia and the Parliament of the United Kingdom. The only remaining legal avenue for an appeal to the Privy Council from an Australian court is now for inter se cases under section 74 of the Constitution with a certificate from the High Court, which because the High Court has stated certificates will no longer be granted is at present at least only a theoretical avenue for appeal – see commentary in C. Saunders, *The Australian Constitution*, published by the Australian Centenary Foundation, 1997 second ed..

47. Allan, J., "You Don't Always Get What You Pay For", *New Zealand Universities Law Review*, Vol. 24, 179 at 184.

48. *Kable v Director of Public Prosecutions* (NSW) [1996] HCA 24; (1996) 189 CLR 51.

49. *South Australia v Totani* [2010] HCA 39 per French CJ at [82] ("Kable").

50. *Kable* at [40].

51. *Fardon v Australia*, [6.3].

52. *Tillman v Australia*.

53. Human Rights Committee, *Decision : Communication No. 1533/2006,* CCPR/C/91/D/1533/2006 (31 October 2007) ('*Zdenek Ondracka and Milada Ondracka v Czech Republic*').

54. *Ibid.*, [7.4.1].

55. *Ibid.*, [7.4.2].

56. *Fardon v Australia,* [10].

57. *Offenders Community Act 1963* (WA), s 34(2)(d) prior to 20 January 1995.

58. *Western Australia v Seel* [2007] WASCA 271.

59. *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted on 18 December 2002, 2375 UNTS 237 (entered into force on 22 June 2006). (OPCAT).

60. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted on 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). The Convention was signed by Australia 10 Dec 1985 and ratified by Australia, 8 Aug 1989.

61. OPCAT, art 17.

62. *Ibid.,* art 18.

63. *Ibid*., art 18-19.
64. *Van der Ven v The Netherland* [2003] ECHR 50901/99 (4 February 2003).
65. Extra Beveiligde Inrichting, or Extra Security Facility.
66. *Van der Ven*, [27].
67. Except for privileged contact.
68. *Van der Ven*, [31].
69. *Ibid.,* [32].
70. *Ibid.,* [36]-[41].
71. *Ibid*., [42]-[45].
72. *Ibid*., [63].
73. *Ibid*., [62].
74. *Ibid*., [46].

Chapter Twelve

Federalism in 2010

Colin Barnett
Premier of Western Australia

Sir Samuel Griffith, drafter of the Constitution of Australia and the first Chief Justice of the High Court of Australia, defended the rights of the States. The Samuel Griffith Society continues to defend our Constitution and the principles of the Federal system, and of the separation and balancing of powers.

It is important that this nation continues an intellectual and public discussion of all these issues. There is no doubt that any system of government, any constitutional arrangement, goes through an inevitable evolution. We need to ensure that the evolution is in the spirit of what Australians past and, I would say, present, wish.

I will not go back into history. I will just give some observations of how our Federal system is operating. These observations are simply from the last two years, the two years that I have been fortunate enough to be the Premier of Western Australia.

The Council of Australian Governments

COAG – the Council of Australian Governments – has become almost a new tier of government within Australia. Lobby groups now actively go out and try to influence decisions of COAG. That is perhaps one symptom of the change that has taken place.

During the Howard Government, COAG met once, possibly twice, a year, a similar mode of operation to the preceding Premiers' conferences. Under Kevin Rudd, COAG met far more frequently. In my first 20 months as premier, I attended seven COAG meetings; they were incredibly frequent.

Kevin Rudd made some good attempts initially to reform and to simplify the COAG process. Indeed, one of his first acts was to reduce the number of specific purpose payments to States and territories from 95 to six. That seemed, on the surface, a good move. Since then, that momentum for reform and simplification has been all but lost. There are now 53 national partnership agreements and there are 43 Ministerial councils.

Now Ministerial councils, meetings of Federal and State ministers, you would think, would be structured primarily on broad portfolio areas – Ministerial councils of Attorneys-General, of Health ministers, of Education ministers and the like, but 43 and growing? The structure of Ministerial councils has become topic-specific. So we have a Ministerial council of gene technology; we have a Ministerial council on food regulation; we have a Ministerial council on the status of women; we have one on northern development; and so it goes on. There are too many; they duplicate; they overlap; and they confuse.

