

Upholding the Australian Constitution Volume Twenty-three

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

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Introduction

Julian Leaser

The 23rd Conference of The Samuel Griffith Society was the first to be held in Tasmania.

No society dedicated to supporting the Federation can say that it is truly a federalist society unless it meets in all of our State capitals. A conference in Tasmania had always been an ambition of the Society but, with relatively few of our members here, it was always a little risky. The strong support for Tasmania from attendees at the 2010 conference gave the Board courage to undertake this venture.

Our attendees numbered around 140, the largest conference to date. It also produced one of the most interesting gatherings of people we have had. Included among our attendees were two former State chief justices, four retired State premiers, three people who have served as solicitor-general including, in a first for our Society, a serving State solicitor-general, among many other distinguished members and guests.

Tasmania produced two great Federation founders – the radical liberal Andrew Inglis Clark who wrote one of the earliest drafts of the Constitution, created a new voting system, and was offered a seat on the High Court of Australia; and the conservative, Sir Edward Braddon, former premier, deputy to Sir George Reid in the first parliament and innovator of the “Braddon Clause” (section 87 of the Constitution) which provided that, for the first ten years of the Commonwealth, three quarters of the revenue from customs and excise be returned to the States. 2011 marks a century since the expiration of that section of the Constitution.

Although Tasmania is, and was, the smallest State, in terms of the framing of our Constitution it punched above its weight. It was therefore appropriate that we came to Tasmania and honoured the work of these men. Scott Bennett and Lawrence Neasey will cover particular aspects of the work of Inglis Clark.

What I enjoy most about the Samuel Griffith Society is that it is a melting pot of people who come from different States, have different professions, are supporters of different political parties and who have had different life experiences, yet all of whom want to support and defend our constitutional system. It is undoubtedly the people who attend the conferences that make this Society worthwhile.

On a sad note, we have lost a number of members recently including Victorian members Barry Strong and Walter Richardson and NSW members Ken Tribe, AC, and the Honourable R. P. Meagher, AO, QC. Roddy Meagher gave a unique address launching the first volume of the Society’s proceedings and remained an active participant in the Society’s affairs. As Justice Heydon wrote of Roddy Meagher in his excellent obituary in the *Australian Law Journal*, “[n]o one who knew him could ever forget him”.

Very much alive but recovering from a serious heart operation is Ray Evans. Another member, Morton Bagley, did not attend as he had had a fall. All members of the Society join with me in wishing them a speedy recovery.

On a happier note, among those whose presence at the conference was especially welcome were the three Mannkal scholars: Whitney Jago, Olivia Walton and Toby Evans. Every year, the Mannkal Foundation sponsors a number of Western Australian students to attend our meetings. It is important for the longevity of our Society that we involve more students in our conferences. It would be wonderful if members or supporters in other States would agree to do as Mannkal does and sponsor the attendance of students from their home State at our conference.

It is also appropriate to acknowledge the assistance the Society received from Business Events Tasmania, the Mercure Hobart and the Tasmanian Government in putting this conference together. Let me, as always, record my thanks to our Secretary, Bob Day, and his assistant, Joy Montgomery, for all they did to bring about the Conference. More Australians learnt of the work of the Society in Hobart as the conference was filmed and shown on APAC- Sky News' public affairs channel. I thank APAC for their support.

In 2012 our Society turns 20. Our conferences and proceedings have been interesting and enjoyable and, through the publication of *Upholding the Australian Constitution*, the ideas discussed at the Samuel Griffith Society reach a broader readership. But we must ask ourselves a more important question – are we having an effect on the broader debate? Where are the new federalist parliamentarians, public servants, academics and judges? Is this annual conference the limit of our capacity? Are we doing enough?

I believe that the mission for the Society in its next twenty years is to move from being a learned debating society to becoming a much more direct influence in the public debate of our nation. If the values of our Society: respect for our Constitution, federalism, the rule of law, skepticism of international law and what the Americans might call “judicial modesty” are to flourish, we must do more to promote our ideas. We must build a coalition for the values of this Society in the law, in the parliaments of our nation, in academia and among students. As a start I propose that we trial Samuel Griffith Society student clubs at one or two university campuses. I also think that we must begin to identify academics, lawyers, jurists and parliamentarians on all sides of politics who share the values of this Society and encourage them to get involved. It is only then that we can have greater success in spreading the important ideas for which this Society stands. Please give me your ideas about how we can achieve this and what, if anything, you might be willing to do to make it happen.

Now to the conference.

We were honoured to experience the splendour of one of Australia's best Government Houses and to be entertained by His Excellency the Governor and Mrs Underwood and some outstanding musicians. Members of the Society will remember this event for a long time. Later we heard a very important paper from His Excellency's predecessor, the Honourable Bill Cox, about the oft-used reserve powers of the Governor of Tasmania. The beneficiary of the exercise of the reserve powers in 1989 was Michael Field, one of our speakers. Mr Field led a government with a hung parliament in coalition with Bob Brown. I think ultimately he found it as unsatisfying an experience as his federal colleagues are now finding it.

In my view the worst decisions of the Gleeson and French courts to date is their jurisprudence on electoral law (the cases of *Roach* and *Rowe*). I express no view on the merits of the policy behind the impugned legislation but it seems to me that, as a matter of law, the High Court erred in both cases. Save for very few matters, the framers of our Constitution left Parliament with unfettered discretion to provide the electoral machinery of the Commonwealth.

Paul Pirani of the Australian Electoral Commission spoke of some of the matters which arise in administering electoral law. Professor Jim Allan addressed the shortcomings of these decisions.

Scott Bennett furnished a very valuable paper on the introduction, history and operation of the Hare-Clark voting method used for the House of Assembly in Tasmania.

Several of our recent conferences have contained papers on bills of rights and this one was no different. With a government inquiry into the Victorian Charter under way, Dr Margaret Kelly examined the case for repealing the Victorian anachronism.

The decisions of the High Court prompt questions about judicial selection and judicial philosophy. These matters form the basis of Ben Jellis's appraisal of High Court activity during the Howard years. Murray Cranston considered similar questions in relation to the Supreme Court of the United States and some other federal courts of appeal.

Robert Ellicott, QC, covered a range of issues relevant to a possible referendum about recognition

of Indigenous peoples in the Constitution of Australia and advanced a proposed amendment.

As always, the Society was honoured by the presence of Justice Dyson Heydon. He spoke about constitutional facts, an issue highlighted by our President, Ian Callinan, when he and Justice Heydon were colleagues on the High Court.

The home stretch of our conference involved another possible referendum we might face on recognition of local government. Like one on Indigenous recognition, it will provide a red rag to an activist judiciary and, in the case of the recognition of local government, would likely weaken the Federation. We also heard a prescient analysis of the constitutionality of the school chaplaincy program which was before the High Court recently.

In 2010, our second post-conference tour was conducted by Malcolm McCusker, QC, who has subsequently been appointed Governor of Western Australia. Lawrence Neasey investigated the possibility of showing us over Andrew Inglis Clark's house. Unfortunately, much of the inside of the house, which is of historical significance, has been demolished. Lawrence kindly prepared a walking tour that members could take in their own time around sites of significance to Inglis Clark. The usual guided tour was replaced by a talk about Inglis Clark by Lawrence, and a "Tastes of Tasmania" lunch.

Chapter One

The Exercise of the Reserve Powers of the Governor of Tasmania

The Honourable William Cox

The American humorist, S. J. Perilman, once observed, “I am no coward; but when World War II broke out, I made goddam sure I was 12 thousand miles away from the fighting and only three years old at the time.” With respect to controversial constitutional issues such as the exercise of the Governor’s reserve power, were I to make a similar disclaimer of cowardice, I would probably be forced to make an analogous concession; for in the nine years during which I was Lieutenant Governor and periodically administering the Government, and in the three years plus that I was Governor, I was in the fortunate position of not being presented with any constitutional dilemma, and no controversy surrounded the two occasions when advice that the House of Assembly should be dissolved was accepted by me. In talking, therefore, on the exercise of that power, I will make some observations on that well-travelled ground unencumbered by personal experience or by any unconscious desire to defend myself from potential criticism.

The first instance of the controversial use of the Governor of Tasmania’s reserve powers to which I will advert is that by Governor Ellison-Macartney in 1914. In April of that year, after being re-elected in April 1913, the Solomon Government was the subject of a vote of No Confidence. The Premier sought a dissolution which was refused by the Governor who thereupon sent for the Leader of the Opposition, Mr Earle, to form a Government. The Governor required of Earle as a condition of his acceptance of a Commission that he should advise a dissolution. Mr Earle acquiesced but subsequently refused to counsel dissolution. The Secretary of State for Colonies directed that the Governor’s imposition of this condition was unwarranted. Forsey commented on the case:

It is noteworthy that in the discussions which resulted from the Governor’s attempt to insist on the condition he had imposed on Mr Earle’s taking office (namely an immediate dissolution), Mr Earle re-affirmed the classic doctrine that ‘two of the cases’ in which dissolution should be refused were: (a) when an alternative government is possible in the existing Parliament, and (b) where there is no important political question directly at issue.¹

It would appear, however, that although the Secretary of State re-stated the constitutional doctrine that all the Governor’s actions must be clothed with ministerial responsibility, no mention was made of the fact that the Governor had refused to grant the request of the outgoing premier for a dissolution.² Perhaps the silence of the Secretary of State implies acceptance of Forsey’s “classic doctrine.”

Nearly 10 years later a dissolution was refused the Premier, Sir Walter Lee, some 15 months after the commencement of the 21st Parliament in July 1922 and to which 12 Nationalists led by Lee, 12 Labor members, five Country Party members and one Independent had been elected. Lee’s ministry had been the subject of a vote of No Confidence after the defection of some Nationalists. The Administrator, Sir Herbert Nicholls, in a document dated 24 October 1923 stated:

Ministers have not tendered their resignations as a result of that declaration, but have asked for a dissolution. It is not my duty to grant a dissolution, if Ministers can be replaced by other Ministers who are prepared to accept full responsibility for my act, and can also command the support of a majority in the House of Assembly. The Leader of the Opposition, Mr Lyons, has given me assurances that he is prepared to accept the necessary responsibility, and that he has the necessary majority. I believe that his assurances are well founded. I have therefore declined to grant a dissolution. Thus the matter is left in the hands of the House of Assembly.³

Although Lee protested that Lyons's assurances were insubstantial, he conceded that the Administrator's enquiry into the latter's ability to form a government was "obviously in accord with the usual practice."⁴

In the General Election of 1948 the Labor Government was returned with 15 seats; the Liberals held 12 and there were three Independents. After appointing the Speaker the Government was reliant upon the vote of at least one Independent. In September 1949 the Labor Speaker died and an Independent, Mr Wedd, accepted the Speakership, thereby restoring the Government to possession of a majority of votes in the House. In January 1950, however, Mr Wedd resigned the Speakership, forcing the Government, then in recess, again to find a Speaker when Parliament resumed and hence returning it to minority. The Premier sought a dissolution and submitted to the Governor that this made the Government's position in the House untenable and that no alternative government was possible. Furthermore, he assured the Governor that no censure motion was pending.

The Premier acknowledged that he was "under the strongest obligation to ensure that [he] did not improperly advise [the Governor] in this matter, for under no circumstances must any advice [he] might tender be such that if acted upon it would bring the Crown into political controversy."⁵ The reasons advanced by the Premier were these:

1. Because of the Resolution of the Imperial Conference of 1926 the Governors of Australian States now stood in relation to a State Parliament as the Sovereign did to the Imperial Parliament. Although the Resolution in terms applied only to the Governor-General of a Dominion it was contended that it was of equal application to the Governor of a State.
2. That being the case, the practice stated by Chalmers & Hood should be followed namely: "It has been the uniform practice for more than a century that the Sovereign should not refuse a dissolution when advised by his Ministers to dissolve. Anson, while affirming this to be a settled convention of the Constitution, points out that it is also a convention that dissolution should not be improperly advised, and that the first rule might not have become established if the second had not been uniformly observed. Hence, if a dissolution were requested improperly the Sovereign might in an extreme case be justified in refusing the request."⁶
3. This was not an extreme case and there was no prospect of an alternative Government being formed.

Having satisfied himself by an interview with the Leader of the Opposition that no alternative Ministry was possible, the Governor granted the dissolution.

In respect of the 1950 dissolution I think it can be said to have been inevitable given the circumstances that the Government was clearly in an unstable situation and that the Governor had satisfied himself that no alternative Government was possible. The contention that the Governor's relationship to a State Parliament is equivalent to that of the Queen to the United Kingdom Parliament, whatever the situation may have been prior to 1986, seems to have been confirmed in the minds of most constitutional lawyers by the passage of section 7 of the *Australia Act* of that year.

The practice enjoined by that relationship is reflected in the letter of Sir Alan Lascelles, the Private Secretary to King George VI, which was published in *The Times* in 1950 under the *nom de plume* of *Senex*:

[I]t can be properly assumed that no wise Sovereign – that is one who has at heart the true interest of the country, the constitution, and the Monarchy – would deny a dissolution to his Prime Minister unless he were satisfied that: (1) the existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; (3) he could rely on finding another Prime Minister who would carry on his Government, for a reasonable period, with a working majority in the House of Commons.⁷

A more controversial grant of dissolution occurred in 1956. For many years the Tasmanian Parliament had been plagued by the risk of deadlock in the Lower House, then a House of 30 seats. In late 1954 an Act was passed to provide that in the event of two parties obtaining the same number of seats the party having the greater number of primary votes could call upon its opponents to nominate the Speaker thereby ensuring it of a majority of one. In the event that the Opposition declined to do so, provision was made for the majority party to nominate a Speaker from its own ranks and to gain another party member from the electorate from which the Speaker came. In the election of February 1955 the Labor Government secured 15 seats and the Liberals the same number. Labor won a majority of primary votes and called upon the Opposition to provide the Speaker, which it did.

Just 17 months into a three-year term, a member of the Ministry, Mr Bramich, resigned from it and from the Labor Party, and the next day joined the Liberal Party. The Opposition thereupon moved a motion of No Confidence in the Government which was carried with a majority of one. Among the reasons advanced by the Premier to the Governor for a dissolution were the following:

1. The Governor should act upon the principles and practice of the Sovereign and accept his Ministers' advice.
2. He conceded that in extreme circumstances, the Governor of a State may reject that advice but claimed that nothing remotely resembling extreme circumstances existed in the present situation.
3. The Leader of the Opposition had a majority only by virtue of Mr Bramich's defection. This, he claimed, would be the complete frustration of the will of the latter's constituents and of the majority of the electorate.
4. The deadlock provision inserted in the *Constitution Act* 1934 in 1954 (sec 24A) was designed, he claimed, to ensure that the party with more primary votes would be able to govern. Under that section no provision was made for a change of party. Once, as here, section 24A was invoked, the life of the Parliament had been reduced from five years to three years. "That the Law requires an early dissolution where section 24A operates leads to the inference that there should be an earlier dissolution when the Government it was designed to sustain would otherwise be overthrown by a change for which it makes no provision."⁸
5. Specifically, with respect to the issue whether the Governor should seek to find an alternative Ministry, he cited L. F. Crisp:

Since the parliamentary struggle has been effectively reduced to a contest between Labour and anti-Labour Australian practice appears to have followed the British pattern which Berriedale Keith sums up in these terms – "The practice in the United

Kingdom in this regard is perfectly clear. The Crown expects not lightly to be asked for a dissolution; but it will grant a dissolution when advised by Ministers, without seeking to find an alternative Ministry.⁹

He also quoted Dr H. V. Evatt's comment in the *Canadian Bar Review*:

The mere fact that some sort of alternative Ministry is possible does not, and should not, prevent the grant of a dissolution by the King's representative. Presumably the Governor would never lose sight of the popular 'mandate' possessed by the existing Assembly. Again, it might be disastrous to democratic feeling to permit the continuance of an Assembly if (say) the alternative Ministry would have little or no popular backing or if it proposed to act, or was dependent upon the support of members who were proposing to act, in flagrant disregard of pledges to the electors.¹⁰

The Governor accepted the Premier's advice "notwithstanding that the Leader of the Opposition has assured me that he is able ... to form an alternative Government."¹¹

The circumstances in 1956, in my opinion, certainly argued strongly for the Governor to accept the advice of the Premier. The Government was unstable, the electorate had elected a finely balanced Parliament with the Government gaining a greater number of primary votes than the Opposition, the equality of votes had brought about a foreshortening of the normal term to a period of three years half of which had been served, and the balance in numbers had been upset by the defection of one member of the governing party. In these circumstances there was much to be said for giving the electorate the opportunity to declare its will by a general election. On the other hand, the mere facts that the Government had been censured mid-term and the Opposition had gained a majority of one making an alternative Government viable, at least in the short term, could not, without more, be said to be circumstances so extreme as to justify the Governor in refusing to accept the Premier's advice.

In 1959 the Premier relied for a dissolution in part on "the constitutional practice common to the U. K. and this State that the Queen would graciously permit her Prime Minister to choose a day for a general election in the last year of a Parliament."¹² The House was due to expire a fraction over six months after the Premier's request. I know of no U. K. nor Tasmanian case where a request for a dissolution made in the 12 months before the expiration of a Parliament has been refused and I would submit that it can now be taken as a settled convention that such a request should be granted save in circumstances where a censure motion is actually pending. Forsey accepts the proposition that "If a Government asks for a dissolution while a motion of censure is under debate it is clear the Crown's duty is to refuse";¹³ see also Dr H. V. Evatt.¹⁴ The Administrator granted the request.

In 1972 the Government lost the support of a coalition partner and its majority. The Premier argued that if the Opposition were to provide a new Ministry it was only to be expected that the Governor would be confronted by a similar request from it for a dissolution thereby placing him in a most embarrassing position. The Premier quoted from Wade & Phillips:

The dilemma is that, if a new Prime Minister took office, he might himself have to seek an early dissolution. If this was granted to him after it had been refused to his predecessor, the political impartiality of the Sovereign would be endangered.¹⁵

The Governor's decision was made easier by the expressed desire of the Opposition to go to an election which they in fact won.

In 1981 the Premier, Mr Holgate, sought to have Parliament prorogued for a period of nearly six months. Late in that year the then Premier, Mr Lowe, was replaced as Leader of the Labor Party by Mr Holgate who then assumed the premiership. By 14 December, when formal advice was tendered,

two former members of the Government were sitting on the cross-benches and the situation in the House of Assembly was described by the new Premier as volatile and unstable. He relied on this fact as “not conducive to proper consideration of the legislative programme.” Second, he claimed that prorogation would give the Government necessary time to consider and analyse the results of a referendum recently carried out in respect of a power development scheme in Tasmania’s South West and third, time was said to be needed to clarify the overall funding situation with respect to the total works programme including energy development.

He therefore sought prorogation to 26 March 1982.

In a file note signed by the Governor, Sir Stanley Burbury, he noted that the Premier saw him on 4 December following the referendum and requested a prorogation until May 1982. The Governor’s note reads in part:

I told the Premier that while I felt he had made out a case for prorogation for a limited period, my strong view was that it would not be in the public interest to prorogue Parliament for a period exceeding 3 months. He readily accepted the force of this view and accordingly in his subsequent letter (dated 14 December 1981) his request was for prorogation until 26 March 1982.

Although ordinarily the Governor acts on the advice of his Ministers in relation to prorogation or dissolution of Parliament, it is a fundamental constitutional convention under the Westminster system that he is not in all circumstances bound to accede to that advice. Two examples occur to me:

1. Advice to grant prorogation when a motion of No Confidence is before the House;
2. Advice not to dissolve Parliament after a Government has been defeated in the House.¹⁶

While Sir Stanley did not specifically refuse to accede to the Premier’s initial request he exercised his right to counsel him, admittedly somewhat forcibly, thereby achieving a reduction in the duration of the prorogation, and so the matter was not put to the acid test. The Premier did, however, extract a further fortnight’s prorogation beyond the limit of three months suggested by the Governor. Parliament, in due course, resumed, the Government was defeated, the House dissolved and a fresh election resulted in victory for the Liberals.

The most controversial occasion for the exercise of the reserve power in Tasmania confronted the Governor, General Sir Phillip Bennett, in 1989. In the previous House of Assembly, the Liberals had a majority and formed government. In the May election of 1989, however, the numbers in the House were 17 Liberal, 13 Labor, and five Independents who had in common environmental policies and were labelled “Greens” although they were not members of any Green party.

The Liberals also attained a greater number of primary votes than either the Labor Party or the Greens. In this situation the first decision to be made was who should be commissioned to form a Government. On the day the result of the election was officially declared, the Governor received a letter from the Leader of the Opposition urging that a minority Labor Ministry be commissioned based on an alliance with the five Independents. The letter was referred to the Premier who tendered advice that, as no formal coalition arrangement was in place, his commission as Premier should continue and that, as his party had the greatest number of seats in the House, the Government should remain in office as a minority Government.

Later that day a copy of a “Tasmanian Parliamentary Accord” signed by the Leader of the Opposition and one of the five Independents, Dr Brown, was delivered to the Governor who referred it to the Premier. On 30 May the Premier advised that the Accord was deficient in a number of important procedural and policy areas. The Governor accepted this advice and, on the following day, swore a Liberal Ministry to office. In my submission this course was unassailable and the Premier had

every right in the circumstances to have the Government's strength tested on the floor of the House when Parliament resumed on 28 June.

On 27 June the Leader of the Opposition forwarded to the Governor a copy of a more detailed Accord signed by himself and each of the five Independents. The Premier advised that the Government had sought a number of legal opinions as to the constitutional alternatives available to the Governor. He stated that these opinions supported advice that the House be dissolved and that such advice would be within the proper limits of constitutional convention. The Governor indicated that, subject to developments when the House met, he was unlikely to accept such advice, if given. The Premier forwarded the opinions to the Governor. The authors of the various advices were Sir Maurice Byers, QC, the Honourable R. J. Ellicott, QC, the Honourable T. E. F. Hughes, QC, Professor R. D. Lumb and Professor P. H. Lane. Next day Parliament was opened and sat for the despatch of business.

On the morning of 29 June the House expressed "no confidence" in the Government. Being acquainted with the No Confidence vote the Governor, with the Premier's acquiescence, summoned the Leader of the Opposition to explore his capacity to form a minority Government and thereafter consulted with each of the five Independents as to their undertakings to support that Government for a reasonable period. He then informed the Premier of the results of the discussions and, on receipt of the latter's resignation, commissioned the Leader of the Opposition to form a Government.

While some commentators have criticised the Governor for imposing on the tentative alternative Ministry tests of its potential stability which were too heavy and suggested that he had been too inquisitive,¹⁷ the fact remains that, when he informed the Premier of the results of the discussions with the Leader of the Opposition and the Independents, and asked the Premier for his advice, the latter resigned and advised the Governor to call on the Leader of the Opposition to form a Government. To follow that advice was the Governor's only proper course.

The 1989 crisis is interesting for the stark contrast in views expressed by the undoubtedly eminent constitutional lawyers relied upon by the Liberal Premier and those engaged by the Governor. Among the latter were the Right Honourable Sir Harry Gibbs, the Tasmanian Solicitor-General, Mr W. C. R. Bale, QC, and Professor Colin Howard. Professor James Crawford, engaged by the Greens, also sided with those engaged by the Governor. All were agreed that the Governor had a discretion to grant or refuse the advice of the incumbent Premier in circumstances variously described as "exceptional" or "extreme" or "in extreme cases" or "an extreme crisis"; where they differed was in their perception of whether the instant circumstances could be so described. Sir Harry Gibbs in his opinion wrote:

The Governor is entitled to expect that a defeated Premier will act responsibly in advising a dissolution and will give proper weight to the public interest and to the necessity of doing everything possible to avoid placing the Governor in a position where he may be thought to have become involved in political controversy. The Governor is entitled to remind the Premier of his obligations in this regard and would be entitled (if it seemed to him proper) to attempt to dissuade the Premier from advising a dissolution. However if the Premier nevertheless advises a dissolution the Governor is not entitled to reject that advice for the sole reason that he considers that the Premier has not acted responsibly in giving it.

The question what circumstances are so exceptional as to render it proper for the Governor to refuse to act on the Premier's advice to dissolve the House has not been clearly answered by existing convention. However, since the fundamental principle is that the person commissioned to form a Government should enjoy the confidence of a majority of the House, it would in my opinion be proper to refuse a dissolution if he were satisfied (1) that since the general election the results of which were declared on 29 May 1989 the Premier had never commanded a majority of seats in the House; (2) that at the first session of the House the Premier was defeated on a motion of no confidence

or on a motion of similar significance; and (3) that the Leader of the Opposition could form a Government which would enjoy the confidence of the House and would be likely to continue to enjoy that confidence for a reasonable period.

If the Governor were minded to refuse a dissolution in these circumstances, it might be wise for him to take all practicable steps to satisfy himself that an alternative Government could be formed and to obtain public assurances from the members concerned to that effect.¹⁸

Professor Howard's advice was that it would not be constitutionally improper for the Premier to advise a dissolution but that the Governor would not be bound to act upon it in the current circumstances.¹⁹ The Solicitor-General wrote that should the Premier advise dissolution, the fact, if established, that the Government had lost the confidence of the House early in the first session of the new Parliament (particularly if there were someone else willing and apparently able to form a stable Government – "in other words, asserting that he is able to give effect to the expressed will of the people")²⁰ might properly be regarded as exceptional.

I note that Sir Harry Gibbs's advice counters the suggestion referred to above that Governor Bennett imposed too heavy an onus on the Leader of the Opposition as to the stability his Ministry could guarantee. Indeed, as the vice-regal office could be embarrassed should the latter's assurances prove illusory, I suggest that Sir Phillip had every right to make the enquiries he did. Professor Howard also advised enquiry into potential defects in the Accord such as the absence of any undertaking that any of the Independents would not vote for a No Confidence motion in a minority Labor Government. It is perhaps only in a Lower House consisting of members all of whom belong to one or other of two parties that the assurance of the Leader of the Opposition can be taken at face value, the discipline of the party system being sufficient to preclude the need for further enquiry.

Mr Ellicott, having been asked the question, "whether it would be within the proper limits of constitutional convention for the Premier to advise the Governor to dissolve the House and what issues are relevant to that advice in the present situation?", answered the first part of the question in the affirmative and said that if the Premier were to advise a dissolution:

[T]he Governor, in accordance with the applicable constitutional convention, should follow that advice unless he considers, contrary to what I consider to be the facts, that this is an extreme case which requires that that advice be not followed.