For Western Australia, in a more practical sense, they are a nightmare. We have had cases of ministers flying across Australia to attend a Ministerial council in Sydney that has gone for 40 minutes, then getting back on the plane and flying back. Some of the worst features simply reflect the duplication that has happened. There are some moves at least to try and reduce that.

COAG is dealing with a very wide breadth of policy and programs, so wide as to cover almost every aspect of government, certainly any aspect that affects the States. There is, in my view, an

increasing lack of transparency. Agreements are circulated; ministers and premiers sign them; off they go.

In Western Australia, we very jealously guard our right to legislate within our own State Parliament. We do not accept legislation passed in other parliaments as applying here as a general rule. If we agree on national consistency or consistency of policy, then we will have mirror legislation in our own Parliament, so at least that brings a public accountability.

In other States, where they simply accept a COAG agreement and accept what may have been implemented through, say, the Parliament of Queensland, and therefore apply in all States, there is no public accountability, there is no transparency, and there is often no awareness within those States of what is happening. That, I think, is not a desirable element of our democracy.

The rising status of COAG also means that the decisions are being made at COAG by premiers, including myself, that actually presume what will be passed by State and Federal parliaments.

COAG, meetings of prime ministers and premiers, a structure for Health ministers and the like, to meet, certainly needs to be part of our Federal system. But at some stage we need to look at this sort of arrangement more objectively as a nation – a good task for The Samuel Griffith Society – and really assess where COAG is leading us as a nation.

It is, in my view, now an extra tier of government.

The future of the GST

A second issue I would like to mention is the growth of Commonwealth powers themselves. This has been discussed over the years – High Court decisions, extensions of Commonwealth powers, Commonwealth control of taxation, duplication of agencies, international treaties, and so on. That trend, that force of gravity, drawing decisions and power and money into the centre has been in large part the history of our Federation.

In some areas there are particular fragilities emerging. One that is very important to Western Australia is obviously finance, as it is to every State, but, in particular, the goods and services tax arrangement.

We are all aware that during the Second World War the States handed over powers over direct taxation to the Commonwealth to finance the war; they did not come back. That is part of history. Out of that we have tax sharing arrangements between the Commonwealth and the States overseen by the Commonwealth Grants Commission.

Under the Howard Government, introduction of the GST was a good reform in terms of the overall structure of taxation, a move away from over-reliance on direct taxation to a more balanced tax regime with indirect tax in the form of a GST being all important. John Howard's inspiration was to make the GST a State tax revenue so it provided some separation, albeit different than what was envisaged at Federation, but it also gave the States their own source of growth tax.

The Grants Commission oversees the sharing of those GST revenues between the States and territories. The way it is going from a Western Australian perspective is not attractive. Most people would expect, as they pay GST when they go shopping, that maybe a hundred cents in the dollar or something thereabouts would come back to their State.

Western Australia currently gets 68 cents in the dollar back. We are penalised through our economic success and, in particular, the strengths of the mining and petroleum industries.

I accept, and I think most West Australians accept, that, for most of the years of Federation, Western Australia has been a net beneficial State. That is fine. We have been supported and we appreciate that. Western Australia is now a very strong economy, a very successful economy and most West Australians accept that we will now become net contributors to the Federation, having for so long been net beneficiaries. I do not dispute that and I have yet to find anyone who seriously does. There needs to be some limit, however.

On current forecasts of the State Treasury, in three years' time, Western Australia will be getting back 55 cents in the dollar. That is hard enough to take but it is particularly difficult to accept when you see that the State of Victoria gets 94 cents in the dollar back, New South Wales gets 95 cents in the dollar back, and Queensland, a comparable State, gets 91 cents in the dollar back. It is way out of whack.

In my view the Grants Commission has outlived its usefulness. It has been an important institution in Australia's history but it is basically a mysterious black box that no-one knows what goes in, what goes on, and what comes out. It has failed, and it is failing economically. It is basically now penalising success in this nation. I do not think that is a good formula for going forward.

What I would argue is that there should be a floor in the GST share and Western Australia would accept a position where our share does not fall below 75 cents in the dollar. There needs to be some limit. Otherwise there is a circumstance, which exists today, where there is little incentive in Western Australia expanding its economy although it is very much in the national interest that we do so. Basically it is a zero sum game. And a government that was less inclined to development may well simply choose not to develop because almost all the gains of development now are taken from this State. All I want is 75 cents in the dollar as a floor to the GST to provide some certainty for public finance in this State, an incentive to continue to expand this State and therefore expand this nation's economy.

It is getting very close to the point of view of the Boston tea party; when you get down to 55 cents in the dollar there is a wide understanding of that in this State through all levels of society, and there is a growing level of resentment even reflected in private television commercials about money going East. This has probably become the most significant Commonwealth/State issue for Western Australia.

And I do not accept, and I do not want, various infrastructure programs or special funding programs invented as a substitute for actually dealing with the issue.

The issue is one of a fair and equitable distribution of GST revenues.

The Rudd proposals on health

The health proposals of Kevin Rudd and, I assume, Julia Gillard, were for the Commonwealth to play an increased role in the public hospitals of this country, or some 800 of them. That is an area where there has been gross duplication. That is the space that we are in now. And I acknowledge that the Commonwealth does play an important role in health, particularly primary health care through the GPs and so on, Medicare and also plays a significant role in the public hospitals. But public hospitals around Australia, all 800 of them, have all been built, owned, operated and staffed by State governments. For this State and for other States, 65 per cent of the cost of running public hospitals is met from State revenues, not the Commonwealth. The State is the major player historically and continues to be in our public hospital system. It is the States that make the decisions.

In Western Australia we are building a major new tertiary hospital at something like two billion dollars and we are about to start building a new children's hospital at a billion dollars.

They are State-based decisions and State-funded projects.

I do accept there is an overlap and that the Commonwealth contributes about 35 per cent. At the COAG meeting in April 2010, Kevin Rudd put on the table his proposals for health reform which had been circulated to some extent in the media. The idea was that we need to improve the efficiency of public hospitals and that we should fund public hospitals on the basis of what they actually do – so much for a knee operation or a hip operation or whatever it might be, targeting the funding to the actual clinical services delivered in our hospitals, reforms in emergency departments, wait lists and so on.

All of that had a broad agreement amongst the Commonwealth and the various State premiers and State health ministers. When the proposal was revealed in its final form at the COAG meeting

in April 2010, it was presented that the Commonwealth would now account for 65 per cent of the funding of public hospitals and that the Commonwealth would achieve that by taking one-third of the total pool of GST collections.

The first error in that was actually pointed out by John Brumby, the (then) Premier of Victoria. He asked, "what do you mean by this 65 per cent" – it was 65 per cent of funding of procedures, in other words, what is called activity-based funding, so much for a knee, and so on.

Brumby pointed out that, even if there was a hundred per cent of activity-based funding, that would only fund about half the cost of a public hospital – a slight error that the Commonwealth had not picked up at stage one but it gave us a hint of where it might go from there.

The Commonwealth back-tracked, saying, "oh yes, we understand that, we recognise that" – and, in the last 30 seconds, they probably had. So it came down to 65 per cent, not of the cost of public hospitals but 65 per cent of activities in hospitals – we got over that point.

Then the point about taking one-third of the total GST. There was not a premier in the room who was happy at that prospect. The first day the COAG meeting had been very productive, a lot of discussion about health, very sensible discussion. The second day, this GST proposal was announced. For Western Australia, given that our share of the GST is already diminished, to have taken one-third of the total GST pool would have accounted, in Western Australia's case, of taking 60 per cent of our GST revenues that remained. In a relative sense it had a far bigger impact.

I was willing to go half-way. I said to the Prime Minister (Rudd) and the other premiers that Western Australia would not hand over a share of GST; that would be simply the thin edge of the wedge, as the GST would basically become a Commonwealth revenue source inevitably over time. We had the powers to prevent that and I exercised them.

I said, however, we do agree there is sense in pooling funding and we do agree that we should have higher reliance on activity-based funding in our health system. So I agreed that we would pay the equivalent amount into a fund to be basically jointly administered between the Commonwealth and the State.