There is very little guidance as to what an 'extreme case' or an 'extreme crisis' means. I have instanced the case of a Premier acting quite improperly, irrationally or irresponsibly. Jennings has said it would be difficult to say what those circumstances would be. Chalmers & Hood Phillips instance a case where a Government having been defeated in the House, has been granted a dissolution, is defeated at the ensuing general election and then advises another dissolution. Such advice would clearly be improper. It would be a clear case where the popular will was manifest. The circumstances here are quite different. The circumstances are unfortunate but they are not so extreme as to warrant the Governor's departure from a Premier's advice.²¹

He then went on to consider what issues were relevant to the Premier's advice. He mentioned the question whether an alternative ministry would reflect the will of the people. As to this he said that relevant factors would include whether the Labor Party presented itself to the electorate as only being willing to govern in its own right, disavowing any coalition or joining of forces with the Independents, and whether the Accord was inconsistent with this. The Independents had given similar disclaimers. This was a factor stressed in other opinions given to the Liberal Government.

Mr Hughes advised:

A very important consideration must be whether, if the present Government were to resign, the formation of the new ALP Government which would come into office with the organised and united support of the Green members pursuant to the Parliamentary Accord would be an outcome congruent with the expectations of the electorate engendered by statements or pledges made during the election campaign. As against this consideration there must be set the fact that it would be possible for an alternative Government to be formed in the House as presently constituted.²²

Sir Maurice Byers commented: “If the Premier is of the view that the electorate was not informed of the possibility of the arrangements embodied in the Accord, he may, with appropriate documentation, inform the Governor that the alternative Ministry does not enjoy popular support and a dissolution is the Governor’s appropriate choice.”²³

In Professor Lane’s view:

[T]he Crown cannot be sure that it is giving effect to the wishes of the electorate – viz. did the electorate want the ALP and the Independents, each with its separate promised policies, unencumbered by an alliance with the other? Or was it prepared to accept the ALP and the Independents, even in alliance and with the inevitable alterations in the six policies of these several parties, if thereby the ALP with the support of the Independents would constitute the Government?²⁴

Finally, Professor Lumb contended:

To give formal recognition to the Accord by commissioning a new minority Government would be a condonation of a breach of faith on the part of the members of the Opposition and Independents arising from promises or pledges made to the electors before the election. Those promises or pledges affect the very nature of Government. Evatt has suggested that the Governor ought to consider whether an alternative Ministry would enjoy a popular ‘mandate’ or whether it might be acting ‘in flagrant disregard’ of electoral pledges.²⁵

Sir Harry Gibbs rejected these considerations as irrelevant. He said:

Notwithstanding contrary views expressed by learned commentators (particularly Dr Evatt and Senator Forsey) it would not seem to me to be right for the Governor, in exercising his discretion, to give weight to a suggestion that a Government formed by the Leader of the Opposition would lack popular backing or that the members supporting it would be acting in breach of their pledges. It would . . . be inappropriate for the Governor to investigate controversial questions of that kind. So far as the Governor is concerned, the wishes of the people have been expressed by electing the members who have gained seats in the House.²⁶

Likewise Professor Howard advised:

[A]ny inconsistency between the conduct of the parliamentary parties after the election and campaign declarations made before the election are not circumstances which the Governor should take into account. He is not required to be a censor of political morality or a crystal ball in which the persuasiveness of electoral rhetoric may be divined. The

evidence of the opinion of the electorate to which he should have regard is the result of the election in terms of seats won in the House of Assembly, not, in the absence of any suggestion that the election was not conducted according to law, anything said or done in the course of the electoral campaign or to statistical analyses of the vote.²⁷

My own view is that these considerations are relevant and may properly be taken into account by the Governor. In a paragraph of his opinion with which Sir Harry Gibbs expressed his agreement,²⁸ Mr Ellicott wrote:

The Premier in formulating his advice to the Governor . . . in broad terms, should, in my opinion, have regard, not only to the state of the parties in the House of Assembly and the possibility of an alternative ministry, but also to the more general question whether the alternative ministry would reflect the will of the people of Tasmania. If the proper view is that it would not, or if there is real doubt about it, that is a strong reason, consistent with constitutional authority, for advising in favour of dissolution.²⁹

I agree that the Governor is not required to be a censor or a crystal ball. Whether campaign rhetoric was perceived by the electorate as underhand or dishonest, those engaging in it would have to accept responsibility for it at the ballot box whenever the next election occurred, but I agree with Mr Ellicott's supplemental comment on that of Sir Harry's rejection of the relevance of prior pledges. Mr Ellicott said: "These issues are part of the political situation which faces the State. To ignore them would be to ignore reality. Judging the likely will of the people is part of the political decision to be made on dissolution and these factors are clearly relevant to that judgment."³⁰ While fresh issues may engage the electorate's attention in the event of a dissolution, another election, where the readiness of the alternative ministry to make alliances was now known, would give a far clearer indication of the will of the people.

Merely because the members of an Appeal Court may individually have adopted a different course, a judicial discretion will not be interfered with on appeal if the primary judge correctly applies the law, does not take into account irrelevant material and does not misdirect himself as to the facts. So, too, the vice-regal discretion does not miscarry in similar circumstances merely because others may have exercised it differently. Had the Governor been advised to dissolve the House, my opinion is that there was a stronger case for him to do so than to reject the Premier's advice. Even if the circumstances confronting him can be said to be exceptional or extreme and brought the exercise of the discretion unequivocally into play, he was still not obliged to exercise it in favour of rejecting the advice given. To my mind, the added fact that promises of no coalition or deal had been made was likely to have created a real doubt as to the mandate to govern of those giving them and justified a further appeal to the people.

There will always be different views as to how such a discretion should be exercised in any given situation. It must be always remembered, however, that it is a necessary discretion and one which we entrust to the impartiality, good sense and integrity of our vice-regal representative.

Endnotes

1. E. A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, 1943, 34.
2. W. A. Townsley, in F. C. Green (ed.), *A Century of Responsible Government in Tasmania 1856*

to 1956, 253-254.

3. Cited in Parliamentary Paper No 59 of 1956, 10.
4. Premier's Office File 75/6/23.
5. Parliamentary Papers No 10 of 1950, 4.
6. *Ibid.*, 5, citing Chalmers & Hood, *Constitutional Law*, 1946, 51-2.
7. J. W. Wheeler-Bennett, *King George VI, His Life & Reign*, 1958, 51-2.
8. Parliamentary Paper No 59 of 1956, 7.
9. L. F. Crisp, *The Parliamentary Government of the Commonwealth of Australia*, 229.
10. Dr H. V. Evatt, "The Discretionary Authority of Dominion Governors", *Canadian Bar Review*, vol. 18, 1, 9.
11. Parliamentary Papers No 59 of 1956, 14.
12. Parliamentary Papers No 6 of 1959, 2.
13. E. A. Forsey, *op. cit.*, 269.
14. Dr H. V. Evatt, *The King & His Dominion Governors*, 1936, 61.
15. Parliamentary Papers No 16 of 1973, citing Wade & Phillips, *Constitutional Law*, 6th ed., 114.
16. Sir Stanley Burbury, Undated Memorandum made December 1981, Government House, Hobart.
17. Ian D. Killey, "Comment – Tasmania: A New Convention?" *Public Law Review*, vol. 2, 1991, 221.
18. Sir Harry Gibbs, Opinion dated 18 June 1989, para 4-6.
19. Colin Howard, Opinion dated 23 June 1989, para 42.
20. W. C. R. Bale, Letter to Official Secretary dated 16 June 1989, para 7.
21. R. J. Ellicott, Opinion dated 27 June 1989, 8.
22. T. E. F. Hughes, Opinion dated 15 June 1989, 1-2.
23. M. H. Byers, Opinion dated 21 June 1989, 5.
24. P. H. Lane, Opinion dated 22 June 1989, 4.
25. R. D. Lumb, Opinion dated 24 June 1989, 5.
26. Gibbs, *op. cit.*, para 8.
27. Howard, *op. cit.*, para 4.
28. Gibbs, *op. cit.*, para 16.
29. Ellicott, *op. cit.*, 8-9.
30. Ellicott, Memorandum dated 27 June 1989, 4.

Chapter Two

Current Issues and Recent Cases on Electoral Law — The Australian Electoral Commission perspective

Paul Pirani

Before turning to an analysis of recent cases dealing with the *Electoral Act* 1918 (Cth) (hereafter: the Electoral Act), I need to give a quick outline of exactly what is the Australian Electoral Commission (AEC) and its role.

What is the Australian Electoral Commission?

The AEC conducts elections under a range of legislation. The main role for the AEC is the conduct of federal elections under the Electoral Act and referendums under the *Referendum (Machinery Provisions) Act* 1984 (Referendum Act). However, in addition, the AEC conducts fee-for-service elections under the authority contained in sections 7A and 7B of the *Electoral Act*, industrial elections under the *Fair Work (Registered Organisations) Act* 2009, protected action ballots under the *Fair Work Act* 2009 and elections for the Torres Strait Regional Authority under the *Aboriginal and Torres Strait Regional Authority Act* 2005.

The AEC itself comprises three persons, the Chairperson (the Honourable Peter Heerey, QC), the non-judicial member (the Chief Statistician, Brian Pink) and the Electoral Commissioner (Ed Killesteyn) (see section 6 of the Electoral Act). The AEC is not a body corporate. As a matter of law, the AEC is not a legal entity that is separate from the Commonwealth of Australia.

This means that the AEC is not a body corporate and is unable to sue and be sued or to enter into contracts in its own right. This is despite what was stated in the Commonwealth Parliament in 1983 when major reforms to Australia's electoral laws took place with the amendments to the Electoral Act to establish the AEC.

The AEC does have some standing to appear in court separate from the Commonwealth in relation to non-voters (see section 245), the Court of Disputed Returns (see sections 357 and 359), and to seek injunctions to restrain persons from breaching the Electoral Act (see section 383). There is a brief discussion of the legal status of the AEC as being separate from the Commonwealth in the case of *Mitchell v Bailey (No 3)* [2008] FCA 1029 because the Court of Disputed Returns has the power to award costs against the Commonwealth in all matters (see subsection 360(4) of the Electoral Act which is contrasted by Justice Simpson from the position in NSW in the case of *Bradbery v Hay (No.2)* [2011] NSWSC 691.

Section 7 of the Electoral Act sets out the functions of the AEC. These include advising the minister and the Parliament on electoral matters. The AEC is responsible for providing the Australian people with an independent electoral service capable of meeting their needs, while enhancing their understanding of and participation in the electoral process. It is therefore essential that all AEC employees, staff and office-holders are, and are seen to be, politically neutral. Any failure by the AEC actually to be politically neutral, or seen to be politically neutral, runs the risk that election results could be challenged and the current trust in the services provided by the AEC could be seriously undermined. Most people are not aware that there is still a provision in the Electoral Act

that prevents each Australian Electoral Officer (there are eight in total – one for each State and one for each of the two Territories) from voting in a Senate election unless it is to have a casting vote to separate two tied candidates for the last vacancy (see subsection 273(17)). By convention the Governor-General does not vote owing to the role of issuing the writs for an election and returning the writs to the Parliament. However, this is not an exception that is contained in the Electoral Act.

The Electoral Act deals with a wide range of electoral matters including determining electoral divisions, the enrolment of voters, registration of political parties, nomination of candidates, the voting process, the scrutiny of votes, election funding and financial disclosure, electoral offences, etc. Exercise of these powers is vested in the AEC, the Electoral Commissioner or individual statutory electoral officers. None of these Parts of the Electoral Act contains any powers for the minister to exercise or to direct AEC staff in the performance of their powers or functions.

The convention has developed whereby the AEC briefs the responsible minister in relation to matters involving the exercise of its powers and functions under the Electoral Act but operates at “arm’s length” from the Executive arm of the Government in relation to the actual exercise of those powers and functions. This “arm’s length” approach is entrenched in guidelines and practices on a wide range of matters.

The relationship between the AEC and the Executive arm of Government is also regulated by the fact that the precursor for the conduct of a general election involves the dissolution of the House of Representatives under section 32 of the Constitution prior to the issuing of the writs for an election. One of the practical effects of this is that the Government is then in caretaker mode during the whole of the election period, placing the AEC in the position where it is required to comply with the caretaker conventions which “aim to prevent controversies about the role of the public service distracting attention from the substantive issues in the election campaign” (see paragraph 1.4 of the *Guidance on Caretaker Conventions 2010* which can be found at the following link: http://www.dpmc.gov.au/guidelines/docs/caretaker_conventions.pdf).

The role of the AEC in litigation

The AEC has always acted in Court of Disputed Returns matters as though it was subject to the approach as set out by the High Court in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13. This results in it not being appropriate for the AEC to be presenting arguments on such matters as the constitutional validity of challenged provisions in the Electoral Act. The AEC’s role in all legal proceedings is to assist the Court. Since 1983, the AEC has clearly been accepted by the High Court as appropriately being involved in matters involving arguments about whether facts as pleaded disclose any illegal practice that may have led the results of the election being likely to have been affected. This test necessarily involves the Court having regard to expert evidence from the AEC about the election and counting processes. Accordingly, the position taken by the AEC is not inconsistent with the principles in *ex parte Hardiman* irrespective of whether or not the AEC is a “tribunal”.

Support for this view can be found in the transcript of the High Court in the case of *Roach v Electoral Commissioner* [2007] HCA 43 where a Judge criticised the AEC’s Counsel for going too far and entering the dispute as a contradictor. His Honour Justice Kirby, in the High Court transcript of 13 June 2007, stated as follows:

KIRBY J: I must say that I took the view that the Commissioner is a neutral officer and, indeed, one of the most important, if not the most important, in the Executive.

MR HANKS: On this basis, your Honour, that there is a presumption of validity and the answers would go to that presumption, only on that basis, your Honour. We do not wish to engage in any of the argument.

KIRBY J: I just want to know what interest the Electoral Commissioner has to disenfranchise many citizens of this country.

MR HANKS: His interest, your Honour, is to administer the law as enacted by the Parliament and to proceed on the assumption that that law is valid. For that reason we support the answers that are proposed by the Commonwealth and for no other reason.

KIRBY J: If a tribunal or a court came here and said that they supported the position of the Executive Government they would be given the rounds of the kitchen. I ask myself is it different in the case of the Electoral Commission? I would have thought with the Auditor-General, the Electoral Commissioner, perhaps the Ombudsman and a few others they are in a position analogous to courts. Anyway, that is just my opinion.

The AEC's role in litigation dealing with the registration of political parties was also the subject of guidance from three Federal Court judges (including then Justice French) sitting as a Full Bench of the Administrative Appeals Tribunal (AAT) in the case of *Woollard and Australian Electoral Commission and Anor* [2001] AATA 166. The AAT stated at paragraph 20:

It is rather the integrity of the electoral process and, associated with that, the interests of electors in making choices unaffected by confusion or mistake that are protected. In this context the role of the Commission as a party to proceedings before the Tribunal is in theory wider than that of a registered political party which will be primarily concerned with its own interests and those of its candidates. The Commission, however, should be at pains not to compromise the reality and appearance of its impartiality in the role it takes in defending its own decision on a question of registration. Where a political party is joined in the proceedings it may well be that it takes the primary role of contradictor, with the Commission assisting the Tribunal as to the construction of the Act and considerations relating to the electoral process generally. Of course, if there is no other contradictor, then the Commission may be left in the position of having to put all arguments to the Tribunal that fairly bear upon the considerations relevant to the decision. It is of particular importance to note that pursuant to s 43, the Tribunal, even though comprising three judges of the Federal Court, is sitting as an administrative body in effect in the place of the Commission. Its task is to make the correct or preferable decision having regard to the provisions of the Act and the factual circumstances. See *Drake v Minister for Immigration and Ethnic Affairs* [1979] AATA 179; (1979) 24 ALR 577, at 589 per Bowen CJ and Smithers J. In the present case, senior counsel appearing for the Commission had filed written submissions going to the merits of the decision. Nevertheless, he accepted that the Commission's role in this case should be limited to addressing the Tribunal on questions of construction and any particular omission or difficulties arising out of the submissions put on behalf of the Liberal Party of WA.

High Court of Australia

I readily concur with the view expressed by many learned commentators (for example, Professor Graeme Orr, Professor George Williams) that there are many provisions in the Electoral Act that use obscure phrases and dense language. The legislative history of many of these provisions (particularly those that relate to the Court of Disputed Returns) go back to Western Australian and South Australian electoral legislation that pre-date federation. The Court of Disputed Returns provisions were contained in the original *Commonwealth Electoral Act* 1902 and were substantially revised in 1983.

The High Court has two roles in dealing with matters relating to the conduct of federal elections. The first role is as the Court of Disputed Returns which is the final arbiter of disputes relating to an election. The second role is as the interpreter of the provisions of the Constitution that have an impact on electoral matters. Often the two roles are combined particularly where there are legal challenges to the qualifications of a candidate who may have been elected (e.g. see *Free v Kelly* [1996] HCA 42).

There have been numerous challenges to various provisions in the Electoral Act which are argued as being an infringement of various rights that are stated as arising from the Constitution. Some are stated to flow directly from such provisions as sections 7 and 24 of the Constitution (“directly chosen by the people”) while others are argued to impliedly exist (for example, the implied freedom of political communications). The Constitution itself contains a distinction between certain matters that are expressly dealt with by the Constitution itself (for example, disqualification of candidates under section 44), while other matters are left to be determined by the Parliament (for example, the qualification of electors in sections 8 and 30 and the voting system in sections 7, 9, 24, 29 and 31).

This distinction has resulted in a fertile ground for legal challenges particularly where various amendments made to the Electoral Act are regarded as being partisan and political in their nature. I take particular note of the comments made by Justice Dawson in the case of *McGinty v Western Australia* [1996] HCA 48 at paragraph 10 where he refers to the various provisions of the Constitution which he describes as providing for the “minimum requirements of representative government but do not purport to go significantly further”. He goes on in the same paragraph to conclude that:

In providing for those matters which are confided to it, parliament is required to determine questions of a political nature about which opinions may vary considerably. For example, the qualifications of electors are to be provided for by parliament under ss 8 and 30 and may amount to less than universal suffrage, however politically unacceptable that may be today. Thus, it may be seen that the form of representative government, including the type of electoral system, the adoption and size of electoral divisions, and the franchise are all left to parliament by the *Constitution*.

So we are left with a conundrum. Given the nature of the Parliament, how are the democratic rights of Australians to representative government to be safeguarded?

It has been stated by Professor Orr that one of the cornerstones of voting rights was the 1975 High Court decision in *Ex rel McKinley v Commonwealth* [1975] HCA 53. Although the High Court in this case rejected the argument mandating one-vote one-value that applies in the United States, the joint judgment of Justices McTiernan and Jacobs at paragraph 6 stated that:

The words ‘chosen by the people of the Commonwealth’ fall to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of these words in s. 24. At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree. It cannot be determined in the abstract. It depends in part upon the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth. For instance, the long established universal adult suffrage may now be recognized as a fact and as a result it is doubtful whether, subject to the particular provision in s. 30, anything less than this could be described as a choice by the people. (at p36)

The majority of the High Court in the prisoner voting case of *Roach v Electoral Commissioner*[2007] HCA 43 adopted and applied the above statement although it appears to be limited to adult Australian citizens and is subject to the exception that the Parliament can enact legislation that limits universal adult suffrage in circumstances that are proportionate to and reasonably consistent with representative government.

In researching this paper I also came across an article written by Jerome Davidson of the Law and Bills Digests Section in the Parliamentary Library. This article was published on 24 May 2004 when the prisoner voting measures were still before the Parliament as contained in the *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill* 2004. It was the resultant Act that was only passed by the Parliament in 2006 that was before the High Court in the *Roach* case. The article contains a detailed analysis of the law and international experience on the denial of civil rights for convicted felons. (The full article can be found at the following link: (<http://www.aph.gov.au/library/pubs/cib/2003-04/04cib12.pdf>)). The article concluded with the following:

The requirements of the Australian Constitution for representative government are open to be interpreted so as to protect the right of Australians to vote in federal elections. The proposed provision to remove the right to vote from all prisoners serving a full time sentence of imprisonment arguably conflicts with the Constitutional requirement, and accordingly would be liable to be held invalid if challenged in the High Court.

The contents of this article were subsequently proved to be accurate. On 30 August 2007 the High Court held that the amendments made by the above Bill were invalid because they are contrary to ss 7 and 24 of the Commonwealth Constitution.

Both the *Roach* case and the earlier *Australian Capital Television* case (see *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45) were notable as the High Court had generally deferred to the Commonwealth in such cases involving the measures in the Electoral Act displaying the traditional reluctance of all courts to interfere with the parliamentary process.

What remedy?

One of the interesting factors that is often overlooked by commentators when examining electoral challenges that are dealt with by the courts is the particular relief that was being sought in each case. The courts are being asked to issue prerogative relief by way of writs of mandamus, certiorari, prohibition or an injunction. It is the effect of the orders sought on third parties (that is, persons other than Applicant themselves or the AEC) that will affect whether a court will grant the prerogative relief that is being sought. The “balance of convenience” test that is applied to all injunctive relief applications will of itself apply to exclude the grant of the particular relief being sought in many of these applications.

However, the timing issue is one that has only been glossed over in most of the literature that I have examined. Let me explain by way of example.

In the matter of *Rowe v Electoral Commissioner* [2010] HCA 46, there was no doubt that the proceedings attracted the original jurisdiction of the High Court under section 75 of the Constitution. The matter first came before Justice Hayne on 29 July 2010. Because the writs for the 2010 general election had already been issued, on 19 July 2010, concerns were raised about whether the relief being sought was able to be accommodated by the AEC without risking the whole election. It should be remembered that the costs of the 2010 general election were in the order of \$110M, with the AEC engaging nearly 67,000 staff and having either a lease or licence of nearly 7,800 premises that were used to house polling booths.

The affidavit of Paul Dacey, the Deputy Electoral Commissioner, set out the timetable that is

in the Electoral Act for the conduct of an election and indicated that if a decision was made that the previous close of rolls period applied, then this could be achieved by the AEC if the Court's decision was handed down by 6 August 2010. Any decision later than this risked electors being disenfranchised and key electoral processes (for example, the nomination of candidates) also being placed at risk. A copy of Paul Dacey's affidavit can be found at <http://www.aph.gov.au/library/intguide/LAW/docs/RowevElectoralCommissionersubmissions.pdf>

Dacey's evidence was specifically referred to at paragraphs 69 and 70 of the judgment of the Chief Justice and reflected in all other judgments.

Accordingly, the High Court was clearly aware that, unless a decision was handed down by 6 August 2010, the whole election would be threatened. Exhibit PD 1 to the affidavit sets out the interrelationship between the requirements of the Electoral Act and each stage of the electoral process that occurs after the announcement by a prime minister of an impending election.

Key times are set out in election writs that are issued by the Governor-General (House of Representative and ACT and NT senators) and the State governors (for senators in each State). The election writs include the dates for the Close of Rolls, the nomination of candidates, polling day and the returns of the writs. The Electoral Act contains a whole raft of requirements and deadlines that flow from each of the above dates. These include such matters as applications for postal votes, the opening and closing dates in which a candidate can lodge a nomination, the finalisation and distribution of the certified lists of voters, the starting of early voting, etc. Any failure by the AEC to comply with those requirements and deadlines invariably results in the electoral process being at risk and an "illegal practice" arising which attracts the jurisdiction of the Court of Disputed Returns.

Many learned authors have argued that the courts are able to deal with urgent interlocutory applications involving challenges to administrative decisions in a timely manner and that this could not affect the "validity of an election".

The current minimum timetable given to the AEC to conduct an election is 33 days from the issuing of the election writs to polling day. A person can only legally nominate to be a candidate after the issuing of the election writs and until the hour of nomination. The hour of the nomination currently occurs at day 10 in the election timeline. The day after the hour of nomination is the declaration time which is immediately followed by the drawing of the positions on the ballot paper under section 213 of the Electoral Act. The Electoral Act then gives the AEC two days to print and distribute the ballot papers and the certified lists of voters so that the early voting can commence (see sections 200D and 208(3) of the Electoral Act). Again, any failure by the AEC to comply with these deadlines gives rise to an "illegal practice" under section 352 of the Electoral Act and therefore attracts the jurisdiction of the Court of Disputed Returns.

Accordingly, anything that could affect the above processes and the required timelines that are set out in the Electoral Act give rise to the potential to affect the results of the election and their validity. Adding a candidate's name to a ballot paper after early voting is required to commence means some electors who have already cast their vote will run the risk of having that vote excluded and not being able to exercise the franchise fully. This is particularly problematical with postal voting which also commences at the same time. Further, how is the order of candidates on the ballot paper now to be determined given that the process in section 213 for the order of candidates has already been concluded? It is clear that the rights of persons other than the prospective candidate would be adversely affected unless this issue can be urgently resolved prior to the declaration time (which is day 11 of the election timeline).

The injunction power

Section 383 of the Electoral Act gives to the AEC the power to commence action for an injunction where any person has engaged in conduct that would constitute a contravention of the Electoral Act. It should be noted that the Electoral Act itself contains a range of offences that apply specifically to

AEC staff and electoral officials (for example, section 103, failing to process claims for enrolment; section 325, improperly influences voting; section 323, identifying electors; and the catch-all in section 324 where an AEC officer contravenes any provision of the Act). The power and duty contained in section 383 is for the AEC to institute proceedings where it is aware of a contravention of the Electoral Act. This is an extraordinarily wide duty that is imposed on the AEC including that the AEC should be taking action against itself where it is aware of some contravention. Indeed, the AEC continues to operate on the basis that it also has a duty to lodge a petition in the Court of Disputed Returns if it becomes aware of any actions by its own staff that have affected the results of an election.

The section 383 injunction power was inserted into the Act following a recommendation from the then Joint Select Committee on Electoral Reform in its First Report to the Parliament dated September 1983 at paragraph 6.43 (recommendations 84 and 85). These recommendations stated, in part, that:

The Committee recommends that the onus rests on the Electoral Commission to ensure that elections at every stage are conducted in accordance with the laws, and it should have the responsibility to initiate action on any occasion when in its opinion sufficient reason is demonstrated. (This would include seeking injunctive relief in situations where information available to the Commission indicated that a breach of the law was probable).

The challenges faced by the AEC in conducting an election are well documented. The Court of Disputed Returns processes are also well documented and have been of a longstanding nature. The AEC is acutely aware of its role as the independent electoral body charged with the conduct of elections and its role as a model litigant in legal proceedings. The AEC would hope that its conduct is at all times of the highest standards and that the existing review rights meet the relevant Australian and international standards that apply to electoral bodies and the application of the rule of law.

Recent cases

Close of Rolls

In the matter of *Rowe v Electoral Commissioner* [2010] HCA 46, the High Court dealt with a challenge by Ms Rowe and Mr Thompson (apparently funded by GetUp Limited) seeking a declaration that certain provisions of the Electoral Act effecting cut-off dates for consideration of applications for enrolment and transfers of enrolment as an elector were invalid. While the Electoral Commissioner was named as the First Defendant, the AEC took no part in making substantive submissions. This was left to the Commonwealth of Australia as instructed by the Attorney-General's Department and the Department of Finance and Deregulation. The Attorney-General of Western Australia also intervened.