For Western Australia, that equated to $1.5 billion out of a State health budget of $6.5 billion, so it was still not even the lion's share or anywhere near it. That is what all the other State premiers wanted to do. John Brumby, to his credit, stood with me on the second day at a press conference and said Victoria had the same view and we would not cave in. Unfortunately John did, but he was the last of the Labor premiers to cave in and all we saw on the second day was a Premiers' Conference / COAG meeting degenerate into a political exercise.

I became suspicious at the beginning of the second day when I noticed the other premiers were not looking me in the eye and also when we went into conference sessions, these lasted about 10 minutes, then we broke for a cup of tea; the whole day was a farce. Finally, the pressure became too much for John Brumby. It was basically Labor Party political pressure that determined where they went.

I signed a piece of paper about six weeks ago that allows the other States to give up one-third of their GST, so I presume they have all done that, but Western Australia has not. And I do not know if they will get it back if Tony Abbott becomes prime minister – that will be interesting.

The proposed minerals tax

Another example is the mining tax proposal – very much an issue for Western Australia and Queensland and, perhaps, New South Wales, to a lesser extent.

The point about the whole debate was that the case for taxing the mining industry more was simply never made. I can accept that the case could be made. Maybe the mining industry should pay more tax, but the case was never made. And, indeed, that whole proposal was, in my view, an attempt by the Commonwealth not only to take over taxing powers in the mining industry but basically to take over the total regulation of the mining and petroleum industries in Australia.

For Western Australia, that would have taken away our economic future.

I would not have been let back into the State had I agreed. The voting in Western Australia, where the Labor Party holds only three of the 15 House of Representatives seats, reflects the widely held view and understanding of the public in this State.

The proposals were just amateurish. My background is in economics and I think I know a little bit about the mining industry, having worked around it for the last 20 years. The argument was put that the reason the Commonwealth needed to take over taxation in the mining industry was that State royalties were preventing marginal projects from going ahead and then, indeed, some projects closed because they could not afford to pay State royalties. This was explained to us by (then) Secretary to the Treasury, Dr Ken Henry.

I have known Ken Henry a little over the years. After his explanation I drew him aside and told him I had been around this industry for a long time. I could honestly say I have never seen a project not go ahead because of State royalties – not one. Sometimes they have had royalty relief in hard economic times, but they have never had to close. Since then I have asked people from various parts of the mining industry if they could think of an example. No one can. Yet that was the whole premise of this proposal.

The original version, the resource super profits tax, was based on 40 per cent taxation of mining, on the argument that a 40 per cent rate applied to the petroleum industry under the petroleum resource rent tax. Well, the international taxation of petroleum is about 40 per cent; the international taxation of mining is about 20 per cent. That is why people got upset.

The petroleum industry was only taxed in advance of projects and the comparison is that most projects or many of those emerging are in developing nations, where the tax actually takes the form of handing over production to a State-owned energy utility and some production-sharing arrangement.

We are unique in Western Australia in that industry in that we have a private sector, our petroleum industry. That is not the case in most parts of the world. It is largely government-controlled and governments sharing in production and revenues directly. No sensible parallel was made. That is why the mining industry are dubbed big time.

Hopefully that issue is now put to bed, but I suspect that it will stay around, or return in some form.

That was not about simply trying to bring about efficiencies in mining and taxation. It was, without doubt, in my mind, all about a Commonwealth attempt to take over the mining industry. Why? Because it is the most rapidly growing and the strongest industry in Australia. It accounts for 70 per cent of Australia's national exports. It is what makes Australia important and the Australian dollar is a commodity currency.

The Commonwealth, I think, resented the fact that Samuel Griffith and others made sure that mining and natural resource ownership stayed with the States.

All those forces, all those events, have been like a great gravitational force bringing money, power, legal responsibility, decision-making into the centre. That has been the history since Federation. There are, however, some countervailing forces, some positive and negative forces. One of them might be simply that in many areas the public is showing an increased tendency to wanting more local say, more local administration. People like to think locally, and they like decisions, where practical, to be made at a local level. That sentiment has been growing for some time.