One of the challenged provisions (subsection 102(4)) prevented the AEC from considering new claims for enrolment lodged after 8pm on the date of the issuing of the writs for an election until after the close of polling. Another challenged the provision (subsection 102(4AA)) which prevented the AEC from considering claims for the transfer of enrolment from 8pm on the date fixed in the writs for the close of Rolls until after the close of polling. A third provision (section 155) was challenged as it provided that the date fixed in the writs for the close of Rolls must be on the third working day after the date of the issuing of the writs for an election.

All of the challenged provisions were inserted into the Electoral Act by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth). This action followed several reports by the Joint Standing Committee on Electoral Matters (including the October 2002 report, *The Integrity of the Electoral Roll*, and the October 2004 report on the conduct of the 2004 election)

which, despite no actual evidence of inaccuracies on the Roll, concluded that the 7-day period of grace provided an opportunity to manipulate the Roll at a time where the AEC was unable to check the integrity of all claims. This was despite evidence from the AEC to the contrary.

In retrospect, the lodging of this application to the High Court should not have been a surprise. The ALP's *National Platform and Constitution 2007* contained a number of commitments to reform electoral legislation. One of those commitments was to replace the close of Rolls provisions enacted in 2006. Legislation had been before the Parliament since 11 February 2010 (see the *Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill 2010*) containing measures that included reinstating the previous seven-days close of Rolls provisions that applied until the 2007 federal election. This Bill did not progress and was replaced on 2 June 2010 with a revised Bill that included only two measures that were regarded as being controversial. When the House of Representatives was dissolved on 19 July 2010, the Bill lapsed.

On 6 August 2010, the High Court ordered that the amendments made by the 2006 Act were invalid and that the previous seven-days close of Rolls period was still in force. The majority judges all appeared to draw their conclusions from what could be categorised as a practice that had evolved in Australia since federation to give electors a reasonable time either to enrol or to update their enrolment details after an election is announced.

To give effect to the High Court decision, just fewer than 100,000 individuals who missed the close of Rolls deadlines were now entitled to have their claims considered by the AEC if they had been received prior to 8 pm on 26 July 2010. The AEC concluded the processing of these claims on 13 August 2010 and sought the Governor-General's agreement to issue a Proclamation under section 285 of the Electoral Act so these 100,000 electors could appear on supplementary certified lists on the same basis as other electors.

Electronic signatures

In the matter of *Getup Ltd v Electoral Commissioner* [2010] FCA 869 the Federal Court examined the legal status of electronic signatures on enrolment forms that were received by the AEC. The Court held that the particular technology and methodology used by Ms Trevitt (a laptop with access to the internet and with a device known as a digital pen that was used on the laptop's trackpad) met the requirements of the Electoral Act. As a result of the Court decision, Ms Trevitt was enrolled.

In the lead up to the hearing the Electoral Commissioner had written to GetUp Limited offering to meet to discuss the technology they were promoting and the issue of balancing of the convenience of electors with the integrity of the voting system (for example, matching signatures on enrolment forms with signatures on declaration envelopes at preliminary scrutiny). The GetUp Ltd OzEnrol website went live without any prior notice or discussions with the AEC. It was taken down on 17 July 2010, but apparently remained accessible for GetUp Limited volunteers to use. The original methodology used a mouse track based signature which did not result in a clear image or the use of similar biomechanical motions to reproduce a signature.

However, the Federal Court proceedings did not involve the use of the mouse track based methodology, but rather only the use of a digital pen. Since the Federal Court decision, the AEC has met with representatives of GetUp Limited to discuss the implications of the Federal Court's decision and the use of methodologies that comply with both the requirements of the Electoral Act and the *ratio decidendi* of the Federal Court's decision.

Postal vote applications issued by political parties

There are a number of sections in the Electoral Act which authorise political parties and candidates to issue Postal Vote Application forms (PVAs), to have them returned to their offices and then to forward these to the AEC for the issuing of the resultant postal vote itself. During each election campaign, the AEC receives many complaints about the use of PVAs and whether it is permissible

that PVAs can be returned to the AEC via a political party.

In the matter of *Peebles v Honourable Tony Burke MP and Others* [2010] FCA 838 (4 August 2010) the Applicant (a Senate candidate in NSW for the Christian Democratic Party (Fred Nile Group)) argued that the sending out of this material by the Honourable Tony Burke MP and the Australian Labor Party (ALP) involved misleading and deceptive conduct. This was because the PVAs failed to state clearly the source of the PVA or that it would be returned to that source before being sent to the AEC. In reasons for decision His Honour stated that there was considerable force in at least some of those contentions. However, the Federal Court dismissed the application referring to the limited scope of section 329 of the Electoral Act which deals with publications that are likely to mislead or deceive an elector in relation to the casting of a vote and held that the act of applying for a postal vote did not fall within the scope of this section.

Ms Peebles subsequently lodged an appeal against the Federal Court decision with the Full Federal Court. This appeal was subsequently withdrawn and replaced with action in the Court of Disputed Returns following the 21 August 2010 general election as the orders sought in the appeal included discarding all votes that were received by the AEC as a result of PVAs issued by the ALP in New South Wales.

When is an MP an MP for electoral advertising?

Mr Faulkner has for many years raised concerns about the legal effect of the dissolving of the House of Representatives under section 28 of the Constitution and whether this results in it being misleading and deceptive for candidates who were formerly Members of the House of Representatives being able to continue to describe themselves as an MP. In the matter of *Faulkner v Elliot and Others* [2010] FCA 884 (17 August 2010), Mr Faulkner (an Independent candidate for the Division of Richmond) sought urgent orders from the Court restraining Ms Justine Elliot from describing herself as a “Federal Member of Parliament”, the “Member for Richmond”, “MP”, “current Member”, “sitting Member” or “Incumbent”. Mr Faulkner argued that the use of these descriptions in publications was misleading and deceptive and in breach of section 329 of the Electoral Act.

The Federal Court dismissed Mr Faulkner’s application, finding that the use of a candidate seeking re-election to the House as “MP” is an appropriate description to present to electors in each Electoral Division. The Court accepted the existence of a protocol that the continued use of “MP” might avoid confusion and operate as a proper matter of courtesy in all the circumstances. The Court held that a contravention of section 329(1) of the Electoral Act required conduct by Ms Elliot that was likely to mislead or deceive an elector in relation to the *casting* of a vote as opposed to influencing the *formation of a judgment* by an elector of for whom to vote. The Court concluded that the use of the phrase “MP” was not in breach of section 329(1) and dismissed the application.

The petitions to the Court of Disputed Returns

The 40-day period for lodging petitions with the Court of Disputed Returns (CDR) following the return of the last writ for the 21 August 2010 election ended at close of business on 27 October 2010. The High Court (which is the CDR) advised that five petitions were filed within the 40-day period, one in the Hobart registry and four at the Sydney registry.

The petition lodged at the Hobart registry involved an allegation that Senator Abetz had not renounced his German citizenship and was disqualified from standing as a candidate for an election under section 44 of the Constitution. This petition was subsequently withdrawn in November 2010 without proceeding to a hearing.

The four petitions lodged at the Sydney registry were all lodged by the same firm of solicitors who appeared to be acting on behalf of the Christian Democratic Party (Fred Nile Group). Three of the petitioners were candidates for this Party (Mr Graham Freemantle, Ms Robyn Peebles, and Mr Andrew Green) at the 2010 general election and the final petitioner (Mr Greg Briscoe-Hough)

was an elector who previously stood for the Family First Party in NSW. The petitions sought to invalidate the elections for the Divisions of Banks, Lindsay and Robertson in NSW and the Senate election in NSW.

All four petitions focused on issues that were previously raised and dismissed by the Federal Court in the case of *Peebles v Honourable Tony Burke and Others* [2010] FCA 838 where arguments were run that the issuing and return of Postal Vote Applications (PVAs) by political parties breached several provisions of the Electoral Act. The Federal Court held that the issuing/return of PVAs by political parties was not in breach of section 329 of the Electoral Act (that is, was not misleading or deceptive in relation to an elector marking a ballot paper) and that the declaration used on the forms was consistent with the requirements of sections 183 and 184 of the Act. These arguments were again being used as the basis for the four petitions.

There were several other grounds raised in the initial petition including that the use of parliamentary allowances by members of Parliament to print and distribute these PVAs was in breach of sections 48 and 49 of the Constitution.

Only the petitions lodged on behalf of Andrew Green and Graham Freemantle proceeded to a hearing. The petitions lodged on behalf of Robyn Peebles and Greg Briscoe-Hough were withdrawn. The decisions on the two petitions of Green and Freemantle can be found at *Green v Bradbury* [2011] FCA 71 and *Freemantle v O'Neill* [2011] FCA 72. In short, the Court held that there were no facts pleaded in the petition that disclosed any illegal practice that could have affected the results of the election. The orders as to the payment of the legal costs in the petitions involving Green, Freemantle and Peebles were resolved in favour of the AEC in *Green v Bradbury (No 2)* [2011] FCA 469.

What of the future?

There are already a number of matters that have been announced that could lead to amendments to the Electoral Act and which will almost certainly involve a risk of a constitutional challenge.

The Agreement between the Prime Minister, the Honourable Julia Gillard, MP, and both the Greens and the Independents all refer to electoral reform. One particular area that is proposed to be reformed relates to political donations and campaign financing. As has been shown in the United States of America, Canada and New Zealand, such reforms have proven to be a fertile ground for legal challenge. The existence of the implied freedom of political communication in Australia will no doubt lead to similar constitutional challenges being launched here irrespective of what particular model results. However, as was shown in the decision of the Supreme Court of Canada in *Harper v Canada* (2004) 239 DLR (4th) 193, a balanced approach may well be upheld if it can be shown that the effect of the legislation results in a level playing field that encourages political communications and removes any negative influences on representative government.

There are often calls for changes to be made to the current system in Australia of compulsory enrolment and compulsory voting. Compulsory enrolment has existed in the federal jurisdiction since 1912 – compulsory voting since 1924. If any changes are made to the Electoral Act that have a significant effect on the participation of eligible Australians to exercise the franchise, the issue will no doubt give rise to a challenge based on the words, “directly chosen by the people”, contained in sections 7 and 24 of the Constitution.

Would such a challenge be successful?

Chapter Three

Until the High Court Otherwise Provides — Electoral Law Activism

James Allan

My topic is the activism of the High Court of Australia in two voting rights cases. Let me preface all that I am about to argue with this caveat. I want my judges to think their job is to give the written legal text its intended meaning, or its original public meaning. I do not want judges who think they are there to prune and shape some metaphorical “living tree” Constitution whose meaning shifts and alters with changing social mores and values – or, to be rather more accurate, that shifts with the *judges’* sense of changing social mores and values. I think you will be queasy about this latter approach if you are at heart a democrat and believe all this updating and pruning ought to be done by the elected representatives of the voters, or after success in a referendum under section 128 of the Constitution.

My comments are about how our top judges are interpreting words on paper. My comments are *not* about my preferred legislative responses if I could magically be made a member of Parliament and somehow enact my personal druthers.

I turn now to look at two recent High Court of Australia cases, the 2007 *Roach* case and the 2010 *Rowe* case, and then to try to back up that general claim about judicial activism.

Roach is a prisoner voting rights case. *Rowe* has to do with the entitlement to vote as well, but this time more circuitously as a result of when the electoral rolls (listing all eligible voters) are to be closed and hence prevent any further applications for enrolment. In both *Roach* and *Rowe* the social policy lines that had been drawn by the democratically elected legislature were invalidated by the top judges of the land. The governing statutory provisions were struck down in majority judgments of the High Court of Australia – 4 of 6 of the sitting justices decided to do so in *Roach*; in *Rowe*, it was a 4-3 decision.

Both majority decisions, in my view, rest on the most implausible and far-fetched understanding of the meaning of the Australian Constitution, one that significantly liberates the point-of-application interpreter when it comes to gainsaying the elected legislature. This *Roach* and *Rowe* understanding of how to give meaning to Australia’s written Constitution allows its judicial exponents to claim – at least implicitly – that legislation can be (and was) constitutionally valid at the time of federation and the coming into force of that Constitution (and, indeed, that the legislation remained so up to 1983 and beyond) but that that same legislation is today no longer constitutionally valid.

On top of that, this same *Roach* and *Rowe* approach to constitutional interpretation – to giving meaning to that text – also carries with it the clear and undeniable suggestion that if Parliament keeps its hands off old legislation governing, say, when prisoners can vote or when electoral rolls must close, then that old legislation will be, and will remain, valid. But where a Parliament in the recent past happens to have legislated to liberalise those rules, then no Parliament of even more recent vintage will be able to revert back to the older rules. Not ever. The Constitution, or so these *Roach* and *Rowe* judges claim, forbids it. If that is not a bizarre implication of any approach to giving meaning to a constitutional text, it is not clear what is.

Now the *Roach* and *Rowe* cases cannot be understood in isolation. They need to be seen as the latest incarnation of the so-called implied rights series of cases dating from the early 1990s. I have

written about those implied rights cases elsewhere, and the very fast-and-loose interpretive approach the majority justices relied upon in those cases. In brief, these decisions were very much premised on a “living tree” or “living constitution” interpretive approach.

For our purposes in this paper it will suffice simply to remind the reader of the reasoning of Chief Justice Mason in the *ACTV* case. Writing with the majority, the then Chief Justice arrived at the conclusion that the Australian Constitution – one that explicitly and deliberately left out any US-style bill of rights or First Amendment free speech entitlements and protections opting, after much debate and discussion amongst the Founders, to leave such social policy balancing exercises to the elected Parliament – nevertheless implicitly created an implied freedom of political communication with reasoning that followed these steps:

- (1) The Constitution mentions that elected Members of Parliament are to be “directly chosen by the people”;
- (2) hence these MPs are representatives of the people;
- (3) hence they are accountable to the people;
- (4) thus they have a responsibility to take account of the views of the people;
- (5) therefore the judges interpreting this Constitution must be able to, and hereby do, assert that there is an implied freedom of political communication.¹

That provides sufficient background to allow us now to consider the majority reasoning in both these voting cases. In *Roach*, the four majority justices ended up deciding that the 2006 Act which disqualified all prisoners is invalid, but that the older legislation that disqualified those serving sentences of three years or more is constitutionally valid and can stand. So, after *Roach*, the Commonwealth Parliament is left with the scope to disenfranchise those prisoners serving three or four or more year sentences (“four years good”), but not to do so to those serving fewer than three years (“two years bad”) – I like to call this “four years good, two years bad” approach *Animal Farm* judging.

Let us start with the joint judgment of Justices Gummow, Kirby and Crennan. After some introductory paragraphs and a recounting of the facts and how the legislation had changed over the years, we eventually come to the third of the plaintiff’s grounds for challenging the legislation, namely that there is an implied freedom of political participation tied to the implied freedom of political communication. The three majority justices then proceed to side-step this third plaintiff’s grounds, half-heartedly asserting that “what is at stake on the plaintiff’s case is *not so much* a freedom to communicate about political matters but participation as an elector in the central processes of representative government” (para [40]). That is that. And it is not an overly persuasive assertion because the joint judgment justices need to tell us *why* it is impermissible for the elected Parliament to do what it did in enacting the 2006 Act.

Or, put the other way around, when the joint judgment justices come to tell us why it is that they can strike down and invalidate this statute, they have virtually nothing to point to in the Constitution itself. Indeed, they again and again make reference to the earlier implied rights case law.

Perhaps that partially explains the rather half-hearted or irresolute nature of their rejection of this third plaintiff’s grounds for invalidating the 2006 Act.

From there we get reliance on another implied rights case, the *Lange* case, and we get assertions that “the Constitution makes allowance for the evolutionary nature of representative government as a dynamic rather than purely static institution” (para [45]). Yes, the joint judgment recognises that representative government can be a dynamic institution through time in two ways: either because Parliament itself occasionally changes the rules falling under this aegis without any supervisory role

or input from the top judges (which is precisely the situation in, say, New Zealand) or, alternatively, because the top judges do have a supervisory role.

Indeed, this whole *Roach* case, and the *Rowe* one that followed, are simply instances of our High Court answering that question in its own favour, concluding that the top judges have been given a supervisory role by the Constitution, at least by the year 2007 if not before.

The constitutional issue is *not* a first-order one of whether you believe or think or prefer top judges to have this role. No, the issue is a second-order interpretive one of which alternative was meant by the Constitution, properly interpreted.

So the question in *Roach* is *not* whether the justices think prisoners serving sentences of fewer than three years ought to be able to vote. No, the question is whether our written Constitution ultimately left this decision with the elected Parliament or with the unelected High Court.

The next step in the argument put forward by the three joint judgment justices involves telling us why the “on their face” (para [46]) outcomes the ss 8 and 30 constitutional provisions appear to dictate – namely, that this issue of prisoner voting has been left to Parliament to decide – are wrong.

That next step involves an ancillary helping one, namely co-opting the Solicitor-General and all sorts of claims about what the Commonwealth accepts in running this case.

In other words, there is an element of “reasoning by claiming the Solicitor-General conceded the point” going on here. You see it in paragraphs [48] and [49]: “in oral submissions, the Solicitor-General of the Commonwealth readily accepted that a law excluding members of a major political party or residents of a particular area of a state would be invalid . . .”.

That is a highly debatable claim, however, and, in my view, not a concession that ought to have been made. The general point can be made by thinking of a parliamentary sovereignty jurisdiction such as New Zealand. There, the elected legislature has no legal or constitutional constraints – no power in the top judges to pronounce a validly enacted law to be invalid. Rather, the constraints are all political and moral, many of them tied to the limits on power that democracy creates.

The Constitution of Australia clearly, and without doubt, not least in the many references to “until the Parliament otherwise provides” and the deliberately chosen lack of a bill of rights, places much weight on these parliamentary sovereignty-style political limits on power. Unlike the United States, our founders and our Constitution were extremely confident in the ultimate good sense and moral bearings of the voters. The scope for judges to invalidate statutes is much less than in the United States and Canada (where a potent bill of rights exists).

My point is that much that in the abstract might today seem distasteful, if enacted into law, nevertheless does not therefore – simply because of its distastefulness or even because of its perceived egregious nature to many present day sensibilities – thereby become something over which the top judges have been given a supervisory role by the Constitution. And, given that, the concessions attributed to the Solicitor-General are problematic, to put it kindly.

Lastly, for present purposes, let me note that the joint judgment picks out and cites an *obiter dictum* comment from *McGinty* by Brennan CJ, one bearing on what “chosen by the people” in ss 7 and 24 means. Not a single other *dicta* on this point of the many other possibilities on offer by many other justices was considered or cited in the joint judgment.² Worse, the joint judgment omits the tentativeness and qualifications and limiting context present in Brennan CJ’s original *McGinty obiter* observations, simply noting in paragraph [83] that: “In *McGinty* Brennan CJ considered the phrase ‘chosen by the people’ as *admitting of a requirement*³ ‘of a franchise that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them’.”

And, with that, the joint judgment is effectively finished as far as providing a ratio for thinking “the 2006 Act impermissibly limits the operation of the system of representative (and responsible) government which is mandated by the Constitution” (para [40]).

Notice how rapidly, in just two paragraphs, the justices of the joint judgment turn the issue from one of (i) whether the Constitution, when properly interpreted, leaves this matter to the

elected Parliament or gives the judiciary a gainsaying, supervisory role that includes the power to invalidate disfavoured statutes into one of (ii) whether the disqualifications in the 2006 Act are “for a ‘substantial’ reason” (para [85]).

But that is it. The rest of the joint judgment is simply a form of proportionality analysis. It contains all that extra double dose of discretionary judicial input and potential judicial gainsaying power, all that plastic malleability, that Thomas Poole argues all proportionality analyses share.⁴

At this point I could note the inherent cherry-picking nature of all proportionality-type analyses. Or I could ask why the 2006 legislation is characterized as being about “stigmatising” prisoners rather than about their “character”.⁵ But, instead, I turn now from the joint judgment to that of Chief Justice Gleeson.

I can be very brief here. That is because Gleeson CJ’s reasoning on the core issue of whether the top judges do or do not have a supervisory or “able to gainsay the Parliament” role when it comes to the details of the franchise – an issue over which there was no binding authority, only *obiter dicta*, before this *Roach* case – is so truncated.

Gleeson CJ’s judgment starts with five and a half paragraphs that, in effect, re-state the fact that the drafters and ratifiers of the Australian Constitution had a fundamental faith in the good sense of the voters, and in the democratic process, and in political checks on distasteful outcomes rather than court-focused, judge-driven ones. Indeed, up to the first two or three sentences of paragraph [6] of the Chief Justice’s judgment there is no indication that he will decide for the plaintiff and invalidate the 2006 Act.

His reasons for doing so are given in the next two and a half paragraphs – after that it is just 17 paragraphs of what amount to proportionality analysis and asking *not* whether judges have this supervisory power but rather whether they ought to use it to gainsay Parliament in this instance, and I am not here directly interested in that latter endeavour.

Here is the Chief Justice’s argument. Firstly, after all the aforementioned genuflecting in the direction of how large a role parliamentary sovereignty thinking has played in the thinking of those who drafted and ratified our Constitution and, indeed, those who interpreted it in years gone by, his first step is to point to overseas democratic jurisdictions and to suggest that there is “a broad agreement as to the kinds of exception [to universal suffrage] that would not be tolerated” (para [6]).

Stop at this first step and notice two things. One is that interpretation of a constitutional text by appeal to overseas practice makes it overwhelmingly likely that the interpreter is adopting – without argument – a “living Constitution” or “living tree” interpretive approach.

The second thing to notice about Gleeson CJ’s appeal to some broad overseas agreement as to who can be denied the vote is that it is empirically or factually suspect or debatable. The implied suggestion that the 2006 Act stands off by itself at the far end of some notional spectrum of how other democracies opt to deal with the issue of prisoner voting is plain out false. Many of the States in the United States have a considerably more restrictive legislative regime *vis-à-vis* prisoner voting than the 2006 Act enacted. And some of those jurisdictions that are more liberal about prisoner voting are so solely because of judges saying a bill of rights demands as much; they are the result of Parliament being over-ruled by judges under a bill of rights – as happened twice in Canada, a fact our majority justices omit to mention when citing the leading Canadian case of *Sauve*.

The second step in the Chief Justice’s reasoning or argument comes in the form of a rhetorical question followed by a statement of belief. “Could parliament now legislate to remove universal adult suffrage? If the answer to that question is in the negative (as I believe it to be) then the reason must be in terms of ss 7 and 24 of the Constitution . . .” (para [6]).

However, this second step (aside from seeming to reason backwards) neatly finesses or fails to distinguish two important reasons for why the answer to the rhetorical question might be in the negative. One possibility, the one the Chief Justice simply assumes to be correct, is that the answer is “no” because the top judges have been afforded a supervisory role by the Constitution and, were

the elected parliament to legislate in this way, the unelected judges would over-rule it and invalidate the statute.

The other possibility, the live one in New Zealand to this day and the one in keeping with all the Chief Justice's earlier genuflecting in the direction of the large role our Constitution reserves to parliamentary sovereignty, is that the answer is "no" because of the democratic and political good sense of the voters and their elected representatives – as has worked perfectly well in New Zealand and in the United Kingdom (leave aside, if you wish, the period after the latter's entry into what is now the European Union).

The third and final step of Gleeson CJ's reasoning, before moving to his proportionality analysis, amounts to an argument that words in a constitution can remain the same and yet, "because of changed historical circumstances including legislative history" (para [7]), the power and supervisory role they grant to the courts can expand over time.

Gleeson CJ does not, of course, put it quite in those terms. What he does is to call in aid an analogy, the *Sue v Hill*⁶ case about the meaning of the words "foreign power" in section 44 (i) of the Constitution, and the High Court's decision that the United Kingdom now (but not immediately after federation or, indeed, for some time thereafter) fell under the aegis of that phrase.

I do not believe that analogy is persuasive. Even leaving wholly to one side all originalist type objections, and there are many, we can still point to serious flaws in this attempted analogy here to *Sue v Hill*. One is that the mixture of factual determinations and evaluative moral sentiments or judgments is quite different when deciding if the mother country is now a "foreign power" as distinct from deciding how many inroads into 100 percent adult suffrage the legislature will be prevented from making based on the phrase "chosen by the people".

Gleeson CJ obfuscates this by claiming that "'fact' refers[s] to an historical development of constitutional significance" and then "of changed historical circumstances including legislative history" (both para [7]). On examination, however, the changed historical circumstances – the so-called facts – that matter in *Roach* are past decisions by High Court justices (most importantly, the implied rights cases) as well as past legislative changes. But these "facts" are encapsulations of "ought" judgments by judges and legislators. They are not observations about which country now controls Australia's defence policy or foreign policy or whether Australia has its own embassies abroad.

As the dissenting judges make plain, it is an odd understanding of how to give meaning to a constitutional text to think past legislation can alter the Constitution's meaning.

More bluntly put, the sort of "facts" Gleeson CJ needs to rely on here are all ones that are just ethical and evaluative statutory and case law judgments by other political and judicial players (including a bit of glancing overseas to see what other jurisdictions' value judgments today are about prisoner voting). These are overwhelmingly all "oughts", some of which are masquerading as "ises" in the form of past statutes and cases.

So this attempted analogy fails in my view, leaving nothing convincing to support the Chief Justice's conclusion. As with the joint judgment, this is an unpersuasive piece of reasoning to the conclusion that the Australian Constitution grants a supervisory role to the top judges over these *Roach*-like issues.

In my opinion the dissenting judgments of Hayne J and Heydon J are far superior.

Perhaps the worst aspect of all as regards these majority judgments is how potentially limitless and unconstrained they leave the supervisory role of the top judges. In fact, it is hard to see what constraints the majority ratios place on judges' future gainsaying of Parliament powers other than ones the judges themselves feel inclined to observe. Here, today, it is which prisoners can vote. Next, on the reasoning of the majority, it could be almost anything else – however trifling.