It is also the case that political power usually follows economic power. Take the special case of Western Australia, because I think it is a special case, but maybe reflected to some extent by Queensland. Australia, whether the Commonwealth likes it or not, is going to have different rates of economic growth, the so-called two-speed economy. That is inevitable, and it is actually in our national interest. You do not achieve a consistency or uniformity across Australia by trying to slow down successful States or successful industry sectors. Western Australia is becoming increasingly attached and entwined in the great economies of Asia, and it is a force that perhaps we have not seen in our Federation before.

The much quoted figure is that Western Australia has 10 per cent of the population and produces now close to 40 per cent of Australia's exports. I have been offering a bottle of good wine for about 10 years to anyone who can come up with the original source of that observation. I still have my bottle of good wine.

I would say that by 2020 Western Australia will be supplying well over half of Australia's exports. Decisions that have already been made will make that an absolutely certain outcome. If you look at some of the individual relationships –China, now our biggest trading partner. 66 per cent of Australia's exports to China come from Western Australia. 35 per cent of Australia's exports to Japan come from Western Australia. 40 per cent of Australia's exports to India come from Western Australia.

Western Australia is forming, not a foreign policy, but international relationships. This State's future is increasingly tied to Asia in economic matters and in social matters as well – health, education, sport, in culture and the arts. That will be a force that will tend to oppose some of the centralisation.

If you go back and look at something like revenue-sharing, GST and the like, just a few years ago Western Australia depended on the Commonwealth for 50 per cent of its revenues. In less than a decade it is down to about 40 per cent. Probably within another 10 years it will be close to 30 per cent. In other words, the Commonwealth will no longer be the dominant economic force in Western Australia – Western Australia will be, with its new partnerships and arrangements developing in Asia.

My final comment is that the argument that everything has to be uniform has some merit. The States and the Commonwealth have worked quite well to get a consistency in taxation matters, in definitions, transport, energy – everywhere. Often that is done by setting up so-called independent regulators – they are the bane of my life. Independent regulators do not always get it right, and when they get it wrong, it becomes a problem for the politician. We have many examples in Western Australia. So there will be a bit of rethinking on that issue.

But in terms of national consistency and uniformity, how often do you hear politicians, federal bureaucrats and even national lobby groups and international companies call for a national approach? It does not matter what it is. We must have a "national" approach on this issue or that issue.

For some things we do want a national approach – in defence, for example. But on other things it does not make sense logically. For Western Australia, if we were to have a national approach, then this State would have poker machines in pubs, we would have toll roads where we do not have any, and we would even have daylight saving when most do not want it.

Support for ideas of a "national" approach is not necessarily pervasive.

Chapter Thirteen

Concluding Remarks

Sir David Smith

As another successful conference draws to a close, I have to say that it has been a great pleasure to listen to thoughtful and thought-provoking papers delivered by knowledgeable people, and to participate in intelligent discussion about the material placed before us. What a contrast with what has been said and written on the other side of the continent this past week about the election and its aftermath. I thank all of our speakers for their contributions, and our colleagues who have organised and conducted this weekend.

Since election day our media have been full of constitutional commentary and advice from many journalists who have no idea about the issues involved. Let me give just three examples. One journalist advised Prime Minister Gillard to simply present her ministry to the Governor-General and ask that they be sworn in immediately, without waiting for the Australian Electoral Commission to finish counting the votes or to return the writs to the Governor-General. Other journalists suggested that the Governor-General would have a conflict of interest in exercising her reserve powers to choose the next prime minister, completely overlooking the fact that constitutional conventions, if observed, would result in Her Excellency acting on advice instead of making her own decision. Another journalist told his readers that the Governor-General should appoint a Deputy to make the decision for her, adding that the power to appoint deputies was added to the Letters Patent relating to the Office of Governor-General seven years ago. The fact is that the Letters Patent issued in 2003 contain no reference whatsoever to the power of the Governor-General to appoint deputies – that power has resided in section 126 of the Australian Constitution since 1 January 1901, and it has been used regularly ever since, for a variety of administrative reasons.

The Samuel Griffith Society was established to uphold the Australian Constitution and to participate in public education and debate on the document and any proposals to alter it. We have done this by producing a most amazing set of published conference proceedings, in hard copy and on our web site, to which the volume of this conference will make a significant addition, under our new editor John Nethercote. What a pity that public education and debate does not include journalists who seem able to write and speak about our constitutional arrangements in total ignorance of the facts, and distribute that ignorance to millions of readers.

Our after-dinner speaker on Friday night was Bryan Pape, who gave the Sir Harry Gibbs Memorial Oration. Bryan's paper enabled him to expand on his case in 2009 before the High Court of Australia, *Pape v The Commissioner of Taxation*, which will come to hold an honoured place in the cause of constitutional federalism. He described the slippery slope down which cooperative federalism gave way to collaborative federalism and has finally degenerated into executive federalism. It seems that there is no end to the reach of the Commonwealth Government.

Saturday morning's opening session dealt with the Commonwealth delivery of State Government services, and we were given case studies for and against such delivery by Andrew Podger and Dr Dan Norton. That was followed by a session on property rights, prompted by the topical questions of the Resources Super Profits Tax on the mining industry, and on the acquisition of property to build the National Broadband Network, with papers by Lorraine Finlay, the Hon. Keith de Lacy, and Richard Douglas on behalf of himself and Grant Donaldson.

In Saturday afternoon's session we revisited the perennial question of the restoration of a State income tax with a paper by Professor Jonathan Pincus.

The afternoon concluded with the first part of our *festschrift* in honour of John and Nancy Stone, when Des Moore reminded us of John's great contributions to the spirit and practice of federalism during his time as a senior officer of the Commonwealth Treasury, and particularly as its head. The long-standing friendship and mutual respect between these two colleagues was very evident in all that Des Moore had to say

Saturday night's after-dinner speaker, the Honourable Justice Dyson Heydon, spoke about the lives of John and Nancy Stone and gave us the second part of our *festschrift* in honour of these two remarkable people who played such an important role in the establishment of The Samuel Griffith Society. The prodigious amount of scholarship and research that went into the preparation of this paper told us almost as much about His Honour as His Honour told us about John and Nancy Stone.

This morning we were given three different aspects of administrative law, federalism and State sovereignty, with papers by the Honourable Justice Gilmour, the Honourable Christian Porter, and a closing address by the Honourable Colin Barnett, Premier of Western Australia. Our Conference Convenor, Julian Leeser, was somewhat prescient in inviting the Premier to give the closing address, given the current state of play in Canberra and the Premier's very real experience of a hung parliament and minority government.

As I reported to the Society's annual general meeting yesterday afternoon, as soon as I close this conference the Society's presidency will pass from me to the Honourable Ian Callinan. It has been a privilege to serve as your President these past five years, and I have been fortunate to have been greatly supported, first by John and Nancy Stone, and more recently by Bob Day and Joy Montgomery. However, no doubt acting under the influence of my past employment, I am accustomed to an appointment at pleasure with the expectation of a five year term, and I therefore asked the Board to allow me to stand down at the conclusion of this conference. I wish the Society continuing success, and I look forward to being an active member and to attending its conferences for many years to come.

I wish you all safe journeys home.

Contributors

The Honourable **Colin Barnett**, MLA, has been Premier of Western Australia since 2008. Educated at the University of Western Australia, he held a range of research and academic posts in both Canberra and Perth prior to becoming Executive Director of the WA Chamber of Commerce and Industry in 1985. He was elected to the Western Australian Legislative Assembly in 1990. He held various ministries in the Court Liberal Government, 1993-2001, including Energy, Resources Development, and Education. He was Deputy Leader of the Parliamentary Liberal Party from 1992 until 2001 when he became leader. He was Leader of the Opposition from 2001 until 2005 and again in 2008.

The Honourable **Keith De Lacy**, AM, has been chairman of Macarthur Coal since 2001. He was educated at Townsville Grammar School, Queensland Agricultural College and the University of Queensland. He held the seat of Cairns in the Queensland Legislative Assembly from 1983 until 1998 and was Treasurer in the Goss Labor Government from 1989 until 1996. Since leaving Parliament he has been chairman of several companies including Nimrod Resources Ltd and Queensland Sugar Ltd and held directorships in others.