And that brings us to *Rowe*, a 4-3 High Court of Australia decision in which the majority invalidated another 2006 Act initiated by the Howard Government. This Act related to when the electoral rolls must close after the calling of an election. The previous 1983 Act had provided a 7-day

grace period to those people who were entitled – indeed, obliged on pain of penalty – to be enrolled. The 2006 Act removed this 7-day grace period.⁷

Put somewhat differently, only three years after the 2007 *Roach* decision, and the then Chief Justice Gleeson’s preliminary paragraphs about how much faith the drafters and ratifiers of the Australian Constitution had placed in the voters and the elected representatives of the people to decide contentious and debatable issues, and we now have, in *Rowe*, a decision in which the majority says the top unelected judges get to supervise when the electoral rolls will close. Or, to be rather more accurate, the majority in *Rowe* asserts that *the Constitution itself gives the High Court Justices a second-guessing or gainsaying power* over the elected legislature as regards 7-days and all the other minutiae surrounding the many competing incentives and disincentives involved in trying to get voters to enrol in a timely fashion. That is the meaning, supposedly, of a constitutional text which explicitly and clearly shunned a bill of rights, one that makes repeated references to “until the Parliament otherwise provides”, and one where this claim about it supposedly meaning this rests only on four words of text, “chosen by the people”, in sections 7 and 24.

In my opinion *Rowe* is one of the worst decisions by the High Court of Australia in years, and by worst I mean most feebly reasoned and most reliant on implicit assumptions (including those about how to give meaning to a written text) that can never be explicitly cashed out in any convincing or persuasive way. And just to make myself clear, let me tell the reader that were I able to legislate on a blank slate I would give the 7-day grace period. My criticism rests on the level of interpreting the law, not one’s druthers if he could make it.

Whether you agree with that evaluation of mine, or not, notice that there are two distinct ways or bases on which to criticize the majority judgments in *Rowe*. They are quite distinct. One involves playing on the majority’s home field as it were. So it involves accepting that *Roach* was correctly decided, unlike the second path I will come to which does not. If you opt for the first path, however, you concede that Australia’s top judges have, or now have, a supervisory role – meaning, to be blunt, that they now have the power to invalidate or strike down Parliament’s legislation – over a host of voting-related issues. What falls under this judicial supervisory power, or new supervisory power, is somewhat uncertain as the majority’s reasoning in *Roach* has what might be thought of as a huge “penumbra of doubt” and a small “core of settled meaning” as far as indicating to where these newly-enunciated judicial supervisory powers extend. In other words, why you reject the majority decision in *Rowe* (should you opt for this first path) is *not* because you say the Constitution gives no supervisory role to the top judges on these matters. For you, that pass has already been sold. Instead, you disavow *Rowe* simply because you say the majority justices erred in performing that supervisory function. In particular, you say their proportionality analysis, denominated in whatever terms you prefer,⁸ misfired. The 2006 Act in *Rowe* – after having been vetted and checked and supervised by the judges – ought to have been found acceptable. (And this seems largely to be what Justice Kiefel’s dissent amounted to.)

Of course, travel down this first path for criticizing the majority in *Rowe* and not only do you accept *Roach* and its creation (or discovery) of a supervisory role for top judges in this area, you also have to ignore or gloss over or finesse the fundamentally unbounded or unconstrained or massive judicial discretion-enhancing nature inherent in all such proportionality analyses. And, on top of that, you are also forced – implicitly if not explicitly – to adopt an approach to constitutional interpretation that disavows completely all forms of giving the words in the Constitution the meaning they were intended to have by the drafters or the meaning they would have been understood to have by the ratifiers at the time.

The Constitution, for you, becomes this metaphorical “living tree” or “living Constitution” whose meaning changes over time (and so potentially locks in nothing) as determined by – and only by – a majority of High Court justices at any point in time.

Yet even that is not all. For travel down this first path for criticizing the majority and you also make it very likely that any and all future proportionality analyses will involve some looking overseas

at other jurisdictions, almost all of which (as it happens) will be ones with a bill of rights. You may make some perfunctory remarks about how proportionality analyses here in Australia without a bill of rights fundamentally differ from those in jurisdictions with such instruments, but that will not prevent you from citing and arguably relying on those jurisdictions and the judicial conclusions reached there. (As a strictly empirical matter, though, it may be that American case law and American resolutions of such things as when prisoners can vote will be quietly ignored.)

To put it bluntly, this first basis for criticizing the majority in *Rowe* involves conceding so much justificatory and theoretical turf to them, that you end up playing all your games on the majority's home ground. You lose before the kick-off (even if you are occasionally allowed to score the odd try or touchdown).

The other basis for rejecting the majority decision in *Rowe* is more principled, more coherent, and the only one with any long-term attraction or prospects. This second path is founded on an explicit rejection of *Roach*, on an assertion that *Roach* is bad law – for all the reasons given above and given in the two dissents there.

And if you have any doubts about how dependent upon *Roach* the majority judgments in *Rowe* are, consider this. The majority judgments cite *Roach* in 29 different paragraphs.⁹ By my rough reckoning that means that over 10 percent of all of the paragraphs in the majority judgments in *Rowe* cite or refer to *Roach*.

If, like me, you believe that any persuasive criticism of the majority decision in *Rowe* pre-supposes – indeed, demands – the concomitant assertion that *Roach* was and remains bad law, then you will think that the Solicitor-General ought not to have relinquished, permanently, home-field advantage by assuming the correctness of the plaintiff's test, and hence of *Roach* itself (and hence should not have accepted the almost inevitable proportionality analysis – framed in terms of the need for the legislature to have “substantial” reasons (as evaluated by the judges) for its statutory provisions – that will come with accepting *Roach* as good law).

All three majority judgments in *Rowe* point to the Solicitor-General's acceptance of *Roach* and use that acceptance to arrive at their conclusion. Indeed, the reliance on *Roach* is such that we can be brief in outlining those majority judgments.

Chief Justice French spends one paragraph and the first sentence of the next paragraph at the very start of his judgment answering in the affirmative the core question of whether the top judges have a supervisory role over Parliament when it comes to “[i]ndividual voting rights and the duties to enrol and vote” (para [1]). A recital of the constitutional words, “directly chosen by the people” from sections 7 and 24, a citation to *Roach*, a bald implicit assertion that Parliament needs to justify its decisions to the judges in this area, and the rest is really just proportionality analysis and deciding that removing the 7-day grace period is disproportionate.

The joint majority judgment of Justices Gummow and Bell is likewise pre-occupied with asking the “Is this reasonably appropriate or rationally connected to a legitimate aim?” question rather than the “Is this any of our constitutionally allocated business?” question. It places huge reasoning weight on the *Roach* decision and then follows the Chief Justice in deciding that the 2006 Act fails the “rational connection” or “substantial reason” or “reasonably appropriate and adapted” or “proportionality” test (all mentioned in para[161]).

The last of the majority judgments is Justice Crennan's. Here there is an historical digression aimed at supporting the living tree approach to constitutional rights and there is a seeming concatenation of the “impolitic” into the “unconstitutional” (para [339]). But this is all much of a muchness with the other majority judgments – lots of *Roach*, mentions of what the Solicitor-General conceded, and the inevitable proportionality analysis coming down against the 2006 Howard Government legislation.

Again, the Hayne and Heydon dissents are far superior, with Kiefel's being unsatisfactory to the extent it is understood as immersing itself in proportionality analysis and so playing the game on the majority's home turf.

I am now in a position to make six concluding remarks about these two cases of *Roach* and *Rowe*. Firstly, the interpretive constraints inherent in the reasoning of the majority decisions in those two cases are almost all in the nature of “This is an evolving document whose changing meaning we seven judges (or a majority of us) will announce as time goes by, based on whether we consider the challenged legislation to be based on ‘substantial’ or ‘proportional’ or ‘non-arbitrary’ reasons.” Put more bluntly, the constraints on what the top judges can do are almost wholly self-imposed; they have next to no connection to external factors such as the actual words and text of the Constitution or, just as importantly, the meaning those words had for the real life people who drafted them and ratified them.

Secondly, metaphors about constitutions being “living trees” merely obscure the fundamental choice we have when we forswear New Zealand-style parliamentary sovereignty and opt for a written Constitution. *Either* we will be locked-in by the understandings of the words and text at the time of adoption (subject to section 128 constitutional amendment) *or* we will be locked-in by the decisions of our present day top judges as they, from time to time, change the meanings they attribute to words that have remained the same.

That latter option, the one that permeates *Roach* and *Rowe* and the earlier implied rights cases, pre-supposes that a handful of top judges will be better at identifying the changing social values and mores that drive this living tree type of interpretation than will be the elected representatives of the people who would otherwise be deciding when prisoners can vote or electoral rolls can close.

Thirdly, and related to that second point, this sort of interpretive approach has the potential to politicise the judiciary (and to be seen to do so by citizens) and too often to circumvent or make redundant the section 128 amending machinery. Under the *Roach* and *Rowe* interpretive approaches it really, really matters who gets appointed to the High Court because those appointees will be the ones who will be exercising this supervisory power over Parliament and whose judicial, moral and political antennae will be consulted to determine if this, that or the other thing is substantial enough or rationally connected enough or adapted and appropriate enough for four of seven of them to give it a tick. In that world you cannot make the mistake of appointing someone whose moral antennae differ from your own (and I say that knowing that is a pathetic sort of world to have to inhabit).

Fourthly, my view is that if the *Roach* and *Rowe* interpretive approaches were spelt out, clearly and in advance, to people living in a parliamentary sovereignty democracy (say, people in New Zealand) who were considering whether to adopt a written constitution, they would overwhelmingly reject it and many would do so precisely because of this externally unconstrained interpretive approach you were spelling out to them in advance (which may be why it never is spelt out in advance).

If you doubt that, or if you think that my mooted change of perspective exercise is irrelevant to present day Australians, consider the possibility that a rewritten preamble to our Constitution will soon be put to the electors, perhaps to recognise the role of indigenous Australians. After *Roach* and *Rowe* what form of words – however clear – would ever leave you confident latter-day judges might not inflate them or redirect them or apply them to some purpose neither you nor any other people voting “yes” in a section 128 referendum (indeed, none of those involved in drafting the words either) intended?

Fifthly, and staying with present day New Zealand, here is a further seeming anomaly. In 2010 the New Zealand Parliament enacted the *Electoral (Disqualification of Sentenced Prisoners) Amendment Act*. This statute had to do with prisoner voting. Prior to this 2010 Act prisoners in New Zealand were unable to vote if they were in jail serving sentences of more than three years. The 2010 Act removed (prospectively only) the vote, the franchise, from all prisoners (however long their sentences) provided they have been convicted and are serving that sentence at the time of the election.

In broad terms this New Zealand 2010 Act is the same as the Howard Government legislation of 2006 that the High Court struck down or invalidated in *Roach*. And the implication, the clear implication, must be that the majority justices in *Roach* would not consider any post-2010 New

Zealand Parliament to be one that has been “chosen by the people.” (And, if anyone is tempted to counter this claim by arguing that the *Roach* case was specific to Australia and Australia’s constitutional text, the clear rejoinder I would make is that virtually all of the majority reasoning in *Roach* relies on a free-standing ethical or political argument about what is politically acceptable or rights-respecting, the text playing little determinative role compared to reliance on the implied rights cases, cherry-picked overseas cases, and the just mentioned free-standing ethical arguments.)

This is the exact same sort of judicial hubris one saw in Canada when the Chief Justice of Canada in *Sauve*, commented upon “self-proclaimed democracies” (meaning all the then democracies like the United States, United Kingdom, New Zealand and Australia that put restrictions on prisoner voting). There is a danger that judges who draw these sorts of contestable and debatable policy-lines can get a tad puffed up. They can implicitly be read as thinking they have superior moral antennae to voters and politicians. Their reasoning can come close to implying such absurdities as that New Zealand’s Parliament, post-2010 elections, has not been chosen by the people.

Sixthly, and lastly, I simply pose a hypothetical question. Could Parliament today – post *Roach* and post *Rowe* – reverse itself and take away, say, Senate representation from the Territories? The first *Territory Senators Case*, you will recall, was a majority decision in which the High Court, weighing the seeming conflicting demands of sections 7 and 122, decided that the Constitution had left the question of Senate representation for the Territories to Parliament. It was a matter for the political process.

However, after *Roach* and *Rowe*, and given the reasoning employed by the majorities in those two cases, it seems quite plausible to me that the High Court of Australia would now assert (on no textual basis whatsoever other than the all-purpose “chosen by the people” passage) that they – the judges – had a supervisory role over that issue too. What would prevent removal of this Territory representation, they would think, was not the political good sense of the people but the keen supervisory eye of the top judges. If so, this hypothetical would see us moving from the plausible position that the Constitution gave Parliament no power to give such Senate representation to the Territories (the minority position in that first *Territory Senators Case*), through the position that it was a matter that had been left to Parliament and the political process to decide (the majority position there), on to a new position that our High Court would now never let Parliament change its mind on this matter (a seeming possibility after *Roach* and *Rowe*).

Most of us may well wish the Territories to have Senate representation (just as most of us might prefer a 7-day grace period). Certainly I do. But it is a *reductio ad absurdum* of the High Court of Australia’s recent judicial activism to believe the Constitution gives our top judges a supervisory power to prevent such a legislative change of mind. It is a manifestation of the unbounded, unconstrained approach to constitutional interpretation that today passes for orthodoxy on our High Court.

And, on that unhappy note, I finish.

Endnotes

1. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at para [138].
2. Nicholas Aroney makes this point in a convincing fashion.
3. Brennan, CJ, did not say it requires this, but that this was one possibility that might be ascribed to the phrase. Hence, perhaps, the careful wording of the joint judgment.
4. Thomas Poole, “The Reformation of English Administrative Law”, *Cambridge Law Journal*, vol 68, 2009, 142 (at 146).

5. See *Roach*, paras [89] and [95].
6. (1999) 199 CLR 462.
7. From the 1930s to the 1983 Act there had been no statutory grace period, but the Executive informally did as much by announcing an election date but delaying the issue of the electoral writ.
8. Perhaps in terms of “substantial reasons”, “practical effects”, “proportionality” or anything else.
9. See *Rowe*, paras. [1], [20], [23], [24], [25], [45], [86], [117], [123], [151], [154], [157], [160], [161], [162], [323], [325], [326], [327], [33], [366], [372], [373], [374], [376], [381] and [384]. Nine of these references to *Roach* have to be looked for in the footnotes.

Chapter Four

Dealing with Hung Parliaments

The Honourable Michael Field

My credentials to speak on this topic are that I was a member of the Tasmanian House of Assembly for more than twenty years, from 1976 until 1997, at various times serving as a minister, Leader of the Opposition and Premier of Tasmania. Especially relevant is that I was the Premier from 1989 to 1992 during the years of the “Labor Green Accord”.

In 1989, in a 35-member House of Assembly, Labor won 13 seats, the Greens five seats and the Liberal Party 17 seats. Nearly three years later, under the threat of a No Confidence motion, the House of Assembly was dissolved and, in the subsequent election, Labor received just 28.9 per cent of the vote, the lowest vote Labor had received in Tasmania since 1910. Despite this thrashing, the remaining members of the Parliamentary Labor Party asked me to stay on as Leader of the Opposition. I saw my task as rebuilding our stocks, aiming to put us in a position to win majority government. In 1996, there was, indeed, a massive swing. Labor received more than 40 per cent of the vote. The Liberals continued to govern in a minority. This government was short-lived. In 1998, Labor won a majority under Jim Bacon’s leadership. I retired from the House of Assembly the following year.

To put the context in which politics is conducted, I wish to describe some of the increasing pressures facing modern government. The biggest of these is coping with the speed of change. When electricity came on the market in 1873 it took 46 years to reach 25 per cent of the Australian population; the mobile phone took 13 years to achieve the same percentage; the internet only took 10 years to reach the same proportion.

Moore’s Law has been in operation for most of the latter part of the twentieth century and in the first decade of the twenty-first. This law maintains that the amount of computing power doubles every two years. My mobile phone now has about a 1000 times the capacity as the computer I purchased in 1990. Amazon.com is the biggest bookseller in the world; in 2011 books purchased and downloaded onto people’s Amazon Kindle or other tablets outsold the number of books sold in hard copy. There are now 750 million users of Facebook, the social network site.

My wake up call was during the 1990 federal election, when I was traveling with Paul Keating. The national employment figures had just been released. Keating was asked for his response; within a few minutes, Bob Hawke, in another location, was being asked his. The ability to do this was facilitated by the use of mobile phones. A journalist stepped away from the media scrum and received information that enabled him to hone his question to Paul Keating. A small difference in response could have affected the result of the election. Little wonder politicians stick to their lines and stay on message.

The 24-hour news cycle means that there is an unquenchable thirst for stories and a story can be transmitted around the world in seconds. Stories can spin out of control in hours. Video phones and the social media mean that anyone can file a story. Anyone can submit pictures. Personal space is almost non-existent.

Running parallel to these changes are the changes in political identification.

Since the late 1960s, what is called “the quality of life voter” has emerged. Until this time, voter identification was predominantly on socio-economic lines. Simplified, the traditional Labor voter

was concerned about equity issues – participation in the work force and an equitable return on his or her labour. Establishing a safety net was also a core concern with unemployment benefits, pensions, health cover and legal aid under this banner. The right-of-centre voter was more focused on reward for effort, individual freedom and the importance of personal responsibility.

From the late 1960s, the so-called “post-materialist voter” emerged. One step removed from the means of production, and often tertiary educated, this voter took material well-being for granted and identified with quality of life issues. The most significant of these have been centred around the environment.

In Tasmania, the division was particularly marked because there had been a long history of exploitation of natural resources from settlement by Europeans – forestry, then mining, and later hydro-industrialisation. Tasmania arguably had a unique environment. It is not an accident that the first environmental party in the world emerged in Tasmania (The United Tasmania Group). It was formed in order to try to prevent the flooding of Lake Pedder.

Eventually, the “Save the Franklin” campaign was successful in 1983, after the intervention of the recently-elected federal Labor Government. From this campaign, the Greens as a political party emerged.

Parties now have to keep a keen eye on post-materialist voters as they increase as a percentage of the population. It has been argued that the Franklin issue played an important role in the election of the Hawke Labor Government in 1983. Malcolm Fraser tried to neutralize the issue by offering a huge amount for the Gray Liberal Government to stop the damming of the Gordon River, below the Franklin River.

In Tasmania, the 1980s left the Labor Party lacking self-definition. Fairness (or equity) voters left Labor because it did not seem sufficiently concerned about creating jobs. Quality of life voters left Labor because it did not seem sufficiently committed to the environment. Nationally, Labor did not hold any seats in Tasmania from 1975 until the late 1980s and so, having a conflict with the Tasmanian government over dams or forests did the Federal Government no harm in the inner city seats of Sydney and Melbourne. It was at the “GST election” of 1993 (a perceived equity issue) that led to Labor winning all five federal seats in Tasmania.

A quality of life party will now be a permanent feature of Australian politics, with the Australian Greens taking over this electoral territory from the Australian Democrats. Depending on the underlying socio-economic and political environment, the level of their support varied. Highs were experienced in Tasmania at a State level of 17.8 per cent in 1989 and 21.61 per cent in 2010. The Greens received only 10.18 per cent in 1998.

So the face of politics has changed. With fewer and fewer “rusted on” Labor or Liberal voters, there is a high probability that an election held under a proportional representation voting system will not result in any one party holding a majority.

The Labor Party is more threatened by the Greens than the Liberal Party. The Greens and Labor are competing for the same electoral territory. The Greens cannot have the Labor Party appear to be performing too well without risk to their voter base. On quality of life issues, generally the Greens will have a position one or more steps further than Labor’s. Because they do not have to worry about the materialist voter, they can be more radical than the Labor Party on matters such the environment, sexuality and general law reform.

In Tasmania, after 1992, it was time for a serious assessment of where progressive politics was going.

There were two views. One was to conclude that a return to majority government was impossible, that the Greens were to be a permanent feature of the Tasmanian political landscape, and that there was only one way to ensure a left-of-centre government, and this was to find accommodation with the Greens in some kind of alliance.

The other was that Labor’s way back was to shake off the minority image and stake out the ground as the progressive political question and to govern only in majority.

The latter position was adopted. The fundamental question that the Labor Party had to confront was whether a fragmented progressive movement could provide more than short-term unstable government in Tasmania. Was it possible with such configurations to have any more than short periods of government followed by long periods of conservative government? The view was taken that any relationship between the Greens and Labor would be inherently unstable.

The Greens are anathema to many traditional Labor voters. These voters are very sensitive to a change of political focus away from their core concerns.

For Labor to say that it would govern in minority would cause a drop in Labor's vote in its traditional areas. In addition it would be letting the potential Green voter off the hook because they then would not have to make the choice between a Labor or Liberal government.

The Labor Party believed that the only way to long-term sustainable government was to stay out of power if it was unable to gain a majority in the election following its defeat in 1992. Labor declined to go into an arrangement with the Greens in 1996, re-establishing Labor's legitimacy and setting the scene for Labor winning in 1998. Labor governed in majority from 1998 until 2010. At the 2010 House of Assembly election, a hung parliament emerged: Labor 10; Liberal 10; and Greens five.

The situation was such that another election was unlikely to resolve the matter and so workable government had to be formed one way or another. What are the arrangements most likely to provide a stable and effective government in these circumstances?

The greater volatility of the parliament means that cabinet has to be stronger, not weaker. The biggest concern surrounding government in recent years has been the weakening of the authority of cabinet, with an increased centralisation of power in the prime minister's and premier's offices. The processes leading to cabinet meetings – a minister presenting a submission, concerned departments having written contributions presented, a 10-day rule that ensures some reflection by the bureaucracy and ministers on the merits of policy initiatives – increase the chances that good policy will emerge. Cabinet not being involved at all in major decisions, or often simply rubber-stamping deals that have already been made, undermines good decision-making.

Confidentiality of discussions is paramount. Reactive decision-making is much more likely in the midst of a media frenzy prompted by leaks. This presumes a high level of trust and an assumption of a commitment to the government overriding personal or sectional interests – a big call at any time, more so if there is a hung parliament!

There also needs to be a high level of strategic thinking – also a big call with any government given the increased reactive pressures on them. This is more difficult when there are competing interests in the parliament that can threaten the future of the government at any time. Mechanisms to maximize the chances of strategic thinking should be put in place. The Prime Minister's Science, Engineering and Innovation Council (PMSEIC), that meets in full session twice a year to discuss major national issues in science, engineering and technology and their contribution to the economic and social development of Australia, is a model that comes to mind.

So assuming a government is to be formed, what are the prerequisites that can increase the chances of success? First of all, there should be guarantees on money bills to avoid the insecurity at least twice a year associated with Supply.

Secondly, there should be an undertaking by all parties involved in any agreement, that a no-confidence motion not be moved, except in circumstances of proven corruption or gross public maladministration. A body external to the parties should evaluate what constitutes corruption or gross public maladministration, with its report tabled in the parliament prior to any debate of confidence.

While this would not stop no-confidence motions being moved, it would act as a brake on those that are moved, but on the basis of political expediency only. It would increase the perceived stability of the parliament and rule out frivolous threats that publicity-seeking members can use that guarantee a headline.

There should be no blackmailing of the future of the government in order to pursue a particular policy issue. The floor of the parliament is where decisions should be determined. The government being held to ransom on a policy issue undermines the credibility of the government and the legitimacy of the institution of parliament itself.

Finally, there should be an adherence to cabinet solidarity. If any member cannot adhere to cabinet solidarity, then they should not be in cabinet. Cabinet members must be able to discuss submissions openly and then come to a corporate decision. If a member cannot adhere to a decision made, then that freedom could only be exercised after a resignation from the cabinet.

Unless these conditions are met, then a minority government is unlikely to go full term and then is likely to spend a substantial time in opposition.

Chapter Five

Inglis Clark's Other Contribution A critical analysis of the Hare-Clark Voting System

Scott Bennett

I have been asked to give a brief history and analysis of the Hare-Clark voting system that is used in Tasmanian House of Assembly and local government elections, as well as for the Legislative Assembly in the Australian Capital Territory. This paper will focus on its use in Tasmanian parliamentary elections.

Origins

Thomas Hare

Thomas Hare was a British theorist of the mid-19th century. He was concerned with the narrow social base of the members of the House of Commons, who were elected by the simple majority system, which we also know as first-past-the-post. Hare noted the dominance of the House of Commons by well-to-do Conservatives and Liberals, and pointed to the existence of many more views in society than were represented by the MPs from those parties. How to give such excluded views a voice in the Parliament was his concern – there was a need for a voting method to bring out “every form and shadow of political opinion”.¹ Hare spoke of the need for an electoral system that would produce a House of Commons that represented a larger proportion of the nation.²

Hare was opposed to the existence of individual electorates, because of what he believed to be their deleterious impact upon the representation of community opinion. His revolutionary proposal was that the nation as a whole should be used as a single, huge electorate. With such an arrangement, a “quota” of votes would be needed for a candidate to be elected. To establish such a quota, he proposed dividing the total number of registered national electors by the number of seats in the House of Commons. If a candidate gained more than the quota, he would be elected. In addition, he believed that a successful candidate’s “surplus” votes – gained in excess of the quota – need not be lost. Hare envisaged such votes being “transferred” to remaining candidates, until the election of the required number of MPs had been achieved. From this emerged the term, the “single transferable vote” (STV), which has become the commonly-accepted title to distinguish this model of proportional representation from other models.³

Hare noted that with House of Commons single-member electorates, the location of a candidate’s home district was often the key to the election of a particular MP. If his model were to be introduced, the voter’s place of residence would be irrelevant, for all votes would weigh the same, and would not be dependent upon the location of the voters.⁴ With significant minorities able to achieve some type of parliamentary representation, there would be an improvement of the political education of the public, the electors would become aroused and keen to vote, better quality candidates would come to the fore, bribery would be reduced, MPs would be less subservient to constituents, and the two large English parties would start thinking of the common good.⁵

A number of contemporary writers, including John Stuart Mill, applauded the Hare scheme. Mill spoke of two dangers of “representative democracy”: the low grade of intelligence in the representative

body, and the danger of class legislation by the majority in the legislature. He claimed that both would be lessened if Hare's system were incorporated into the British electoral arrangements.⁶ The idea also influenced debate in Europe.

Australian interest

Australians were soon discussing Hare's proposal. The *Sydney Morning Herald* reviewed it in November 1860, and the Melbourne *Argus* and *Sydney Empire* gave it publicity in the following year. Hobart's *Mercury* ran an explanatory article by Mill in September 1862.⁷ In 1862 the Legislative Council of New South Wales passed a bill to make the Legislative Council an elected body, with the Hare model as the voting system, though the Legislative Assembly failed to pass the bill.⁸

Despite this New South Wales activity, greatest interest seemed to exist in South Australia. The political activist, Catherine Helen Spence, wrote letters to newspapers, published a pro-Hare pamphlet, and worked with the local Effective Voting League to push for its adoption. Two local MPs each introduced legislation to introduce the system, though with no success.⁹ Spence did suggest one important refinement to Hare's model that had later relevance to the Tasmanian experience. She believed that it would be better to have manageable electorates, rather than the whole polity as a single electorate.¹⁰ So much did Spence praise Hare's system, that for a time some Australians referred to the "Hare-Spence" system.¹¹ However, despite spending many years pushing for its implementation, she found it impossible to persuade many politicians to accept the merits of the Hare voting system. A common view was expressed by one South Australian Labor MP, who claimed that, "The method was too philosophic for the everyday requirements of ordinary people".¹² Eventually, though, a breakthrough came in Tasmania.