Grant Donaldson, SC, was Senior Assistant Crown Counsel in the Crown Solicitor's Office, Western Australia from 1996 to 1998 before commencing private practice as a Barrister at the Western Australian Bar. A graduate of the University of Western Australia in Jurisprudence and Laws, he took a Bachelor of Civil Law at Oxford where he was a Rhodes Scholar for Western Australia. He was a Manager at Whitlam Turnbull Ltd from 1989 to 1991 and a partner at Mallesons Stephen Jacques from 1991 until 1995.

Richard Douglas holds degrees in Arts and Laws from the Australian National University. He was admitted to practice in Western Australia in 1995 and New York in 2001. He previously practiced as a solicitor at Blake Dawson Waldron in Perth and as an attorney with Simpson Thacher and Bartlett in New York. He is currently a member of the Law Reform Commission of Western Australia.

Lorraine Finlay graduated in Arts and Law at the University of Western Australia. She subsequently took a dual LL.M. in Law and the Global Economy from New York University and a Master's from the National University of Singapore. Admitted as a Barrister and Solicitor of the Supreme Court of Western Australia and of the High Court of Australia in 2004, she worked at the High Court, initially as a Legal Research Officer and later as Associate to Justice J. D. Heydon. After a period as a State Prosecutor in Western Australia she joined the School of Law at Murdoch University in 2010.

The Honourable **Justice John Gilmour** has been a member of the Federal Court of Australia since 2006. He was born in Scotland and studied at the University of Dundee. He settled in Australia in 1976 and was admitted to the Western Australian Bar in that year (QC since 1994); he was also admitted to practice at the Victorian Bar in 1994 (QC since 1995).

The Honourable **Justice Dyson Heydon**, AC, has been a member of the High Court of Australia since 2003; he was previously a justice of the New South Wales Court of Appeal from 2000 until 2003. He was educated at the University of Sydney and, as a Rhodes Scholar, at Oxford University. He was subsequently a Tutor and Fellow at Keble College, Oxford, 1967-73, and

CUF Lecturer at Oxford, 1969-73. Upon return to Australia in 1973, before practicing at the Bar, he held a chair in the Faculty of Law at the University of Sydney until 1981, and was Dean, 1978-79. He has published extensively on legal matters and, since 1990, been the General Editor of *Halsbury's Laws Australia*. He has been an Honorary Fellow of University College, Oxford, since 2003; and of Keble College since 2006. He has also been an Honorary Bencher of Gray's Inn since 2005.

Julian Leeser, Conference Convenor of The Samuel Griffith Society, took degrees in Arts and Laws from the University of New South Wales. He was an elected Australians for a Constitutional Monarchy delegate to the 1998 Constitutional Convention and, subsequently, a member of the No Case Committee for the Republic referendum. In addition to a year as Associate to Mr Justice Callinan of the High Court of Australia, he has been an adviser to the federal Minister for Employment and Workplace Relations (the Honourable Tony Abbott, MP) and the federal Attorney-General (the Honourable Phillip Ruddock, MP). He is now Executive Director of the Menzies Research Centre and is working on a biography of Sir William McMahon.

Des Moore studied Law at the University of Melbourne before taking a M.Sc.(Econ.) at the London School of Economics. He joined the Commonwealth Treasury in London in 1958 and was a Deputy Secretary from 1981 until 1987 when he became a Senior Fellow with the Institute of Public Affairs in Melbourne, in charge of the Economic Policy Unit. When he left the IPA in 1996 he established the Institute for Private Enterprise of which he is Executive Director. He publishes widely on economic and related policy matters.

J. R. Nethercote studied at the University of Sydney, the Australian National University and the London School of Economics. An officer of the Australian Public Service from 1970 until 1999, he had assignments in, among other organizations, the Public Service Board, the Cabinet Office, the Royal Commission on Australian Government Administration, the Public Service Commission of Canada, the National Inquiry into Local Government Finance and the Department of the Senate. Editor of the *Canberra Bulletin of Public Administration* from 1980 until 2000, and of *Australasian Parliamentary Review* from 2001 to 2003, he has edited many books including *Liberalism and the Australian Federation* and jointly edited others such as *The Menzies Era* and *Restraining Elective Dictatorship*. He is currently Adjunct Professor, Public Policy Institute, Australian Catholic University.