Andrew Inglis Clark

Inglis Clark was a Tasmanian lawyer, democrat, liberal and politician who had a strong interest in the electoral arrangements of his colony. He was critical of the inequality of voting power that placed government "virtually in the hands of an Oligarchy".¹³ This, he believed, was due to the impact of first-past-the-post, the voting method used since the introduction of parliamentary elections in Tasmania in 1851. Clark spoke of his admiration for the Hare proposal, which "offers to those whose aim it is to have the representation of a reflex of the nation, a sure means of compassing their ends."¹⁴ Clark had read Mill on Hare, and he knew of the views of Spence.

Enjoying the support of Premier Edward Braddon, and the practical assistance of the Tasmanian Statistician, R. M. Johnston, Clark pushed through the Parliament a revolutionary alteration to the colony's voting arrangements. The *Electoral Act* 1896 retained a 37-member House of Assembly, but with only 27 MPs still to be elected from single-member electorates by use of first-past-the-post. The breakthrough was the creation of one four-member electorate for Launceston, and one six-member electorate for Hobart, with proportional representation as the voting system for both. The quota for election replicated Hare's proposal for dividing the aggregate number of first preferences by the number of seats to be filled. According to Clark, the Braddon Government "wanted to . . . have the benefit in the Assembly of the intelligence, energy, zeal, and patriotism of the people who, at the present time voted for defeated candidates."¹⁵

Clark thus introduced Hare's system, while also accepting Spence's call for the provision of electorates rather than a colony-wide electorate. His biographers speak of proportional representation as Clark's great legacy to Tasmania,¹⁶ though Johnston believed that it actually was due to "Miss Spence's unwearied advocacy [that] . . . the success of the introduction of the Hare System in Tasmania by Mr Clark is largely due".¹⁷

Cautiously, Clark had not attempted to introduce proportional representation throughout the colony. He apparently believed that were he to do so, rural MP opposition would probably bring about the defeat of the legislation. He did state, though, his hope that if the Hare model was seen as

a successful innovation, he later would push for its use throughout Tasmania for the election of all members of the House of Assembly.¹⁸

First Tasmanian use of the Hare system

The system introduced in 1896, for one year only, actually was used in the next two Tasmanian elections in 1897 and 1900.¹⁹ Overall, the use of the new arrangements was successful despite the opposition of many. Generally, Hobart and Launceston voters coped well, though informal votes were significantly higher in 1897 than in the previous election. There seems to have been some organisation of joint tickets, as seen in the high number of preferences flowing between particular candidates. Both elections appeared to confirm Hare's belief that different interests in a community, if enjoying sufficient popularity, could gain parliamentary representation. Most notably was this seen in 1897 in Launceston when labour supporter, Ronald Smith, gained an unexpected victory. Three years later the election of Teddy Mulcahy in Hobart was said to be due largely to the Irish and Catholic vote.

In Hobart, where the Braddon Government's income tax proposals had caused much opposition, some marveled that the successful Hobart candidates in 1897 included the Treasurer, Philip Fysh, as well as noted anti-income tax campaigner, Alfred Crisp. Perhaps the most controversial victory was that of Edward Miles in 1900. Found guilty of improper conduct while a minister, Miles had left his West Coast electorate and nominated for Hobart where he spent most of his campaign criticising his opponents. Loud was the public condemnation of his success, but some saw it as an indication of how differing interests could gain election from the one electorate.²⁰ It can be argued that the results in these two elections were closer to what Hare had been seeking, than in any Tasmania-wide Hare-Clark election since.

The 1896 legislation needed renewal if what had become known as the "Hare-Clark" system was to be retained. The Government had promised, in fact, to introduce a thoroughly-revised *Electoral Act* that would incorporate proportional representation on a permanent basis. Despite this, Clark's departure from the Government in October 1897, and the House of Assembly seven months later, seemed to lessen Braddon's eagerness to proceed. Each year thereafter, the Legislative Council would reluctantly agree to a renewal of the legislation for one year – and nothing more. The need to provide for the election of the members of the first Commonwealth Parliament also intruded. As a consequence of this inaction, the 1900 election saw the retention of the Hare system because no other arrangements had been made. Soon after the election, however, it was removed by a 21-8 vote in the House of Assembly, and first-past-the-post, with single-member electorates, was re-introduced for Hobart and Launceston voters.

Proportional representation is resurrected

It took activity by the Commonwealth Parliament to give Hare-Clark supporters the chance to place the voting system back in Tasmania's electoral legislation. Owing to governmental and parliamentary inaction, in the first Commonwealth election the five Tasmanian MPs had been elected from a State-wide electorate. After five electorates eventually were created for the 1903 election, it came to be realised that an opportunity now existed to make significant changes to Tasmania's electoral legislation, while also giving the small State an opportunity to save money. Accordingly, in 1906-07, the Tasmanian Parliament made three legislative changes of particular significance.

A major alteration was reduction in the number of House of Assembly electorates from 35 to five. Six MPs were to be elected from each electorate. There was therefore a reduction in the number of MHAs, with the associated savings. The second change also promised governmental savings. The five House of Assembly electorates were to have the same name and boundaries as those for the House of Representatives. Whenever Tasmania's House of Representatives boundaries were changed, so also

would the House of Assembly boundaries be changed. In effect, therefore, the State had handed over to the Commonwealth the cost of altering the local lower house's boundaries whenever that became necessary.

The third alteration flowed from the introduction of these changes. Proportional representation was reinstated, but a significant change was made to the quota arrangements with the introduction of what was known as the Droop Quota.²¹ This required that an electorate's votes be divided by the number of members to be elected, plus one, to which the figure of one was added: $(\text{votes}/\text{seats}+1) + 1$. This would ensure that it would be impossible for more candidates to gain a quota than the number to be elected.

Hare-Clark over the years

Hare-Clark has remained in use since 1909, though with various changes to the way it has operated. It would be misleading to suppose, however, that the system's continuing use has been universally applauded. Before we look at what critics have said over the years, however, it is important to describe various aspects of the system.

Electorates

Since Federation, Tasmania has never qualified for a sixth House of Representatives seat. This has meant that the State has been able to maintain the five House of Assembly electorates, based on the boundaries of the five House of Representatives electorates. From 1909 to 1959 six members were elected from each electorate. Uneven numbers per electorate has been the norm since seven-member electorates were created for the 1959 election. This was changed to five per electorate in 1998.

Ballot paper — appearance

Grouped party candidates on a Tasmanian ballot paper are listed in columns as in Senate elections. Ungrouped candidates appear in a column to the right of the party groups. The ballot paper does not have the horizontal line seen on Senate ballot papers that was introduced to encourage voters to vote "above the line" for the party of their choice.

Ballot paper — rotation of names

Where a candidate's position in each column was originally alphabetical, since 1979 this has varied from paper to paper under what is known as "Robson Rotation".²² This provides for the names in each group to be re-ordered from ballot paper to ballot paper, so as to reduce the impact of any advantageous ballot positions.

Quota

A major difference between the Hare-Clark system and preferential voting is the size of vote needed to be elected. Whereas the latter requires 50 per cent (plus 1 vote), the Hare-Clark requirement depends upon the number of parliamentary seats to be filled. In a five-member electorate, the quota is 16.7 per cent, in a six-member electorate it is 14.3 per cent, and in a seven-member electorate it is 12.5 per cent. For Bass in 2010, 63,698 votes were divided by six (5 + 1), giving a figure of 10,616.333. The remainder was dropped and one added to the total, giving a quota of 10,617 votes to gain election.

Vacancies

When a seat becomes vacant in all Australian preferential voting elections, a by-election is conducted. The Tasmanian legislation specifies recounts, where the votes of the retiring member are used to elect that member's successor. Thus, only candidates from the previous election may nominate for a recount.

Hare-Clark strengths

Ballot paper “freedom”

Ideally, electors should be given the chance to vote for any of the candidates contesting an election. Some multi-member systems have a single “closed list”, where voters may only vote for a party. Israel is an example. In Australia, the provision for “above the line” voting in some proportional representation elections influences the voting behaviour of many people. By contrast, in Tasmanian elections, although party lists are presented on the ballot paper, the voter is unrestrained, and able to vote for any individual candidate in what is described as an “open list” system. In fact, Tasmanian Hare-Clark voters have to work out their preferences with no assistance from their party. The electoral law forbids anyone from canvassing for votes, soliciting the vote of an elector, or attempting “to induce an elector not to vote for a particular candidate or particular candidates” within 100 metres of a polling place. The consequence is that how-to-vote cards are nowhere to be seen on polling day for the Tasmanian House of Assembly.

Reflecting voters’ wishes?

In a single-member preferential voting electorate with a long history of voting Labor, a Liberal voter may feel little relationship with the local MP. In that voter’s case there may well be no acceptance that an election has reflected community views. On the other hand, Hare-Clark, in which either five or seven MPs are returned in each Tasmanian electorate, has never failed to return some Liberal²³ and Labor MPs in each. Green members have also been regularly elected since the 1980s. In years past, a number of Tasmanian independent MPs have been elected, though none since 1982.

Representing all voices?

Western legislatures tend to under-represent women, manual workers and religious and racial minorities. This is intimately connected with the pre-selection practices of the major parties. When proportional representation is used in multi-member electorates, however, parties feel they can afford to allocate more places on candidate lists to female candidates and the members of minority interests. The incentive to have a more balanced ticket thus has appeal.²⁴ This can be seen in the practices of both the Tasmanian Labor and Liberal parties with regard to the nomination of women.

Proportionality

The term, “proportional representation,” refers to representation in proportion to the vote gained by a party. This is pointed to by its supporters as far more likely to be achieved when using this voting system than when other methods are used. In the most recent Tasmanian House of Assembly election (2010), the Liberals (39.0 per cent) and Labor (36.9 per cent) each gained 40 per cent of the House of Assembly seats, while the Greens (21.6 per cent) secured 20 per cent of the seats. Preferential voting is far less likely to see such a high degree of proportionality. In the 2011 New South Wales Legislative Assembly election, Labor’s 24.0 per cent vote earned it 21.5 per cent of Legislative Assembly seats, and the Greens’ 10.3 per cent produced one seat (1.1 per cent). By contrast, the Coalition’s 51.1 per cent saw its share of Assembly seats being 74.2 per cent. Observers refer to this as the “winner’s bonus” that advantages the winning party or parties in elections that use single-member electorates. Ironically, Hare-Clark’s tendency to produce higher levels of proportionality does not appeal to the major parties. Sawyer has spoken of the “considerable” major party distrust of the voting system, due to its removal of the bias against minor parties so evident in preferential voting.²⁵

Reduction of wastage

Another Hare-Clark advantage is the avoidance of a great deal of what is called the “wastage” of votes that occurs when single-member electorates are used. When preferential voting is used, for example, a 50 per cent (+1) vote is all that is needed for a candidate to be elected. Therefore, it can be said,

every vote above that figure is “wasted”. A typical example was the electorate of Albury in the 2011 New South Wales election, where Greg Aplin’s 61.1 per cent vote meant that he gained 11,531 more votes than he needed to win the seat. It is impossible not to have some wastage when proportional representation is used, but the distribution of surplus votes means that it is nowhere nearly as marked as in examples from preferential voting or first-past-the-post elections.

No seat is safe

Potentially, all party candidates are vulnerable in a STV election. In Senate elections, however, a combination of fixed-order party lists and above-the-line voting gives protection to the first two candidates in each major party’s State list. In Tasmanian House of Assembly elections, however, parties may not rank their party lists, and many voters seem to understand that they may target a non-performing MP, while still voting for that MP’s party. The system thus provides no safe seats for “complacent or tired party members”.²⁶ In Tasmania this could be seen most spectacularly in 1979 when the Labor Government was returned with 54.3 per cent of the vote, yet a controversial, under-performing minister lost his seat, against all expectations.

The relative lack of safety for candidates is due to the fact that they are fighting not only their obvious political opponents for votes, but candidates from their own party. A typical case occurred in the 2010 election. In Braddon the campaign of a new Liberal candidate, the well-known local businessman, Adam Brooks, saw the defeat of fellow-Liberal, Brett Whiteley, a member who had been considered likely to be re-elected.²⁷

Hare-Clark weaknesses

If we look at the use of preferential voting for various Australian elections, we notice that little is said about the voting system, suggesting general community acceptance. This has not been the case for Hare-Clark in Tasmania, which, despite being generally accepted by the community, is often criticised. An *Examiner* editorial in 1934 noted that a State election “always brings more or less criticism of the Hare-Clark system”,²⁸ something that has been confirmed in the years since. There are various problems that have been pointed to over the years.

Not easily understood

It can be argued that the more citizens understand how they elect their representatives, the more accepting they will be of their representative assemblies. The general acceptance by voters of preferential voting for elections for the Australian House of Representatives since 1919 seems not to have wavered on the rare occasions when a clear result has not been achieved. By contrast, a long-expressed Tasmanian view is that the complexity of the Hare-Clark system is difficult for a great many voters to understand, or necessarily accept. Many probably share the views of a letter-writer to the *Mercury* more than a century ago, who described what he called the “Clark-Hare” system, as “abstruse” and, except for the Government Statistician, “unworkable”.²⁹ Does this matter? A supporter of Clark, Professor Jethro Brown, realizing the complexities of the system, tried to dismiss such concerns. According to him, “a knowledge of the system is of no more practical importance to the voter than is a knowledge of the steam engine to a railway traveler”.³⁰

This is not a view with which others have agreed. Some have tried to suggest ways around this problem. In 1922 John Piggott MHA (CP) called on the Minister for Education to have the workings of Hare-Clark taught in State schools.³¹ In 1953 the ALP State Conference called on the Government to have voting rules taught in 8th and 9th grades of Government-subsidised schools.³² Another idea has been voter-targeted publicity at election time. For some years, as polling day approached, it was common for newspapers to include details of the system, in order to educate voters. In 1928, for instance, the *Mercury* included a “How to Vote” segment to aid its readers, something the *Examiner* was still providing in 1950.³³

A slow result

Most preferential voting election results are known quite quickly. By contrast, the counting in proportional representation elections for multi-member electorates is much slower, due to the larger ballot papers and the more complex method of counting. This can produce counts of inordinate length – in the 2002 Tasmanian election there were 251 counts in the electorate of Braddon, but 739 counts in the electorate of Bass. It can be many days before the final membership of the House of Assembly becomes clear.

Unstable government

For many observers, a very important feature of an electoral system is whether or not it produces stable government. On this measure proportional representation in Australia does not have as good a record as does preferential voting. In the years since the latter was introduced for House of Representatives elections, only in 1940 and 2010 has one party or a coalition of parties failed to win control of the House. By comparison, in only 12 of 21 Tasmanian elections since 1940 has one party gained a majority of House of Assembly seats, and in a number of cases an early election has been forced upon a government, most notably in 1948, 1950, 1956, 1972, 1992 and 1998. Minority governments thus are much more common in Tasmania than in jurisdictions where preferential voting is used.

The “problem” of a third party

The Hare-Clark system has worked quite well over the years, but critics would say that was because the battle was generally between Labor and the major non-Labor party. Occasionally an independent would disturb the major party monopoly, but the “problem” was seen as short-term only. However, since 1972, when the environmental United Tasmania Group contested an election and nearly won a seat, the emergence of an environmental party has caused difficulties for the two major contestants. Much to the dismay of the major parties, the Greens won four of 25 seats in each of 2002 and 2006, and five seats in the most recent election of 2010.

The size of the Parliament and the impact upon government

The Tasmanian House of Assembly was reduced from 35 to 25 members prior to the 1998 election in an effort to eliminate Green MPs.³⁴ An unintended consequence, however, is the impact this has had upon government in the smallest State. With a vote of 66.7 per cent needed to win four of the five seats in any electorate, it is highly unlikely that a party or coalition could do so. This means that even were a party to win a majority of seats in every electorate, the best it can achieve is to hold 15 of the 25 seats.

This limited number creates appointment problems. As there are usually nine Cabinet positions and one government member holding the Speakership, most government MPs will hold portfolios, with reduced flexibility for portfolio changes during a Government’s term of office. In a recent Parliament, the resignation of two deputy premiers saw the Labor Government forced to take replacements from the Legislative Council, something that is not unknown, but which runs counter to the traditional non-party history of the State’s upper house. When a new government is unable to gain a majority in the House of Assembly, the choice of ministers is even more difficult than it would be in a larger parliament. Currently, seven Cabinet members, plus the Speaker, come from the ALP’s ten lower house MPs.

As noted above, the 1998 reduction in size of the House of Assembly was an effort to return elections to Labor versus Liberal contests. In 2008, the *Mercury* acknowledged that it had supported the 1998 reduction in size, but in the years since had come to regard this as a serious mistake. An editorial spoke of there being too much power in the hands of advisers and public servants, because ministers did not have the time to get across their various portfolios: “The cold, hard fact is that there

is simply too much work for too few people in the executive arm of government and too few people left over – the backbench – to deal adequately with the concerns of the electorate.”³⁵

Some now believe that if there is to be an improvement in the performance of the House of Assembly, there must be a return to the 35-member House. The only uncertainty is the number of electorates – five or seven.

Putting parties before representation

For Inglis Clark, making Parliament the forum of the colony was the key benefit he sought from the new voting system. Taking his cue from Thomas Hare, he saw what he called “the representation of all opinions” in the Parliament as the ideal that proportional representation would help achieve. In doing so, the place of the “accursed party system”³⁶ would be undermined, as Parliament’s role as the forum for Tasmanian voices was emphasized. However, these views have been of no importance in Tasmanian politics since. Although the principle behind Hare-Clark was thus more about the representation of interests than party control of the Parliament, this is not a view that the Liberal or Labor parties have ever been prepared to accept. The problem has been very much affected by Tasmanians’ views of the place of parties in the polity.

As early as 1909 the future Liberal Premier, Albert Solomon, was warning that the voting system would cause the disintegration of the newly-emerged political parties.³⁷ Solomon’s view was an early indication of the centrality of parties in many Tasmanians’ understanding of Parliament’s primary function. This attitude has strengthened in the century since. In fact, Tasmanians’ views of the centrality of parties to government has not been significantly different from that of their fellow citizens in the other Australian States. The unhappy reaction of many to the hung parliaments that were the consequence of the 2010 Commonwealth and Tasmanian elections indicated this very clearly. Rather than see Parliament and the community being strengthened by results where the major parties had to acknowledge the presence of other community views in the Parliament, there has been widespread dismay that each government would have difficulty in implementing its electoral mandate. Some critics took the electoral outcomes as an indication that the Gillard and Bartlett governments did not have a mandate to govern. The Hare and Clark aims of a broad community representation therefore is of little importance to such critics. The main indicator of this has been that the changes made over the years to the Tasmanian voting system have been driven by concern about the parties’ problems, rather than whether or not Hare-Clark was operating as Clark had expected. This can be seen in five important examples.

Numbers of members per electorate

Throughout Hare-Clark’s history, voters have often produced a House of Assembly in which the government has had a very narrow majority, or has even been forced to form a minority government. When there were six members per electorate the major parties occasionally won 15 seats each. Rather than accept what the voters have decided in different elections, however, the major parties have tended to reject what was basic to Clark’s hopes. The 1958 increase in the size of the House of Assembly to seven members per electorate, for example, was driven by party concerns over achieving control of the House of Assembly, rather than a preparedness to accept the result of the election as an indication of voters’ views about government and society.

The Speaker

Much discussion in the early 1950s addressed the “problem” of the two major parties halving the House of Assembly membership. Some seemed prepared to undermine the place of the office of the Speaker of the House in an effort to rectify the situation. Former Nationalist Premier, Sir John McPhee (1928-34), for example, wondered if there should be a permanent Speaker, possibly a public servant. Future Labor Premier, Bill Neilson (1975-77), suggested that the Speaker should be able to

vote only on matters of precedence.³⁸ A 1951 Board of Enquiry came up with the idea of a State-wide election of the Speaker, or else a permanent Speaker with a casting vote.³⁹ Eventually, changes made in 1953 and 1954 provided for the possibility of an increase in the size of the House of Assembly to 31 members for the duration of a Parliament, if the parties' numbers were equal. The Speaker would be appointed from the party with the higher popular vote, and a replacement appointed by a recount of that Member's vote. Such a revolutionary event never occurred.

Placement of names on the ballot paper

Originally, the candidates' names on the ballot paper were placed alphabetically in a single column. In 1941 this was altered so that each party's candidates were placed together in separate columns. The parties hoped that this would help keep electors' votes under a tighter control than had been possible under the previous arrangement. One can surmise that Inglis Clark would not have been impressed by the reasoning behind such an alteration of the electoral law.

Robson Rotation

From 1941 there were occasions when an advantageous ballot position was significant in the election of particular candidates. "Donkey vote" electors, voting up or down a party list, occasionally aided particular "undeserving" candidates to gain election. This was recognized on both sides of the chamber as a weakness and, as noted earlier, the electoral law was changed in 1979 to provide for the position of names within each group to be altered by provisions of the so-called "Robson Rotation". Once again, the change was made with the parties' well-being in mind, rather than the electors'. Its introduction was, in effect, a criticism of the voting behaviour of the Tasmanian community. Rather than accept the public's vote, it was another attempt to control it for the sake of the parties.

By-elections – and recounts

When Hare-Clark was established in 1907, by-elections were the method of filling a casual vacancy. As it came to be realised that governments were very likely to have narrow majorities, it was seen that members leaving the House of Assembly might, inadvertently, threaten the very existence of the government. Most by-elections produced victories by the party of the former member but, on two occasions during the First World War, a by-election was won by the Opposition party. As a consequence, a speedy change to the law in 1917 introduced recounts. This has been widely accepted by the parties, but not all observers are keen on the arrangement. In 2011, a letter-writer to the *Mercury* spoke of the need to have by-elections rather than recounts, so that voters could elect "who they want, not just the next runner-up".⁴⁰ As the parties believe that the health of governments is of more importance than the voters' views, however, recounts have remained in operation.

Abolition of Hare-Clark?

Over the years since the 1909 election, party concern over the frequent absence of a workable majority in the Parliament has been a constant theme in Tasmanian politics. Perhaps not surprisingly, it has often led to suggestions that Hare-Clark should be taken out of the electoral legislation in favour, probably, of preferential voting.⁴¹ In 1948, Frederick Marriott, MHA (Lib), predicted that were the voting system to be dispensed with in favour of preferential voting or first-past-the-post, single-member electorates "would not permit deadlocks in Parliament".⁴² Probably more non-Labor politicians have tended to push such a view than have their Labor opponents, though "Stymie" Gaha, former Labor MHR and later MHA, was one senior Labor critic who urged that single-member electorates be created for the House of Assembly. Hare-Clark might be "mathematically perfect", he stated, but had "failed for practical purposes in present-day politics".⁴³ On another occasion he described the system as "the invention of a madman".⁴⁴

As the Greens have become a force in Tasmania since the 1980s, more anti-Hare-Clark voices have come to be heard. After the 2010 election, with its 10-10-5 result, there were a number of calls for an end to “this idiotic system”.⁴⁵ One critic was veteran Tasmanian economics and business commentator, Bruce Felmingham. He reported that small businesses were effectively frozen during the long period required to count the vote. This was due to the uncertainty as to who would be forming a government. For such firms, the electoral system “has become a nightmare”, and he advocated replacing Hare-Clark with a voting system that produced a more speedy result.⁴⁶

Does the Hare-Clark system have a future in the State from which it emerged? One’s answer to that can depend upon one’s view of political parties.

If the major parties are determined to aim for majority governments, then it would seem to make little sense to retain the system. Changing to preferential voting, for example, would be just a matter of a Labor and Liberal cobbling together of a short-term majority in each house to pass legislation. Almost certainly, such a change would mean the achievement of more government majorities in the House of Assembly and the end of Green membership of the House. There are certainly some observers, such as Felmingham, who believe such outcomes would benefit the State.

On the other hand, a University of Tasmania forum, held during the 2010 election, noted that “multi-party systems are increasingly common in advanced democracies” and nothing to be too worried about. If such governmental arrangements are to succeed, however, “distinctive strategies and institutions are needed”. Speakers pointed in particular to such governments in New Zealand and Denmark, as well as the ACT.⁴⁷ Perhaps political culture is important in this? Since the establishment of the ACT Legislative Assembly, there has been only one majority government to emerge from the eight post self-government elections, yet this is not a major issue in that polity.

Nor has it been a major issue in New Zealand since the alteration to a form of proportional representation in 1996. As in the ACT, minority governments have become the norm, with little apparent difficulty. According to the Prime Minister, John Key, government proceeds smoothly, “the minority parties have got better at recognizing their influence has to be proportionate to their support [from the electorate]”.⁴⁸ Such an acceptance is not the attitude of many Tasmanians, nor of the two major parties. The snap 1992 Tasmanian election was held after the Labor Premier, Michael Field, said that he would no longer work with the Greens in the uncomfortable partnership that had existed from the 1989 election: “we are not going to enter into any accord, or coalition or any alliance of any sort with any group”.⁴⁹ This was despite the likely defeat of his party. By contrast, another former ALP Premier, David Bartlett, has recently stated that minority government “allowed for more debate and transparency”:

What it allows us to do is have mature, sensible, effectively mutually beneficial conversations, because they [minority governments] are not about opposition for opposition’s sake, they’re about what’s for the best of the constituency.⁵⁰

His view, while politically realistic, would not be accepted by many Labor or Liberal party members.

In conclusion

With so much criticism over the years, how has Hare-Clark survived for so long? Claims are sometimes made that the voting system is beloved by many Tasmanians – perhaps that plays a part? Many voices have praised it over the years. Labor MLC, Jim Connolly, stated sixty years ago that Hare-Clark had proved to be “an almost infallible way of obtaining proportional representation”. He asserted that, while it continued to be in the electoral legislation, there “need be no fear that the people will not be properly represented”.⁵¹ Many probably still share such a view – Malcolm Mackerras has spoken

of it being “widely admired by reformers and commentators and loved by Tasmanian voters”.⁵² A different view is that of Richard Herr of the University of Tasmania, who has wondered if its position in the Tasmanian governmental system is not necessarily because of what Clark hoped it would achieve, but for “its image as a uniquely Tasmanian development”⁵³ – or, as another writer has put it, Hare-Clark is “a part of our life”.⁵⁴

Many years ago, Herr pointed to the irony in the fact that Hare-Clark “is more highly supported when it does not achieve its philosophical aims than when it does”.⁵⁵ More than twenty years later, the irony has only deepened. It does, however, make for a fascinating story for those who are interested in the operation of parliament and government in Australia.

Endnotes

1. Thomas Hare, *Treatise on the Election of Representatives, Parliamentary and Municipal*, Longman, Brown, Green, Longman and Roberts, 1859, 127.
2. [Thomas Hare], *Machinery of Representation*, London printed, 1857; Hare, *Treatise on the Election of Representatives...*, *op. cit.*
3. Scott Bennett and Rob Lundie, *Australian electoral systems*, Research Paper 5, Parliamentary Library, Canberra, 2007-08, 12-26.
4. Hare, *Treatise on the Election of Representatives...*, *op. cit.*, 122-3.
5. Jenifer Hart, *Proportional Representation. Critics of the British Electoral System 1820-1945*, Oxford University Press, 1992, 26-28.
6. J. S. Mill, “Of True and False Democracy: Representation of All, and Representation of the Majority Only”, *Mercury* (Hobart), 11 Sept 1862, 2.
7. *Ibid.*
8. David Clune and Gareth Griffith, *Decision and deliberation. The parliament of New South Wales 1856-2003*, Federation Press, 2005, 148-49.
9. C. H. S., *A Plea for Pure Democracy. Mr Hare’s Reform Bill applied to South Australia*, W. C. Rigby, 1861; Helen Jones, “South Australian Women and Politics”, in Dean Jaensch (ed.), *The Flinders History of South Australian Political History*, Wakefield Press, 1986, 435.
10. Hart, *op. cit.*, 45.
11. Susan Magarey, *Unbridling the tongues of women a biography of Catherine Helen Spence*, Hale and Iremonger, 157. For an early use of the term, see “Mr H. S. Taylor’s Statement”, *South Australian Register* (Adelaide), 30 Dec 1893, 6.
12. Magarey, *op. cit.*, 163.
13. F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, University of Tasmania Law Press, 2001, 35.
14. [A. I. Clark], “Hare’s System of Representation”, *Quadrilateral*, 1874, 249.
15. “The new electoral bill. The Attorney-General explains it”, *Mercury* (Hobart), 11 Aug 1896, 3.
16. Neasey and Neasey, *op. cit.*, 229.
17. R. M. Johnston, “Observations on the workings results of the Hare system of election in

- Tasmania”, *Papers and Proceedings Royal Society of Tasmania for 1897*, 88.
18. Scott Bennett, “‘These New-Fangled Ideas’: Hare-Clark 1896-1901”, in Marcus Haward and James Warden (eds), *An Australian Democrat. The Life, Work, and Consequences of Andrew Inglis Clark*, Centre for Tasmanian Historical Studies, 1995, 146.
 19. Bennett in Haward and Warden, *op. cit.*, ch. 14.
 20. Scott Bennett, “Political corruption, the fall of the Braddon government and Hare-Clark voting: E. T. Miles, 1899-1900”, *Tasmanian Historical Research Association Papers and Proceedings*, vol. 39 (4), Dec 1992, 155-56.
 21. Named after English mathematician, H. R. Droop, who devised the formula.
 22. Named after Neil Robson MHA, the originator of this system.
 23. Nationalist Party between the elections of 1917 and 1941.
 24. Marian Sawyer, “A Matter of Simple Justice? Women and Parliamentary Representation”, in Marian Sawyer and Giani Zappalà (eds), *Speaking for the People, representation in Australian politics*, Melbourne University Press, 2001, 173.
 25. *Ibid.*
 26. W. A. Townsley, *The Government of Tasmania*, University of Queensland Press, 1976, 27.
 27. Scott Bennett, “Tasmanian election 2010”, Background Note, Parliamentary Library, Canberra, 2010.
 28. “Hare-Clark System”, editorial, *Examiner* (Launceston), 24 July 1934, 6.
 29. Alfred Thorpe, “The Hare system”, letter to *Mercury*, 9 December 1903, 3.
 30. W. Jethro Brown, quoted P. C. Douglas, *The Hare-Clark System of Election*, Government Printer, 1908, 9.
 31. “Teaching the Hare-Clark system”, *Mercury* (Hobart), 21 June 1922, 6.
 32. “Teaching of How to Vote”, *Mercury* (Hobart), 27 February 1953, 2.
 33. “How to vote”, *Mercury*, 30 May 1928, 5; “Pointers for Voters. Election Guide For To-day”. *Examiner*, 6 May 1950, 1.
 34. Scott Bennett, “The Reduction in the Size of the Tasmanian Parliament”, Research Note 2, Parliamentary Library, Canberra, 1998-99.
 35. “We need a bigger House”, editorial, *Mercury*, 8 Sept 2008, 14.
 36. W. A. Townsley, *Tasmania From Colony to Statehood 1803-1945*, St David’s Publishing, 1991, 168.
 37. “Address by Mr Solomon”, *Mercury*, 20 February 1909, 8.
 38. *Mercury*, 17 February 1951, 12.
 39. W. A. Townsley, “Electoral system and constituencies”, in F. C. Green (ed.), *A Century of Responsible Government 1856-1956*, Government Printer, [1956], 89.
 40. Craig Hoggett, “Burnett calls for review”, *Sunday Tasmanian*, 15 May 2011, 6; Geoff Wells, “Bring on Denison by-election”, letter to *Mercury*, 14 May 2011, 23.
 41. For an early example, see “Our system of voting”, editorial, *North-Western Advocate and Emu Bay Times*, (Devonport and Burnie), 20 May 1912, 2.

42. "Electoral reforms suggested", *Examiner* (Launceston), 16 Sept 1948, 3.
43. "Labor MP to move for single *electorates*", *Mercury*, 2 Oct 1953, 3.
44. W. A. Townsley, "Electoral system and constituencies", *op. cit.*, 77.
45. See e.g. Errol Wright, "Scrap Hare-Clark", Bernard Rospin, "Minority soap box", letters to *Mercury*, 25 March 2010, 17; Gerry Kite, "Hare-Clark", Jim J. Campbell, "Voter system", letters to *Examiner*, 5 March 2010, 17.
46. Bruce Felmingham, "Hare Clark in need of review", *Sunday Tasmanian*, 4 April 2010, 17.
47. "Making multi-party systems work: governing Tasmania beyond the 2010 election", quoted Bennett, "Tasmanian election 2010", *op. cit.*
48. Dennis Shanahan, "Minority government works for us, says Key", *Australian*, 21 June 2011, 4.
49. Michael Moore, "February 1 showdown", *Mercury*, 3 January 1992, 1.
50. Emma Hope, "Bartlett backs minority rule", *Mercury*, 26 August 2011, 18.
51. "Favors present voting system", *Examiner*, 8 June 1950, 5.
52. Malcolm Mackerras, "The Operation and Significance of the Hare-Clark Electoral System", in Haward and Warden (eds), *op. cit.*, 179.
53. R. A. Herr, "Hare-Clark: The Electoral Legacy", in Haward and Warden (eds), *op. cit.*, 193.
54. Reg. A. Watson, *Distinguished Tasmanian Historical Parliamentarians*, Anglo-Saxon-Keltic Society, 1987, 14.
55. Herr, *op. cit.*, 181.

Chapter Six

The Victorian *Charter of Human Rights and Responsibilities Act 2006*

The Case for Repeal

M. R. L. L. Kelly

Some preliminary observations

Former Justice of the High Court, the Hon Michael McHugh, in a speech in 2007, repeated that old saw that “[Australia appears] to be the only Western country in the world without a Bill of Rights”. He added that this “raises questions about [Australia’s] true commitment to . . . human rights standards...”¹ He bolstered his arguments by references to sayings of a number of legal academics² – for example, Professor Hilary Charlesworth had noted a “marked gap” in Australian democracy in that there is not “a coherent system of protection of human rights”³ – and quoted his own observation in *Al Kateb v Godwin* that:

Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments. It is an enduring and many would say a just criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights.⁴

Leaving to one side the sagacity or otherwise of a sitting High Court judge making such a gratuitous statement, it should be noted that, in that case, where he was in the majority, Justice McHugh immediately went on to say that: “But, desirable as a Bill of Rights may be, it is not to be inserted into our *Constitution* by judicial decisions drawing on international instruments that are not even part of the law of this country.”

This speech illustrates three major themes that have surrounded debate in Australia on “human rights”:

- First, it is primarily lawyers who agitate for a bill of rights;
- Second, that such lawyers believe that Australia’s democracy is somehow second-rate because of the lack of such a bill; and
- Third, that nevertheless, it is not for judges to go about inserting rights from international instruments into the law, especially the law of the Constitution.

I have argued elsewhere that Australia’s robust democracy has been and remains the best protection of individual citizens’ rights, and suggested that much of the support for notions for bills or charters of rights within Australia amounts to no more than a fashion, albeit one that lawyers appear quite desperate to wear.⁵ But, as George Santayana noted, “Fashion is something barbarous, for it produces innovation without reason and imitation without benefit.”⁶

Immediately obvious difficulties with the Charter

Nowhere is this clearer than with the Victorian *Charter of Human Rights and Responsibilities Act 2006*⁷ (hereafter: the Charter).

For all its vaunted title, the responsibilities aspect of the Charter is sadly lacking – “Responsibilities” are mentioned only in relation to section 15(3) concerning freedom of speech, and the only obligations specifically mentioned as such are those referred to in the heading of Part 3, Division 4, “Obligations on public authorities”. The consequent concentration upon “rights” of persons (“Only persons have human rights. All persons have the human rights set out in Part 2”),⁸ as opposed to any “responsibilities” of persons, (there is no equivalent provision stating, “All persons have the responsibilities set out in ...”), is of itself an idicium of either careless drafting, or of a disregard for individual responsibility.⁹

There can be little doubt that the Victorian Charter owes a great deal to imitation. In the Victorian Court of Appeal, the then Victorian Labor Attorney-General¹⁰ and the Victorian Equal Opportunity and Human Rights Commission¹¹ argued that the provision in the Charter owed a great deal to, and was modelled upon, *Ghaidon v Godin-Mendoza*,¹² a United Kingdom case decided in the context of the UK *Human Rights Act 1998* that incorporated the European Convention of Human Rights into the municipal law of the United Kingdom. The then Victorian Attorney also pointed to cases interpreting the New Zealand *Bill of Rights Act 1990*, and the *Constitution of the Republic of South Africa 1990*.¹³ But all those cases clearly occurred in constitutional situations greatly different from those of the State of Victoria within the Commonwealth of Australia. Inevitably this was bound to lead to severe difficulty, and has done so (see the discussion of *Momcilovic v The Queen*,¹⁴ below).

The Charter, in section 5, states that “A right or freedom not included in this Charter that arises or is recognised under any other law (*including international law*, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included” [emphasis added]. This wording implies that by virtue of this particular State statute, all internationally recognized rights (whether under treaty or customary international law) are incorporated into the law of Victoria.¹⁵

The means by which internationally binding obligations are incorporated into municipal law in Australia is through action by the Commonwealth Parliament.¹⁶ Australia does not have any federal clauses in its accession to or ratification of treaties. And while on many occasions complementary Commonwealth-State legislation or activities may occur to implement treaty obligations, in contrast to Commonwealth legislation, it must be doubted whether Victoria off its own bat has the legislative capacity to cause obligations binding on the Commonwealth in international law to be recognized in municipal law. The extent to which the Commonwealth or other States and Territories were consulted¹⁷ on the Charter is not known to the author; but it is noted that the Commonwealth’s *Common Core Document forming part of the reports of States Parties – Australia*, submitted to the United Nations on 25 July 2007, states that the Victorian Charter “seeks to protect and promote civil and political rights *based on*” the ICCPR [emphasis added].¹⁸ That document, however, also notes that:

83. Australia’s strong democratic institutions, the *Constitution*, the common law and current legislation, including anti-discrimination legislation at the Commonwealth, State and Territory levels, protect and promote human rights in Australia. For these reasons, the Australian Government is not convinced of the need for a Bill of Rights in Australia.
84. The Australian Government considers that the best ways to protect human rights are by ensuring that the existing mechanisms described above work effectively, and by educating the community about human rights and responsibilities.¹⁹

In addition, the Victorian Charter purports to confer a discretion on those interpreting “rights” (presumably the courts) to consider “International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right” when interpreting an impugned statutory provision.²⁰ The utility of considering in Australia cases concerning different legislation in different countries in different constitutional circumstances must be doubted; and, indeed, it was this kind of comparison that the High Court itself warned against in the *Engineers’ Case*.²¹ The extent to which even a discretionary direction of this kind would be constitutional remains to be seen: if it amounts to an intrusion into the judicial power of the Commonwealth, then the provision would not be valid (see below).

The Victorian statute purports to grant “all persons” the “human rights set out in Part 2,”²² and to bind not only “the Crown in right of Victoria”, but also, “so far as the legislative power of the [state] Parliament permits, the Crown in all its other capacities.”²³ While, after the passage of the *Australia Act* 1986 (Cth), the right of States to legislate extraterritorially (that is, beyond State borders) has been recognized,²⁴ the extent to which the Charter can lawfully extend cannot be as wide as the provisions mentioned suggest. Can the State of Victoria bind the Commonwealth Crown? or another State Crown? Can it bind people who are not resident in Victoria but in some other State? If so, which people? These were questions that recently exercised Justice Gummow.²⁵

In regard to residents in States, the Commonwealth Constitution requires, in section 117, that:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

This is one of the very few constitutional guarantees, and the extent to which “discrimination” may be distinguished from “disability” in a positive sense may well prove problematic for the future of the Charter if it could be said that the Charter itself sets up a discriminatory regime in relation to residents in States.

The Charter requires that after four years operation, the Attorney-General of Victoria must cause a review to be made of the Charter’s operation, to be laid before both Houses of the Victorian Parliament before 1 October 2011. This review, currently underway, must include consideration of whether additional human rights should be included under the Charter, including but not limited to, rights under the International Covenant on Economic, Social and Cultural Rights (ECOSOC), the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women. Implicit in this provision is that the Charter already includes²⁶ rights under the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), and the International Convention on the Elimination of All Forms of Discrimination against Women (ICEDAW).²⁷ The extent to which a State legislature, unilaterally, may implement international obligations is raised starkly by this review, in so far as any implementation of the aspirational ECOSOC rights are liable to have severe economic ramifications beyond Victoria alone.

The State of Victoria has no constitutional authority to act as if it were a nation state, by virtue of its laws incorporating international obligations into law. This is solely the prerogative of the Commonwealth (though it may choose to do that in tandem with the States). But it is a Commonwealth matter, not a State matter. This was made abundantly clear in *Koowarta*²⁸ and the *Tasmanian Dams Case*.²⁹

The reason the Commonwealth has the responsibility of implementing international obligations is clear: so that the implementation applies equally throughout the Commonwealth. A State has no power to achieve such an end. For a State to attempt selectively to implement international

obligations or to require State courts to require the implementation of international obligations is arguably to usurp Commonwealth power, to undermine the equal application of law, and to cause grave disruption to the Commonwealth legal system.³⁰

The current confusion

Only a few of the most immediately obvious Charter difficulties were outlined above; but the truth of the observations in the previous paragraph is demonstrated in the current High Court appeal in *Momcilovic v The Queen*.³¹

Momcilovic

That case is an appeal³² from the Victorian Court of Appeal. Ms Momcilovic, a resident of Queensland³³ and a former solicitor, was prosecuted and convicted of trafficking in methylamphetamine, and sentenced to imprisonment for two years and three months. The drugs in question were found in the appellant's apartment. Under section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (the Drugs Act) the appellant was deemed to be in possession of the drugs unless she "satisfie[d] the court to the contrary." Her partner (Markovski) owned another apartment in the same building but mostly lived with the appellant in her apartment; he admitted that he was involved in drug trafficking and said that the drugs were in his possession for that purpose. He denied, as did the appellant in her own evidence, that she had any knowledge of the drugs or the trafficking operation.³⁴

The Court of Appeal upheld the conviction unanimously. In so doing, it made a Declaration of Inconsistent Interpretation pursuant to section 36(2) of the Charter, stating that section 5 of the Drugs Act could not be interpreted consistently with the presumption of innocence right set down in section 25(1) of the Charter.³⁵

The appeal focussed on the reversal of the onus of proof in the Victorian Drug Act, on the approach to interpretation under the Charter adopted by the Court of Appeal, on whether the Charter required judges effectively to amend or repeal legislation, on inconsistency with the Commonwealth Criminal Code pursuant to the Constitution, section 109, on the meaning and efficacy of the Declaration of Inconsistent Interpretation, and on the effect on the judicial power of the Commonwealth of the jurisdiction given to the Supreme Court of Victoria under the Charter.

Twenty-six counsel appeared before the High Court.

Issues touched upon included:

The effect of the "Declaration of Inconsistent Interpretation"

Some judges³⁶ expressed distaste for the word "declaration", no doubt having in mind the pending decision in *M70*.³⁷

- The "declaration" would appear to have no legal effect, as the relevant Minister is not obliged to respond to it (and, in the instant case, the Attorney-General had not)³⁸
- Justice Gummow expressed some disbelief at the Charter scheme,³⁹ noting that the outcome for the State court was akin to "writing in water."⁴⁰
- Whether on an appeal, the High Court could in fact do anything with respect to any such "declaration."

The Charter as Deception

Because there is no real legal remedy, is there "A deception being practised upon the public"?⁴¹

The judicial power of the Commonwealth

Can a State court, vested with the judicial power of the Commonwealth, act in such a fashion?⁴²

- The likely answer would appear to be “no” given the High Court’s findings in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, *Kirk v Industrial Court(NSW)* (2010) 239 CLR 531, *South Australia v Totani* [2010] HCA 39, and *Wainohu v New South Wales* [2011] HCA 24.
- Unless somehow what the Supreme Court was doing under the Charter was not an exercise of judicial power at all
- But if this were to be the case, what power would it be using?

Will the constitutional appellate jurisdiction of the High Court, pursuant to the Constitution, section 73, be engaged, if there is no relevant order, “matter” or “decision” in relation to the “Declaration of Inconsistent Interpretation” on which the High Court constitutionally may decide?

- If there is not, then the High Court had limited jurisdiction to hear the appeal, probably limited solely to the section 109 inconsistency question; and had no jurisdiction to hear anything in relation to the “Declaration”
- Therefore, if this were to be the case, despite ordinarily there being no separation of powers in the States, the reach of the judicial power as interpreted by the High Court means that any State legislation purportedly conferring on a State court capacity to make declarations of the kind in the Charter could well be unconstitutional.

Courts legislating

To adopt the approach first taken by the former (Labor) Attorney-General in the Victorian Court of Appeal could well amount to a court vested with the judicial power of the Commonwealth undertaking legislation, in the sense of amending or repealing statutes passed by the legislature.

- Such an interpretation draws upon the UK case of *Ghaidon*,⁴³ where the House of Lords appeared freely to admit that it was “legislating.”
- This is antipathetic to the judicial power of the Commonwealth in the context of the separation of powers.⁴⁴

Constitutional inconsistency

Adoption of the Charter process of interpretation may lead to inconsistency between Commonwealth and State legislation which would not otherwise exist.

Interpretation

Is it possible to find an approach to “Charter interpretation” that avoids bringing the judicial power of the Commonwealth into disrepute?

- That is, that does not involve the Court in amending or repealing legislation passed by the State parliament
- This will depend on the view the Court takes about the nature of the power being exercised by the Court of Appeal.

Different strokes

On the change of government in Victoria, the Coalition Attorney-General took a different approach to argument than had his Labor predecessor.

- While this approach eschews the “legislating” approach said to have been adopted in *Ghaidon*,⁴⁵

it nevertheless argues for the constitutionality of the Charter approach.

On the other hand, the Solicitor-General for the Commonwealth⁴⁶ appears to be arguing for the constitutionality of the Charter and the approach on the basis that while the judicial power of the Commonwealth may be involved, this is a matter that can be reconciled using an adaptation of the reconciliation process adopted in *Project Blue Sky*,⁴⁷ by looking at the intention(s) of the relevant legislatures; this approach would also be the one used in relation to section 109 inconsistency.

- I am by no means sure that this is an accurate statement of the Solicitor-General's approach.

The change in policies and approach at the State level (and perhaps at the Commonwealth level as well) demonstrates the need for certainty in the law in relation to all individuals.

- This tends to argue against ad hoc State and territory rights legislation.
- But this does not necessarily mean that there is a need for a Commonwealth "bill of rights."

Conclusion

This paper has had a very quick glance at some of the issues that have arisen in the context of the first Declaration of Inconsistent Interpretation by the Supreme Court of Victoria.

It is clear that all that the Charter has been able to do is to muddy the waters, create confusion, earn many lawyers a lot of money, while leaving the individual whose rights were said to be infringed without any remedy.

It is also clear that on the basis of this first venture into Declarations of Inconsistent Interpretation, the Victorian Charter has opened a proverbial can of worms. The Charter is riddled with inexactities, overblown sentiment, overlarge expressions, and is of doubtful effect.

The fact is that there is no need for the Victorian Charter at all. As the Honourable J. J. Spigelman, former Chief Justice of New South Wales, said in the first McPherson lecture, there is a ". . . group of principles of the law of statutory interpretation which constitute, in substance, a common law bill of rights."^{48 49} Why is this not sufficient?

Professor John McMillan, the then Commonwealth Ombudsman, said in 2004:

My own view is that the limited empirical evidence that is available suggests that institutions such as the Ombudsman, together with other innovations in administrative law and government, have had a marked impact over three decades in developing a new culture in public administration that is more attuned to the rights of members of the public.⁵¹ If so, those innovations – which are now strongly rooted in Australian public law – deserve more attention in any discussion about enhancing respect for the rule of law in Australia.⁵⁰

Why are all these measures not sufficient?

Chief Justice Gleeson of the High Court, in *Plaintiff S157*, said:⁵²

courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.⁵³ As Lord Hoffmann recently pointed out in the United Kingdom,⁵⁴ for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual.'

This is all very well, in that courts ensure that legislatures do not override fundamental common law rights and freedoms without the clearest statutory expression. But Spigelman, CJ, speaking in the context of the dangers of “spurious interpretation” undertaken by courts, said:

The task of the court is to interpret the words used by Parliament. It is not to divine the intent of the Parliament.⁵⁵ The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say.⁵⁶

...

... the position in Australia is that identified by Stephen J:

‘It is no power of the judicial function to fill gaps disclosed in legislation.’⁵⁷

Indeed Justice Stephen subsequently said:

‘To read words into any statute is a strong thing and, in the absence of clear necessity, a wrong thing.’^{58,59}

But this is exactly what the Charter is telling judges to do.

Australians already are hedged around with thickets of Rights Commissions, of merits review bodies, Judicial Review Acts, judicial review in the courts, Ombudspersons of all kinds, anti-corruption and pro-integrity bodies, inspectors-general into a range of areas, and royal commissions and judicial inquiries; not to mention the old-fashioned things available to protect rights, scrutinise government activity, and make governments and their agencies accountable like Question Time, Questions on Notice, parliamentary scrutiny committees, your local members and the ministers themselves, and the omnivorous 24-hour news cycle.

Chief Justice Gleeson once said that the rule of law did not mean “rule of lawyers.”

If this is what Australians want (a rule of law), then those who make the laws, the elected representatives, should receive proper support and acknowledgement, not continual cutting down by lawyers, judges and courts. The more statutes there are, and there are now hundreds of thousands, the more work for lawyers and judges. The more statutes there are, the more an Act such as the Charter will provide yet an additional layer of interpretative and quasi- if not outright-legislative work for courts. This may have become the way in the United States and now in the United Kingdom, but it has never been the Australian way. We are an egalitarian bunch, in the past most happy looking after ourselves and giving one another a fair go. And we have not yet arrived at the stage where Australians are happy for unelected judges to make our laws for us – we cannot throw them out.

The Victorian Charter is a very sorry mistake. It must be repealed.