Dr **Dan Norton**, a graduate of the University of Melbourne, the University of New England, North Carolina State University and the University of Hawaii, has held a variety of senior posts in government. These include Deputy Secretary, Tasmanian Department of Treasury and Finance; Secretary, Tasmanian Department of the Premier and Cabinet; Chief Executive Officer, Hydro-Electric Corporation; and Chairman, National Electricity Market Management Company. He also held major posts in business including directorships. Since 2008, he has been Chairman, Capital P&O Logistics Pty Ltd.

Bryan Pape, a Barrister since 1977, joined the Law School at the University of New England in 2000. He has specialized in taxation and corporation law cases and is a former full-time member of the Taxation Board of Review (No 1) and a part-time member of the Australian Accounting Standards Board. Early in 2009, on his own initiative and at his own financial risk, he mounted a case in the High Court of Australia where, representing himself, he sought to have the Rudd Government's Tax Bonus legislation declared unconstitutional. Although narrowly unsuccessful (4:3) in that regard, the Court's judgments when dealing with the Commonwealth's defences represent major victories for constitutional propriety. As such, the *Pape case* will come to hold an honoured place in the cause of constitutional federalism.

Professor Emeritus **Jonathan Pincus** was educated at the University of Queensland and Stanford University. He has since been a Fellow of the Institute of Advanced Studies, Australian National University (1974-85) and held chairs at Flinders University (1985-91) and the University of Adelaide (1991-2002), where he was Convenor of the Academic Board. From 2002 until 2007 he was Principal Adviser, Research, at the Productivity Commission.

Andrew Podger was educated at the University of Sydney and the Australian National University. He served in the Bureau of Census and Statistics (now the Australian Bureau of Statistics), the Social Welfare Commission, the departments of the Prime Minister and Cabinet, Social Security, Finance and Defence before appointment as Secretary, Department of Administrative Services and the Arts in 1993. The following year he became head of the Department of Housing and Regional Development and, in 1996, Secretary of the Department of Health and Aged Care. He was Public Service Commissioner from 2002 until 2004 and subsequently chairman of the Prime Minister's Task Force on Health. He was National President of the Institute of Public Administration Australia from 2004 until 2010.

The Honourable **Christian Porter**, MLA, has degrees from the University of Western Australia in Economics, Arts and Laws, and from the London School of Economics. After admission to the Western Australian Bar in 1996, he worked as a commercial litigator at Clayton Utz (1996-99), as an adviser to the federal Minister for Justice (2001), and as a Senior State Prosecutor in the Office of the Director of Public Prosecutions for Western Australia (2002-07). He has also lectured at Edith Cowan University and the Law School at the University of Western Australia. He was elected to the Legislative Assembly in 2008, at a by-election, and, upon the election of the Barnett Liberal Government later that year, was appointed Attorney-General.

Sir David Smith, KCVO, AO, studied at the University of Melbourne and the Australian National University. He joined the Commonwealth Public Service in 1954. He served in the departments of Customs and Excise, Interior, Works and Prime Minister's before appointment as Official Secretary to the Governor-General in 1973. He served five Governors-General in that post from which he retired in 1990. He was personally knighted by Her Majesty the Queen. He has been a Visiting Scholar at the Faculty of Law in the Australian National University. In February 1998 he attended the Constitutional Convention in Canberra as an appointed delegate, and subsequently played a prominent role in the "No" Case Committee for the 1999 Referendum.

John Stone was educated at Perth Modern School, the University of Western Australia (BSc Hons, 1950) and then, as a Rhodes Scholar, at New College, Oxford (BA Hons, 1954). He joined the Australian Treasury in 1954, serving 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. He has since been, at one time and another, a Professor at Monash University, a newspaper columnist, a company director, a Senator for Queensland and Leader of the National Party in the Senate (1987-90) and Shadow Minister for Finance. In 1996-97 he was a member of the Defence Efficiency Review, and in 1999 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 was Editor and Publisher of its Proceedings until 2010. Today he writes frequently for *Quadrant*. In 2008 he became a member of the Mont Pelerin Society.