Endnotes

1. Hon Michael McHugh, AC, QC, Speech to the NSW Bar Association, 8 August 2007, available at http://www.nswbar.asn.au/docs/resources/lectures/bill_rights.pdf, 2.
2. Professors George Williams, Hilary Charlesworth and Larissa Behrendt.
3. H Charlesworth, ‘Human Rights in Australian Law,’ (2002) 13 *Public Law Review* 155, 155, as quoted and cited in McHugh, n. 1 above.
4. *Al-Kateb v Godwin* (2004) 219 CLR 562; 78 ALJR 1099; (2004) 208 ALR 124, per McHugh J at [73].
5. MRL Kelly, ‘Australia Without a Bill of Rights,’ *Sydney Papers Online* Issue 7, 4 May 2010,

available at <http://www.thesydneyinstitute.com.au/paper/margaret-kelly-%e2%80%93-australia-without-a-bill-of-rights/>

6. George Santayana, *The Life of Reason; or the Phases of Human Progress*, (Dover Publications Inc., NY: 1982; originally published by Charles Scribner's Sons 1905), Chapter VII, available at The Gutenberg Project, <http://www.gutenberg.org/files/15000/15000-h/vol3.html>
7. *Victorian Charter of Human Rights and Responsibilities Act 2006*(Vic).
8. *Charter*, s. 6(1).
9. C.f. *Momcilovic v The Queen* M134/2010: [2011] HCATrans 15; ll. 2642-6 (Gummow J).
10. See *The Queen v Momcilovic* (2010) 200 A Crim R 453, 466 [43]; [2010] VSCA 50 (The Court: Maxwell P, Ashley and Neave JJA).
11. See *The Queen v Momcilovic* , *ibid.*, 466-7 [45].
12. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
13. See *The Queen v Momcilovic* (2010) 200 A Crim R 453, 466 [43]
14. See *Momcilovic v The Queen* M134/2010: [2011] HCATrans 15; [2011] HCATrans 16; [2011] HCATrans 17; [2011] HCATrans 145. Heard 8, 9, 10 February 2011, and 7 June 2011, before French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ — *Judgment reserved*.
15. See also text accompanying n. 27.
16. See *Constitution* s. 51(xxix).
17. E.g., through the Treaties Council consisting of the Prime Minister, the Premiers and the Chief Ministers.
18. *Common Core Document forming part of the reports of States Parties— Australia*, June 2006, submitted to the UN 25 July 2007, par. 80 (available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_CommonCoreDocument).
19. *Common Core Document*, *ibid.*, pars. 83-4.
20. *Charter*, s. 32(2). See also Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Mr Hulls, Attorney-General).
21. *Amalgamated Society of Engineers v Adelaide steamship Co. Ltd (Engineers' case)*, (1920) 28 CLR 129, 146-7 (Knox CJ, Isaacs, Rich and Starke JJ).
22. *Charter*, s. 6(1).
23. *Charter*, s. 6(4).
24. *Australia Act 1986* (Cth) s. 2(1)
25. See *Momcilovic v The Queen* M134/2010: [2011] HCATrans 15; 8 February 2011, ll. 1940-1955; [2011] HCATrans 17; 10 February 2011, ll. 9450-85.
26. See text accompanying notes 15-22 above.
27. See definition of 'discrimination' in *Charter* s. 3, incorporating the definition in the *Equal Opportunity Act 1995* (Vic.).
28. *Koowarta v. Bjelke Petersen* (1982) 153 CLR 168.
29. *Commonwealth v. Tasmania* (1983) 158 CLR 1.
30. C.f. *Momcilovic v The Queen* M134/2010: [2011] HCATrans 15; ll. 2531-3 (Gummow J) – 'The Parliament of Victoria does not have ultimate sovereignty to make laws for the good government of the people of Victoria. It is subject to the federal *Constitution*.'
31. See *Momcilovic v The Queen* M134/2010: [2011] HCATrans 15; [2011] HCATrans 16; [2011]

- [HCATrans 17](#); [\[2011\] HCATrans 145](#). Heard 8, 9, 10 February 2011, and 7 June 2011, before French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ – *Judgment reserved*..
32. For the short particulars of the appeal, see [2011] HCAASP 4 at <http://www.austlii.edu.au/au/other/HCAASP/2011/4.html>
 33. See [\[2011\] HCATrans 17](#); 10 February 2011, ll. 9450-85.
 34. It has been said that Ms Momcilovic holds a ‘Bachelor of Science Honours degree from Monash University majoring in chemistry as well as a Graduate Diploma in Drug Evaluation and Pharmaceutical Sciences from Melbourne University’ – <http://www.abc.net.au/rn/lawreport/stories/2010/2850808.htm>
 35. *The Queen v Momcilovic* (2010) 200 A Crim R 453, 498.
 36. *Momcilovic v The Queen* M134/2010: [\[2011\] HCATrans 15](#); Gummow J, ll. 1805-1815, 2115-2133.
 37. *Plaintiff M70 v MIAC* [2011] HCAASP 36 at <http://www.austlii.edu.au/au/other/HCAASP/2011/36.html> .
 38. *Momcilovic v The Queen* M134/2010: [\[2011\] HCATrans 15](#); ll. 1527-38.
 39. *Momcilovic v The Queen* M134/2010: [\[2011\] HCATrans 15](#); ll. 2125-9 – ‘It is unthinkable – and of course it has not happened – that the Minister, after M61, would report to the Parliament that the decision is to be ignored, but you seem to accept that can happen under the system of this Victorian statute.’
 40. *Ibid.*, ll. 2153-4.
 41. *Ibid.*, l. 2629 (Gummow J).
 42. *Ibid.*, ll. 2230-3; 2550-2560.
 43. See n. 12 above.
 44. C.f. ll. 2235 (Crennan J); 3455 (Gummow J).
 45. See n. 12 above.
 46. The Solicitor-General acts under instructions from the Attorney-General. The attorney has always favoured a Bill of Rights; but the Cabinet decided against it in April 2010 (see Address to the National Press Club, 21 April 2010, at http://www.ema.gov.au/www/ministers/mcclelland.nsf/Page/Transcripts_2010_SecondQuarter_21April2010-LaunchofAustraliasHumanRightsFramework .
 47. *Project Blue Sky v ABA* (1998) 194 CLR 355.
 48. The terminology common law bill of rights was, so far as I am aware, first deployed by John Willis in “Statute Interpretation in a Nutshell” (1938) 16 *Canadian Bar Review* 17. It has been adopted by others: see, e.g., D. C. Pearce and R S Geddes, *Statutory Interpretation in Australia*, 6th ed, LexisNexis Butterworths, Sydney, 2006, at [5.2].
 49. “*The Common Law Bill of Rights*,” First lecture in the 2008 McPherson Lectures: *Statutory Interpretation & Human Rights* University of Queensland, Brisbane, 10 March 2008.
 50. John McMillan, “The Ombudsman and the Rule of Law,” (2005) 44 *AIAL Forum*, 1-16— *Revised version of a paper presented at ANU Public Law Weekend, Canberra, 6 November 2004*.
 51. That was the clear conclusion in two empirical studies I jointly undertook: see two articles by Creyke and McMillan, above n 24 and n 54. The annual reports of the Commonwealth Ombudsman also describe the steps taken by agencies to improve their systems in response to complaints from members of the public. Similarly, for an explanation of how the creation of an accountability and integrity framework within the executive branch of government transformed the Queensland Police Service (in the view of the Queensland Ombudsman) ‘from a corrupt institution at the highest levels to a professional and respected organisation’ see D Bevan, ‘Queensland’s Public Accountability Framework: Effective Regulation or Effectively Over-Regulated?’ in M Barker (ed), *Appraising the Performance of Regulatory Agencies* (AIAL, 2004) 228.

52. *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 492.
53. *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.
54. *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131.
55. See *State v Zuma* (1995) (4) BCLR 401 at 402; [1995] (2) SA 642; *Matadeen v Pointu* [1999] 1 AC 98 at 108; *R v PLV* (2001) 51 NSWLR 736 at [82]; *La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius* (Unreported, Privy Council, 13 December 1995); *Pinder v The Queen* [2003] 1 AC 620 at [24].
56. *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168–169; *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 at 953d; [1978] 1 WLR 231 at 236G; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 613G, 645C–V; *R v Young* (1999) 46 NSWLR 681 at [5]; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at [10]; *Donselear v Donselear* (1982) 1 NZLR 97 at 114.
57. *Marshall v Watson* (1972) 124 CLR 640 at 648; See also *Council of the City of Parramatta v Brickworks Ltd* (1971) 128 CLR 1 at 12; *Ruzicka* at [6]; *VOAW* at [12]; *Cornwell v Lavender* (1991) 7 WAR 9 at 23.
58. *Western Australia v Commonwealth* (1975) 134 CLR 201 at 251.
59. Hon J. J. Spigelman Chief Justice of NSW, ‘Legitimate and Spurious Interpretation,’ Third Lecture in the 2008 McPherson Lectures: *Statutory Interpretation & Human Rights*, University Of Queensland, 12 March 2008, at <http://acthra.anu.edu.au/resources/McPherson%20Lectures%2012%5B1%5D.3.08%20Third.doc>. Also available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1806738.

Chapter Seven

The High Court under Howard

Benjamin Jellis

In 1994, Mr Justice Callinan, prior to his appointment to the High Court of Australia, asked, in a speech to The Samuel Griffith Society, whether the Court had become “an over-mighty court”. Now, nearly 20 years and two changes of federal government later, it is timely to look again at the place of the High Court in Australian society. What, if anything, has changed? Has government policy towards judicial appointments changed anything about the Court?

This paper considers one of the least discussed aspects of the legacy from 11 years of coalition government led by Prime Minister John Howard – that is, to assess whether the approach of his government to High Court appointments was a success.

It intends to open discussion about an area of government decision-making that has been the subject of little debate and discussion in Australia. That is: what approach *should* a government take to judicial appointments? It will conclude that the Howard Government’s approach was one of appointing quality black letter judges to the Court. This policy facilitated return of a more orthodox approach to judging. This had the significant consequence of restoring public faith in the High Court and halting a deterioration in public sentiment that might have resulted in some measure of politicisation of the bench.

During the 1996 federal election campaign, a key phrase used by the incumbent Prime Minister, Paul Keating, was the warning: “when you change the government you change the country”. History recalls that the Australian people took this warning to heart. They enthusiastically voted to change the country.

Over its 11 years in power the Howard Government appointed six judges to the seven judge bench (replacing all but two members of the court (Justices Gummow and Kirby) and appointing a new Chief Justice, Murray Gleeson). After Howard, only Menzies as Prime Minister has been responsible for more appointments to the Court.

Such is the significance of the High Court in the legal system that it could be said that, to adopt Keating’s aphorism, if the High Court changes, so does Australia. But did the Court change?

Success – what success?

This paper argues that the approach of the Howard Government towards judicial appointments was something of a success. This is a conclusion that might, however, seem – at least from an outcome-based perspective – to be somewhat surprising. This can be illustrated by reference to two matters of concern to this Society:

- Federalism; and
- “implied-rights” in the Australian Constitution.

Federalism

Federalism is one of the central values of The Samuel Griffith Society. Fears about the decline of federalism in Australia are one of the factors that led to establishment of the Society and its first conference in 1992.

It can scarcely be said that by 2007, the end of the Howard Government, that the health of Australian federalism had improved. In his retrospective on the Howard years, “Our Greatest Prime Minister?”, John Stone expressed considerable concern with the centralist philosophy of the Howard Government – legitimated by the High Court upholding what Stone described as the “notorious” Work Choices legislation.¹ Alongside this we can include other recent High Court decisions such as *AG (Vic) v Andrews*.² In combination, they demonstrate the relatively unobstructed continuation of a long decline in federalism that can be traced from *Engineers’ v Tasmanian Dams* through the Howard years and to the present day.

Implied constitutional rights

What then of implied constitutional rights? Discussion of implied rights begins with the decisions of the High Court in the early 1990s which discovered a hereto unrecognised right to freedom of political communication within the Constitution.³ These decisions have been criticised for taking Australian constitutional law down a path that had been specifically rejected by the founders – that of judicially enforceable constitutional rights more familiar to American constitutionalism.

Such activism in the constitutional sphere had particularly worrying consequences.⁴ These include the fact that the Court had, without a clear constitutional mandate, asserted a new sphere in which it could render democratically-enacted legislation (in respect of political speech) invalid; and the further issue that, having done so in constitutional decisions, they had put this new judicial power beyond ordinary democratic amendment.⁵ A consequence was effective disenfranchisement of Australian citizens over certain areas of social policy – a clear irony in cases that reasoned from principles of representative government.

The greater concern, though, was that this “implied right” might be the thin end of the wedge. Having taken this dramatic constitutional step, it was unclear just how far the High Court might expand this jurisprudence. It was speculated, for example, by one member of the Court that this could have been part of a move towards a broader “implied” bill of rights.⁶ Further, some minority dicta existed, from Deane and Toohey in *Leeth v Commonwealth*,⁷ that a broad-based right to equality might be implied into the Constitution: a finding that, if it was to persuade a majority of judges on the Court, might have provided those judges with a new and extremely broad power to assess the merits of Commonwealth legislation.

Controversy about a number of aspects of the basis and scope of the implied freedoms was settled in 1997 in the *Lange* decision. A full bench of seven justices upheld the doctrine in the context of a defamation action involving former New Zealand Prime Minister, David Lange, a unanimous decision that included the hitherto unconvinced Justice Dawson. The state of affairs captured in the decision was described by one future appointee to the Court as a settlement of which the fourth French republic would be proud, and one in which all seven judges agreed to something that none of them had hitherto believed.⁸

Yet, looking back from 2011, this patchwork precedent is one that has held together. During the years of the Howard Government there was no substantial unwinding of the implied rights jurisprudence. Indeed, in respect of an implied right to the franchise in prisoner voting and the regulation of the electoral rolls, there has even been a limited expansion of this jurisprudence.⁹

In some ways courts are like ships. They take a long time to change direction, and it is not always easy to judge if they are turning at all. But, in respect of federalism and implied rights, it is fairly clear that there has been no substantial shift in the decisions of the Court. After a decade of conservative government, what are we to make of this? Is it, with the continued decline of federalism, a sign of failure for that side of politics?

Success or failure?

There is a metaphor that comes to mind when assessing this aspect of the legacy of the High Court during the Howard years. It comes from *Slaughterhouse 5* by Kurt Vonnegut. He described the protagonist watching a war movie backwards:

the formation flew backwards over a German city that was in flames. The bombers opened their bomb bay doors, exerted a miraculous magnetism which shrunk the fires, gathered them into cylindrical steel containers, and lifted the containers into the bellies of the planes . . . some of the bombers were in bad repair. Over France, though, German fighters came up again and made everything and everybody as good as new.

When the bombers got back to their base, the steel cylinders were taken from the racks and shipped back to the United States of America, where factories were operating night and day, dismantling the cylinders, separating the dangerous contents into minerals.¹⁰

In some conservative fantasies it may have been hoped that the High Court during the Howard period would simply be the activist years of the Mason Court in reverse. With heroic conservative judges flying backwards through the *Commonwealth Law Reports* and overturning bad precedent back to the Gibbs Court or beyond.

That is not how things turned out. Things cannot be so simple, particularly when the critique of earlier activism is based upon the orthodox theory of judging known as legalism.

This is an important dynamic that needs to be borne in mind when considering the success or failure of the High Court in the Howard years; legalism places great significance on previous authority.

Take federalism as an example. A different decision in *Work Choices* may have required repudiation of the longstanding *Engineers'* doctrine: something that only two judges of the Court (Justices Kirby and Callinan) appeared willing to countenance. Similarly, overturning the implied rights jurisprudence, an idea only toyed with (perhaps) by one judge in the *Lenah Game Meats* decision,¹¹ would have required repudiation of the seven-judge settlement in *Lange* referred to above.

This is the conservative tragedy: a conflict between the need to give weight to precedent as against other considerations that might lead to the correct outcome.

This problem has drawn some consideration in addresses to this Society. One such paper was presented by John Gava, an academic who obtained some attention for his “Hero Judges” critique of the Mason Court during the 1990s.¹² He suggested that it would be “activist” for a judge and, in particular, Justice Callinan (whom he labelled an “activist federalist and originalist” judge), ever to overturn longstanding precedent. So he suggested Justice Callinan in the *Work Choices* Case “deserves exactly the same criticism” as the “judicial activism of the Mason Court”.¹³

With respect to Professor Gava, I doubt matters are so clear as that – identification of what is, without doubt, a tension, is not the same as providing a resolution of that tension.

What has been identified is, as I have said, a tragedy. A judge who seeks to apply an approach of legalism in the face of precedent that has been forged in a different spirit will face a choice between two *wrong* (or perhaps right) outcomes.

Professor James Allan has discussed this issue which he refers to as an asymmetry problem. He states:

Where some judges are more precedent-respecting than others, there comes a point at which those who feel themselves to be more constrained by past decisions than their judicial colleagues start to look like chumps (to the outside observer). Movement is all one way. The interpretively-conservative, precedent-respecting judge can only ever hold

the existing line. His or her judicial philosophy does not allow for the recapturing of lost territory. Once lost, it is lost forever. The upholding of past decisions, even of what are seen to be wrongly decided precedents, counts for too much for these judges.¹⁴

A well-known example that brings this difficulty into its clearest focus is provided by the *Territorial Senators Cases*. These arose, after the Whitlam Government sought to provide Senate representation in the Senate to the ACT and the Northern Territory – in the face of considerable (genuine) ambiguity as to whether such action was constitutional, having regard to section 7 of the Constitution (which, on one view, might have exclusively limited such representation to the States). This was to be the minority view: representation was upheld by a 4-3 majority of the Court with Sir Harry Gibbs among the dissenters.

Shortly afterwards a second challenge was brought, in substance raising the same issue. There had, however, been a change in the composition of the bench; one of the previous majority had been replaced by Justice Aickin, an appointment of the new Fraser Government who was believed to be sympathetic to the earlier minority view. So it was thought 4-3 might have been converted into 3-4. As it happened, Sir Harry Gibbs along with Justice Stephen switched to the outcome favoured by the previous majority on the basis that, whatever justified the departure from previous High Court precedent, a mere change in the composition of the Court was not sufficient to return to the *status quo ante*.

An amusing comparison is provided by a relatively recent decision of the United States Supreme Court. There a majority *was* convinced to abandon a precedent established only the year before. In his dissent, the conservative judge, Justice Antonin Scalia, wrote of the majority: “the changes are attributable to nothing but the passage of time (not much time, at that), plus application of the ancient maxim ‘That was then, this is now’.”¹⁵

Reflecting on the *Territorial Senators* decisions in the inaugural Sir Harry Gibbs Oration, Mr Justice Heydon remarked on the significant way in which the approach of Gibbs and Stephen contributed to rule of law values of “reasonable certainty and stability.”¹⁶

Few cases, though, present the tension between precedent and correctness in such stark terms. The High Court in the Howard years had to deal with far more difficult cases, where different legitimate approaches were open.

To resolve such difficulties, a useful pathway may be to reflect on one of the less discussed benefits of precedent, which is that it allows the law to embody wisdom beyond what can be possessed by an individual judge at a particular time. The common law is best understood as a collection of accumulated wisdom. Reflecting on the Dixonian tradition, Justice Dyson Heydon has observed: “It subordinated individual judicial whim to the collective experience of generations of earlier judges out of which could be extracted principles hammered out in numerous struggles.”¹⁷

The healthy respect (although not total deference) required by legalism for the collective wisdom of others is a legal approach that, interestingly, has plenty in common with conservative *political* philosophy more generally.

Indeed, it is somewhat consistent with the approach of Prime Minister Howard who, although always more a pragmatist than an ideologue, worked from conservative principles encapsulated in his reflection that “a conservative is someone who does not think that he is morally superior to his grandfather.”¹⁸ Both ideas embody a pragmatic, though not doctrinaire, respect for the contributions of previous generations.

The Howard Government’s approach to appointments could not remedy the tragic choices created by previous activist decisions (what to do with precedents that were created without sufficient regard for earlier precedent?).

But, as will be argued below, restoration of a more orthodox approach to judicial decision-making may make such problems less likely to arise in the future.

A snapshot of the High Court in the early to mid-1990s

To continue with this inquiry, it is helpful to provide a snapshot of the High Court in the early to mid-1990s.

Public Faith in the Court

Consider this retrospective assessment by high profile Geoffrey Robertson, QC. He remarked: “If there were an Olympic medal for teams of judges – and why not, since there are medals for tae kwon do and beach volleyball? – the Mason High Court (of the 1980s) would have won gold year after year.”¹⁹

Such effusive praise of a set of judges is a pretty good clue that those judges might have gone a fair way beyond their remit. Whenever judges are lionised, alarm bells should start ringing and, indeed, there is plenty of evidence indicating widespread alarm around the time the Howard Government came to office.

Here is Professor Greg Craven speaking to The Samuel Griffith Society in 1997: “judicial activism is a more popular topic of conversation in Australia now than at any time in its history”. He went on: “we live in an age of prevalent judicial controversy, where the doings of the courts are discussed almost as frequently and with as much venom as those of our more usual anti-heroes, the politicians”.²⁰

Such a view sounds foreign to our ears now. It would be considered totally bizarre if I had stood up and said the equivalent at the opening of my presentation. This underscores an important cultural change that occurred during the years of the Howard Government.

Much of this was a consequence of the Court in the early 1990s embracing a more active, and openly acknowledged, role in setting public policy. This approach was articulated by Chief Justice Sir Anthony Mason during an interview on the ABC in 1994 where he agreed that it was a “fairy tale” that judges did not make the law,²¹ and that “the protection of individual rights is better left in the hands of judges than it is in the hands of politicians”.²² He went on to imply that judges were less likely to be criticised if they were open about what he suggested was their creative law-making role.²³

One consequence of departure from legalism, and particularly in embracing a role in making public policy decisions, is that people may justifiably ask why it is that judges are entrusted to make those policy decisions? It will surprise nobody that this point was well-understood by Sir Harry Gibbs. In 1988 an idea similar to that which Mason would espouse in 1994 was put to Gibbs. He was asked, “what is the creative role of judges?” He replied:

Individuals and governments would not be prepared to entrust their destinies to the will of a few persons who would make their decisions simply in accordance with their individual beliefs and principles. But they entrust them to judges, who decide in accordance with the law. The courts ultimately can function only if they command general respect within the community. Their judgments command respect as a general rule because they are seen not as the expression of the personal prejudices or beliefs of the judges, but as an attempt to apply existing legal principles, which bind the judges just as much as they bind the people. The judges are performing a role which, although it is undoubtedly creative, is at the same time subject to great restraints. **If the judges cast off those restraints they are likely to lose the confidence of those who are affected by their judgments.**²⁴ [emphasis added]

At this point it is instructive to remember the degree of criticism which was levelled at the High Court during this time. Many of these were collated by Justice Michael Kirby in a speech in 1998 in which his Honour said:

Recent High Court decisions, the Court and the justices were labelled “bogus”,

“pusillanimous and evasive”, guilty of “plunging Australia into the abyss”, a “pathetic . . . self-appointed [group of] Kings and Queens”, a group of “basket-weavers”, “gripped . . . in a mania for progressivism”, purveyors of “intellectual dishonesty”, unaware of “its place”, “adventurous”, needing a “good behaviour bond”, needing, on the contrary, a sentence to “life on the streets”, an “unfaithful servant of the Constitution”, “undermining democracy”, a body “packed with feral judges”, “a professional labor cartel”.²⁵

Some of this controversy can be brought back to the aftermath of the politically controversial 4-3 decision of the High Court in the *Wik* case.²⁶ Yet one would not want to give the impression that this is a solely post-*Wik* phenomenon.

The High Court’s earlier embrace of a more political role laid the groundwork for the post-*Wik* outbreak of political controversy. For example, the former Chief Justice, Sir Garfield Barwick, said of the Mason Court in 1994 that it “. . . is undemocratic. It is making law not just interpreting it, and in doing so, it has taken over what should be the role of our parliament”.²⁷

Judge Richard Posner of the United States 7th Circuit Court of Appeals often tells a joke to illustrate what he says about legal reasoning:

a devout Jew is startled, walking past the office of the local mohel [the person who performs circumcisions in accordance with Jewish law], to see pocket watches displayed in the window. He enters and says, “Mohel, why are you displaying watches in your window?” The Mohel replies, what would you like me to display.²⁸

Posner’s point is that legal reasoning is displayed in the place of what would be unacceptable: a mere statement of the judges’ personal views and preferences. Posner remains sceptical about forms of legal reasoning, but there is a strong counter view in Australian law within the Dixonian tradition of legalism. This rejects the view that all judging is essentially political. Noting that key doctrines such as judicial independence must be based upon an ideal of judging that holds the policy preferences of individual judges to be separate from the law.

Writing post-retirement in the context of the bill of rights debate, John Howard made the following comment about the relationship between the Parliament and the courts:

The strength and vitality of Australia’s democracy rests on three great institutional pillars: our Parliament with its tradition of robust debate ; the rule of law upheld by an independent and admirably incorruptible judiciary; and a free and sceptical press.²⁹

He went on to describe these as “the title deeds of our democracy”. In the 1990s public disillusionment about the political role taken by the High Court had reached the point that these title deeds were becoming somewhat frayed.

The approach of the Government to appointments

We have seen how perceptions of activism damaged the High Court in its public standing during the 1990s. The task, therefore, for the Howard Government was how to arrest these problems through its approach to judicial appointments. So, what was the Government’s approach to appointments?

John Howard has expressed the view that “judges should be appointed according to legal merit, not social or political bias”.³⁰ This is reflected in public statements of both Attorneys-General during the Howard years, the first of whom, Darryl Williams, stated simply that the “essential criterion” is merit.³¹

No inquiry into political views or views on particular issues

The Howard Government took the approach that it would not inquire into the personal or political opinions of possible appointees.³² The temptation to make political appointments was avoided.

In this they continued what is a long-standing, bipartisan commitment not to vet prospective High Court appointments for their personal or political views, one that was continued by the Rudd Government.

For many reasons Australians should be glad the alternative path was not taken. This was wise, not least because attempts to “stack” a Court have a notorious tendency to be counter productive. The United States provides two illuminating examples. The first, Harry Blackmun, was appointed by the Republican President Nixon as part of an attempt to dampen down what was seen as the activism of the Supreme Court under Chief Justice Earl Warren. Blackmun ended up writing the legally unorthodox lead judgment in *Roe v Wade*: a case that has assumed totemic significance (at least for the conservative side of US politics) as an example of constitutional activism.³³

The second, the appointment of Justice Souter by the Republican administration of George Herbert Walker Bush – who was expected to be the last conservative vote needed to overturn a raft of liberal authority from the Warren era (but including *Roe v Wade*). Souter almost immediately became the Court’s most liberal judge.

Appointment of black letter judges

In 1994 the increasing activism, and consequent potential for politicization of the High Court, caused Ian Callinan to ask this Society: “are we going down the American path of critical and searching examination of the views and philosophies of any potential candidate for appointment to the Court?”³⁴

Looking back at the High Court during the Howard Government, we can answer this question in the negative.

A key reason for this is the decision of the Government to appoint judges of a “black letter” persuasion, which is to say those more in the tradition of Dixonian legalism. This had the useful side effect of lessening the impetus to make a political appointment, as the more orthodox the legal approach of a particular judge, the less their personal politics will matter.

Any attempt to appoint a particular “kind” of judge is unpredictable; they may not take the particular approach to judging that you predict. Judicial independence means there may always be surprises. Chief Justice Mason himself was appointed by the McMahon Government, and seemed to have impeccably orthodox credentials – including being a star of the commercial bar. No-one could have predicted the trajectory of his time on the Court.

There is an interesting passage in David Marr’s biography of Sir Garfield Barwick. Marr describes Mason touring the electorate of Parramatta in a hired loudspeaker van spruiking for Barwick who was then seeking election as a Liberal MP.³⁵ If the image of Mason spruiking like a character in the *Blues Brothers* is not irony enough, consider the early impression of Marr himself who, at least in the 1980 edition of the book, seemed underwhelmed by Mason, describing him as “cautious and conservative” but “at least a post-war man”.³⁶

Commentators who assessed the Howard years have generally come to the conclusion that a more black letter style of judge was appointed. To this point, these appointments have given rise to few surprises. Over the period of the Howard Government a more orthodox style of legalism was adopted by the Court with greater predictability in its decisions and less open discussion of the Court’s law-making role. Unsurprisingly, a significant consequence of this was a restoration of public faith in the institution of the High Court and an almost total decline in controversy surrounding the Court.

To illustrate, I might close with the *Work Choices* decision. It is a case that has caused great heartburn among many members of The Samuel Griffith Society owing to its consequences for federalism, but a silver-lining is the almost total absence of expectation that the High Court would

(or did) discharge its duty in that case in a political manner. Indeed, there was never an expectation that the Howard appointees would vote one way, and the two remaining Keating appointees in another. And this, in ruling on the most politicised legislation in recent Australian history. The contrast to reporting on “Obamacare”, for example, which is currently working its way through lower courts to the Supreme Court of the United States, is striking. So, too, the decision in *Bush v Gore* that decided the US Presidential election in 2000.³⁷

I recently attended a speech by Justice Antonin Scalia of the United States Supreme Court. He was asked about *Bush v Gore*, he told the audience: “get over it!”, to great laughs. But it cannot be easy to do so. In deciding the US election between a Republican and Democrat candidate, the Court (except for Souter, referred to above) divided directly along the lines of party appointment.

Chief Justice Gleeson has pointed out that the only time his High Court directly split 4-3 along the lines of political appointment was in the negligence case, *Brodie v Singleton Shire Council*.³⁸ And, as Gleeson has observed, that “had nothing to do with politics”.³⁹

An epitaph for the High Court constituted during the Howard years might conclude, more or less, the same.

Conclusion

The more activist a court becomes, the greater the incentive to appoint those with similar ideological views to the court. By using its power over judicial appointments to appoint judges with a more orthodox approach to the exercise of judicial power the Howard Government, ironically though quite deliberately, lessened the political significance of the judicial appointment power – reversing the opposite trend during the early years of the 1990s.

I have long believed that judges are like surgeons: the better known they are, the worse of a sign that is. High Court judges are now less likely to be household names, and a Court that was once frequently front-page news in Australia has now been relegated quite firmly to the middle pages of the newspaper where it belongs. This is an important, and continuing, sign of the return to legal orthodoxy on the High Court.

Endnotes

1. John Stone, “Our Greatest Prime Minister?”, Keith Windschuttle et al. (eds), *The Howard Era*, 2010, 18.
2. (2007) 233 ALR 389.
3. *ACTV Pty Ltd v Commonwealth* (1992) 177 CLR 1; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
4. Well set out by Professor Jeffrey Goldsworthy in a devastating contemporary *Quadrant* critique. Jeffrey Goldsworthy, “The High Court, Implied rights and Constitutional Change”, *Quadrant*, vol 39(3), 46-54.
5. *Ibid.*
6. John Toohey, “A Government of Law, And not of Men?”, *Public Law Review*, vol 4(3), 158-74.
7. (1992) 177 CLR 106.
8. J. Dyson Heydon, “Judicial Activism and the Death of the Rule of Law”, *Quadrant* January 2003, 9-22.
9. See, for example, *Rowe v Electoral Commissioner* [2010] HCA 46; *Roach v Electoral Commissioner*

- [2007] HCA 43.
10. Kurt Vonnegut, *Slaughterhouse 5*, 1969, 53-54.
 11. *ABC v Lenah Game Meats Pty Ltd*(2001) 185 ALR 1.
 12. John Gava, “The Rise of the Hero Judge,” *University of New South Wales Law Journal*, vol 24, 2001, 747-759.
 13. John Gava, “Can Judges Resuscitate Federalism?,” *Upholding the Australian Constitution*, vol 19.
 14. James Allan, “When does Precedent become a Nonsense?,” *Upholding the Australian Constitution*, vol 19.
 15. *County of Sacramento v Lewis* 523 US 833 (1998).
 16. J. Dyson Heydon, “The Inaugural Sir Harry Gibbs Memorial Oration – Chief Justice Harry Gibbs – Defending the Rule of Law in a Federal System”, *Upholding the Australian Constitution*, Vol 18.
 17. J. Dyson Heydon, “Judicial Activism and the Death of the Rule of Law”, *Quadrant*, January 2003, 9-22.
 18. David Martin-Jones, “Introduction”, K. Windschuttle et al (eds), *The Howard Era*, 2010, 4.
 19. Geoffrey Robertson, *The Statute of Liberty*, 2009.
 20. Greg Craven, “Reflections on Judicial Activism: More in Sorrow than in Anger” *Upholding the Australian Constitution*, vol 9.
 21. Geoffrey Lindell (ed), *The Mason Papers*, 2007, 400.
 22. Ibid 405.
 23. Ibid 400.
 24. Garry Sturges and Phillip Chubb (eds), *Judging the World: Law and Politics in the World’s Leading Courts*, 1988, 351.
 25. Michael Kirby, “Attacks on Judges – A Universal Phenomenon”, 1998.
 26. *Wik Peoples v Queensland* (1996) 187 CLR 1.
 27. Garfield Barwick quoted in Geoffrey Lindell (ed), *The Mason Papers*, 2007, 398.
 28. Richard Posner, *How Judges Think*, 2008,351.
 29. John Howard, “Don’t Risk What We Have”, *Don’t Leave us With the Bill – The Case Against an Australian Bill of Rights*, 2009, 68.
 30. Ibid 67.
 31. Daryl Williams, “High Court Appointment”, *Sky News*, 17 December 2002, in George Williams, “High Court Appointments: The Need for Reform”, *Sydney Law Review*, vol 30, 164. For Ruddock see Philip Ruddock <http://blogs.theaustralian.news.com.au/yoursay/index.php/theaustralian/comments/ruddock Bringing judgment to account> - 14 August 2007.
 32. Philip Ruddock at <http://blogs.theaustralian.news.com.au/yoursay/index.php/theaustralian/comments/ruddock Bringing judgment to account> - 14 August 2007.
 33. For an interesting account of expectations of Blackmun and the ramifications of his appointment, see Bob Woodward and Scott Armstrong *The Brethren*, 1979.

34. Ian Callinan, "An Overmighty Court?", *Upholding the Australian Constitution*, vol 4.
35. David Marr, *Barwick*, 1980, 136.
36. David Marr, *Barwick*, 1980, 239.
37. *Bush v Gore* 531 US 98 (2000).
38. [2001] HCA 29.
39. Interview with Chief Justice on "The Law Report" 19 August 2008 at: <http://www.abc.net.au/rn/lawreport/stories/2008/2338639.htm>.

Chapter Eight

The Reliability of Judicial Appointments in the United States During the Presidencies of Ronald Reagan and George H. W. Bush

Murray Cranston

Before I commence I would like to forewarn such an eminent audience that I do not have a law degree and the manner in which I approach this topic is merely as a humble, unknown political scientist in a field casually referred to as American political jurisprudence.

I have always been very curious about the vast power of judges of the United States Supreme Court and, in particular, the fact that they are appointed for life. To the American president with the power of making these rare and significant nominations, *in political terms*, this simply represents a very stark gamble. For me, the fundamental question has always been, from a crudely political perspective, how can the President of the United States be absolutely sure that the judicial nominee he has entrusted for life to reflect his ideological values on the Court be as reliable as he would expect? I use the term “reliable” in this context in the same way as the term “concordance” is applied in the existing literature regarding this subject matter. Concordance is used by Jeffrey Segal and others to explain the degree to which a judicial nominee adheres to the ideological and philosophical preferences of the nominating President. It is simply defined as, “the relative agreement between judicial behaviour and presidential policy preferences.”¹

Even today it is remarkable to think that my own personal hero, Justice Clarence Thomas, will celebrate his twentieth anniversary on the Supreme Court in October 2011 – yet he will only be 63 years old; based on recent departures he still has a twenty-year future determining the course of that country’s political culture and legal history. Imagine a situation in Australia, for instance, where Justice Ian Callinan would still be a delightful part of the High Court today having been appointed way back in 1998; or where Justice Dyson Heydon would continue to grow as the Court’s intellectual force during the next ten years instead of having his vocation so cruelly interrupted in the next eighteen months by a replacement from the Gillard-Brown government.

In looking more deeply at this concept of judicial reliability, I would like to do so in three parts: First, to recount the many classic instances of spectacular lack of reliability American Presidents have faced in the past with their choice of judicial nominee. Second, to share with you my own direct observations regarding the judicial reliability of a specific cohort of judges on the Supreme Court and the United States Court of Appeals for the Fourth Circuit. Finally, I would like to provide three reasons why it came about that certain judicial nominees in the example I use were not completely reliable choices.

A short history of judicial reliability in the United States

The opportunity to appoint men to lifetime positions throughout the appellate levels of the American federal judiciary is one of the most significant and enduring acts the President of that country can make. However, it can also be a perilous undertaking if that President wants to be assured of success.

It is broadly accepted that the American President possesses a deliberate political interest in the type of person he nominates to the courts. As John Maltese observes, “. . . (a) president’s Supreme Court appointments are among his most important (and most contentious). As a tool for influencing

judicial policy making, they are an important part of presidential power. Symbolically, they are a test of presidential strength.”² Harry Stumpf makes clear, “...the president, through his Supreme Court appointments, enjoys a unique opportunity to influence the course of judicial policy making for the nation far beyond his term of office, and few chief executives have been unmindful or careless in their use of this power.”³ Finally, Donald Songer and others have demonstrated that a President’s interest in judicial nominations can vary according to the importance placed on specific criteria. They declare:

. . . an administration can undertake a deliberative effort to appoint judges who will advance, through their decisions, the policy agenda of the president. Other administrations may utilise judicial appointments for partisan goals. In this respect, presidents view judicial appointments as vehicles for advancing their own political base or the stature of their parties. Some presidents, on occasion, use judicial appointments as opportunities for rewarding close friends who have been loyal throughout their political career. Selection processes also vary by administration in terms of the personal involvement of the president and the attention given to input by home state senators and others interested in the staffing of the bench.⁴

The desire of Presidents to take a personal interest in the philosophical outlook of their judicial nominees has long been a part of American presidential history. John Maltese records the significance that was placed on selecting the “right” judicial nominees under President Thomas Jefferson. He states:

After an unsuccessful attempt to remove Federalist Supreme Court justices through impeachment, the Democratic-Republicans slowly replaced justices through natural attrition. But their first opportunity did not come until 1804. Thomas Jefferson appointed three justices during his eight years in office, but appointing the justice who would give the Democratic-Republicans a majority on the Court fell to Jefferson’s successor, James Madison. ‘The death of (Justice William) Cushing is opportune,’ Jefferson wrote in a letter to Attorney General Caesar Rodney, ‘as it gives an opening for at last getting a Republican majority on the supreme bench . . . I trust the occasion will not be lost.’⁵

The former Chairman of the Senate Judiciary Committee, Senator Orrin Hatch of Utah, has acknowledged that there is a risk in attempting to select judicial nominees who could meet the expectations of their nominating President throughout their entire time on the bench. The Senator concluded:

. . . trying to judge a person’s political views is a less than accurate science. Judicial appointments are for life. You may think you know what a person believes today, but there is no guarantee that these opinions will remain intact over the course of a career of perhaps several decades. David Souter, John Paul Stevens and Earl Warren, to name a few, all defied expectations.⁶

Here it is worth pointing out further examples of where American Presidents were convinced they were selecting “safe” and “known” candidates to the nation’s highest court only to be gravely disappointed as their nominees adopted an altogether different legal methodology once securely confirmed on the bench. John Maltese recounted:

. . . history books are full of pithy quotes of presidents spurned by their judicial nominees. Betrayed by Justice Tom Clark’s vote on important cases, Harry Truman called Clark’s

appointment his ‘biggest mistake.’ Truman had first named Clark as his attorney general and then elevated him to the Supreme Court. ‘I don’t know what got into me,’ Truman later said. ‘He was no damn good as Attorney General, and on the Supreme Court . . . it doesn’t seem possible, but he’s even worse. He hasn’t made one right decision that I can think of . . .’⁷

Well, Joseph Menez has also provided a wonderful summary of disappointed Presidents and their Supreme Court legacies:

Justice Blackmun . . . despite viewing himself as a centrist has travelled in thirteen years from the conservative to the liberal wing. Stanley Reed started out as a liberal New Dealer, became a ‘swing’ man and ultimately a conservative; and the Chief Justice Charles E. Hughes travelled the same road but in the opposite direction. A liberal president, Woodrow Wilson appointed McReynolds who became a reactionary member of the Four Horsemen . . . Thomas Jefferson urged President James Madison to appoint Joseph Story of Massachusetts, an intellectual great, to ‘neutralise’ Chief Justice John Marshall, only to see Story ‘captured’.⁸

Finally, Hodding Carter provided an interesting example as to how such candidates can fall well below presidential expectations – he uses the famous liberal Justice Hugo Black as a specific example:

Hugo Black took the judicial oath under a far more ominous cloud, the revelation that he had once been a member of the Ku Klux Klan, and had even received an award from that organisation. Yet Black persevered to become a great champion of civil rights and civil liberties and, in the estimates of some authorities, one of the great Justices in the Court’s history.⁹

An empirical example

I turn now to the second part of our exploration into the reliability of judicial nominees. Over some years I examined a core set of 50 criminal justice cases from the United States Supreme Court and a core set of 227 such cases from the United States Court of Appeals for the Fourth Circuit. As these core cases were heard by more than one judge a gross total of 648 criminal justice cases were examined. Of these, 242 cases were in the Supreme Court and 406 were decided in the Fourth Circuit. The timeframe for this analysis was between 1995 and 1999. There were five Reagan and Bush appointed judges from the Supreme Court in this dataset; and six Reagan and Bush appointed judges from the Fourth Circuit.

Of the thirteen circuit courts of appeal in the American federal judiciary, the Fourth Circuit was selected because back then it had a widely acknowledged reputation as the country’s leading conservative appellate court, particularly regarding criminal justice cases. Because of this court’s willingness to adopt a strongly conservative legal methodology towards criminal justice, the Fourth Circuit provided a model of concordance when it came to the policy preferences of Presidents Reagan and Bush. In many ways, but particularly with regards to criminal justice, the Fourth Circuit at the time was very much a living template of the type of court and the sorts of judges Presidents Reagan and Bush wanted to place throughout the federal judiciary.

To determine whether each of these eleven judges realised the expectations Presidents Reagan and Bush had of them, every judge’s vote in a criminal justice case was placed into two broad categories. Decisions in favour of the criminal defendant were coded as “liberal” while those against a criminal defendant were coded as “conservative.” These two broad categories were then separated further

into four dependent variables so that each judge's vote was coded as either "liberal," "partly liberal," "partly conservative" or "conservative." Because exercising a *less* tolerant position in criminal justice cases was necessary to conform to the expectations of Presidents Reagan and Bush, each decision was weighted according to how strongly each judge ruled *against* a criminal defendant.

The results revealed that on average the Fourth Circuit judges displayed concordance with their respective nominating President in more than nine in every ten criminal justice cases. The Supreme Court judges displayed the same degree of concordance in just over seven in every ten criminal justice cases heard during this same period. More specifically, the results that were generated showed that every one of the Reagan and Bush appointed Fourth Circuit judges displayed a greater degree of concordance than even the most conservative of the Supreme Court appointees (that is, Justices Scalia and Thomas).

The underlying question then became: why did the Supreme Court judges appointed by Reagan and Bush display less concordance with their nominating President's expectations than those on the Fourth Circuit? Conversely, why did those Fourth Circuit judges appointed by Reagan and Bush show a much greater adherence to their expectations than their brethren on the Supreme Court? There are three possible reasons.

The Fourth Circuit: the power of American senators

The first explanation focuses on the judges of the Fourth Circuit and relates not to the Republican President's power but rather the influence of the Republican senators who actually guided the nominees through to their appointment. It so happened that the two senators of relevance here were two ex-Democrats – the legendary Strom Thurmond of South Carolina and Jesse Helms of North Carolina. Strom Thurmond was the arch conservative famous for speaking against the *Civil Rights Act* of 1957 for 24 hours and 18 minutes without stopping, and who remained a serving senator at the age of 100; Jesse Helms was a five-term Republican senator also famous for his arch conservative views on divisive social issues.

The foundation for the involvement of these two senators in the process of judicial selection is written directly into the American Constitution. Under Article II, Section 2, paragraph 2, it is declared: "[The President] shall have Power, by and with the Advice and Consent of the Senate . . . [to amongst other things] . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States . . ."¹⁰

These two senators had strong, uncompromising attitudes towards criminal justice. In particular, they were both committed advocates of the death penalty and of very strict sentencing practices. Strom Thurmond, for example, had personally handed down four death sentences whilst serving briefly as a judge on a State circuit within South Carolina even before he became a United States senator.

But there were several key variables in particular that strengthened the ability of these two men to influence the judicial appointment process and to ensure that hardline, "law and order" type judges were selected to the circuit covering their respective home States. One of the most important was that all of the six Fourth Circuit judges I examined were appointed during a twelve year period by a President who belonged to the same political party as both of these two senators. This supports the findings of others who found that "home state" senators possessed considerable power over nominees when the President belonged to the same political party.¹¹

Another aspect to the power these two senators brought to the process came from what is known as the "blue slip" convention. The "blue slip" is best described by the current chairman of the Senate Judiciary Committee, Senator Patrick Leahy of Vermont. Leahy said: "These pieces of blue paper are what the Chairman [of the Senate Judiciary Committee] uses to solicit the opinion of home-state Senators about the President's nominees. Simply stated, the blue slip practice is the enforcement mechanism for the consultation that the Constitution calls for."¹²

More particularly, Senator Thurmond, for example, had an intimate and decisive influence in the selection of many of the nominations to judicial positions throughout South Carolina and beyond that, to the District Courts and the Fourth Circuit.

Richard Hardin, writing in *The Richmond Times Despatch*, a prominent South Carolinian newspaper, makes clear that Senator Thurmond's power over this process was strengthened further when he assumed the chairmanship of the Senate Judiciary Committee:

Thurmond took the helm of the Judiciary Committee from Sen. Edward M. Kennedy ... when factors converged to bring Thurmond extra clout. Ronald Reagan won the White House in 1980 after pledging to name conservative federal judges. The Republican Party platform had supported selection of judges who believed in 'decentralization of the federal government.' And the Senate, which confirms judges, was in Republican hands for the first time in 25 years. With federal courts resembling 'a ship listing to the left,' Thurmond 'was trying to rebalance the court from an ideological direction he didn't agree with . . .'¹³

Another key reason for Senator Thurmond's success was the interdependence that existed between the White House and Thurmond's ability to use his role as chairman of a key Senate committee to extract benefits for his extensive power base. Hardin stated:

Thurmond always looked out for his state. A story circulated in Washington that he often would come up with a name of a possible nominee from South Carolina even before a newly deceased judge was buried. And the White House needed him. Because of the array of bills before Thurmond's committee, it helped Reagan's White House to help the South Carolina senator . . .¹⁴

A further account of Senator Thurmond's influence throughout the States within the jurisdiction of the Fourth Circuit comes from Chris Weston, writing in South Carolina's *Greenville News*. He quoted the former Chief Justice of the Fourth Circuit, Judge William W. Wilkins Jr, noting that Wilkins, ". . . a long-time Thurmond aide, protege and friend, said every living federal judge in the five states carried Thurmond's stamp of approval."¹⁵

All of this is important to establish because it is necessary to understand the philosophy and values these two senators were injecting into the selection and confirmation of candidates for the Fourth Circuit.

In summary, the appointments to the Fourth Circuit displayed a greater degree of concordance with their nominating Presidents in criminal justice cases, compared to those on the Supreme Court, because of the direct influence of Senators Thurmond and Helms in ensuring their own strongly held conservative values had weight in each judge's selection. The seniority of these two senators, the influential roles they played in their respective Senate committees, their well-established friendships with Presidents Reagan and Bush *and* with many of the individual nominees themselves, as well as the wide-ranging senatorial courtesy accorded to them, ensured they had crucial input in ascertaining that these nominees were very conservative from the outset.

The Supreme Court: political compromises in judicial selection

The second explanation I provide focuses on the *lesser* concordance exhibited by three of the Reagan and Bush appointments to the Supreme Court. Those appointments were Justices Sandra Day O'Connor, Anthony Kennedy and David Souter – all of whom were products of significant political and ideological compromises at the point of their selection and during their confirmation to the Supreme Court.

President Reagan's first appointment to the Supreme Court, Sandra Day O'Connor, was more the product of political and electoral expediency than any real determination to seek a judge who would demonstrate strong concordance with his administration's ideological agenda. Well known Reagan biographer, Lou Cannon, provided the following account of the expediency surrounding O'Connor's appointment:

Though [Reagan] had promised on October 14, 1980, to name a woman to 'one of the first Supreme Court vacancies in my administration,' both the wording and the timing of this commitment were suspect. The idea had originated as a political proposal in a discussion with Stu Spencer during a low point in the Reagan campaign. Its timing reflected the obstacles Reagan then faced with women voters both on the peace issue and Equal Rights Act. The political nature of the promise was underscored by Reagan's record as Governor of California, where all three of his appointments to the state Supreme Court had been male.¹⁶

Lee Epstein and Jeffrey Segal also provide evidence to support the view that O'Connor's nomination was based on gender rather than the necessity of seeking a judge who would represent the President's philosophy on the bench. They have stated:

When Ronald Reagan nominated Sandra Day O'Connor to the Supreme Court in 1981, he was not appointing a crony; he had met her only once, and that was six days before he nominated her. Rather, Reagan was seeking to fulfil a campaign promise to appoint a woman to the Court – a promise he no doubt felt would further his and his party's chances of attracting female voters.¹⁷

The nomination of a judge from the United States Court of Appeals for the Ninth Circuit, Anthony Kennedy, to the Supreme Court was likewise the product of ideological compromise. On this occasion it was not for more immediate electoral gains but to avoid further political embarrassment which the Reagan administration had been encountering from the process of judicial selection at the time. The failed nominations of D.C. Circuit judges Robert Bork, for allegedly having extreme views, and Douglas Ginsburg, for previously smoking marijuana, acted as a pressing political constraint when yet a third nominee was needed to replace them in filling this vacancy.

John Massaro best described President Reagan's view of Kennedy's nomination and identified the judge's moderately conservative judicial philosophy and bi-partisan appeal as his key selling points:

[Reagan] also expressed the hope that Kennedy would be confirmed 'in the spirit of cooperation and bipartisanship.' And rather than emphasizing the nominee's generally conservative ideology, the president noted that Kennedy 'seems to be popular with many senators of varying political persuasions.' In selecting Kennedy, the president also conveyed a willingness to compromise in regard to ideology.¹⁸

Robert Katzmann also argued that the success of Kennedy's nomination was largely based on his more moderate judicial philosophy:

Kennedy may have escaped intense questioning partly because his writings were less sweeping and provocative than Bork's. Kennedy was aided by the conciliatory tone in which the White House advanced his nomination and by the disinclination of a weary Senate to take on another time consuming confirmation battle.¹⁹

The ramifications that flowed from the Bork saga also played a significant role in the emergence of David Souter as a presidential nominee to the Supreme Court and the consequent trend of nominating “stealth” candidates. Former Senator Paul Simon of Illinois provided the following account of Souter’s nomination with a particular emphasis on the nominee’s lack of a contentious judicial record:

... he [Souter] had shown little inclination to put ideas on paper . . . As a New Hampshire Supreme Court Justice seven years, and then on the U.S. Court of Appeals, he had not defined himself clearly and had written remarkably few opinions . . . The only article he ever wrote was a tribute to another New Hampshire Supreme Court Justice. He probably represented as blank a slate as anyone ever offered by a President for a seat on the Court. That was his strength and his weakness, and Senators of all political philosophies felt some unease as we proceeded to vote.²⁰

Mark Silverstein best described the political dynamics that underpinned Justice Souter’s successful nomination.

Everyone was equally in the dark regarding Judge Souter. Liberals, however, were quietly assured by Senator Warren Rudman, the respected Republican of New Hampshire and a close friend of the nominee, that Souter was as good as they could possibly hope to get from the Bush administration. Conservatives were eventually forced to trust the promises of the president and the judgement of the Department of Justice. Armed with a quiet, restrained style and doggedly refusing to engage members of the Senate Judiciary Committee in a substantive discussion of his judicial philosophy, Souter (quickly dubbed the ‘stealth nominee’) was easily confirmed.²¹

So, to summarise, each of these three individual Supreme Court judges was selected against a background of varying degrees of political expediency and compromise – and for their capacity to assist these two presidents to avoid the bitter confirmation process that could have quickly erupted again in the post-Bork era of judicial selection. Even before the appointments of these three particular judges to the Supreme Court were confirmed they were compromise candidates. To both nominating presidents at the time, political circumstances dictated that the strength of each nominee’s judicial philosophy was not as important as each nominee’s political saleability and acceptance. Consequently, the judicial behaviour of these three Supreme Court judges was not one of committed conservative judicial ideology but of varying degrees of moderation, compromise and concession.

The Supreme Court: can personalities have an impact?

The last potential explanation I provide regarding the reliability of this prestigious little cohort of Supreme Court judges is contentious given the secretive nature of the Court’s inner workings. For it focuses on the personality and character of just one judge – the legendary conservative intellectual, Justice Antonin Scalia, and the tempering influence he had on the judicial behaviour of Justices O’Connor, Kennedy and Souter. This presumptuous explanation relies on the work of the esteemed political scientist, Walter Murphy, and his concept of strategic voting amongst Supreme Court judges; and also on the contemporary works of Christopher Smith and Jeffrey Rosen which are aimed more specifically at the impact of Justice Scalia’s personality and character.²² As Rosen outlined it: “The ideal of the justices as impersonal oracles, of course, is something of a myth. Like any small group, the Court is a deeply human institution, where quirks of personality and temperament can mean as much as ideology in shaping the law”.²³

In his work, *Elements of Judicial Strategy*, Murphy introduced the reader to the psychological processes a judge undergoes when he first moves on to the Supreme Court:

. . . the freshman Justice, even if he has been a state or lower federal court judge, moves into a strange and shadowy world. An occasional helping hand – a word of advice about procedure and protocol, a warning about personal idiosyncrasies of colleagues or the trustworthiness of counsel – can be helpful and appreciated . . . The new Justice may also feel it necessary to establish warm social relations with his brethren.²⁴

Murphy illustrated how the personality of former Supreme Court judge, James McReynolds, influenced the judicial decisions of his colleagues on the Court under Chief Justice William Howard Taft. Regarding a then newcomer, Justice Harlan Stone, Murphy recounted the following example of a situation where personalities can influence a judge's shift into the "conservative" or "liberal" camps of judicial philosophy. The following example may well resonate when thinking about a similar shift by Justice Souter:

When Stone first came to the Court, he was, as Taft thought, fundamentally a conservative. Within a very few years, however, Stone had joined Holmes and Brandeis in what the Chief Justice considered "radical" constitutional opinions. In part this change reflected Stone's capacity for intellectual growth, but the warm and stimulating companionship of Holmes and to a lesser extent Brandeis may also have been a decisive factor. As Thomas Reed Powell, a long time confidant of Stone, commented, it was 'respect and liking for Holmes and Brandeis that turned him from his earlier attitudes.' On the other hand, Stone probably had slight intellectual respect for Taft. This fact, coupled with McReynolds' bigoted attitude toward Brandeis as well as his continual carping at Stone's opinions, did little to keep the new Justice in the conservative camp.²⁵

Murphy explored further the intra-court dynamics of the Taft Court and, in particular, the personality of Justice McReynolds. In some distant, yet similar ways the McReynolds character in Murphy's account replicates the Scalia character in Christopher Smith's work. Murphy observed:

McReynolds expressed his displeasure over Justice Clarke's votes and opinions in a more systematically unpleasant fashion. When he was Attorney General, McReynolds had been instrumental in getting Clarke appointed to the district bench; and when Clarke was promoted to the Supreme Court, McReynolds thought the new Justice should follow his benefactor's ultra-conservative constitutional philosophy. Clarke, however, went his own individual and sometimes erratic way; but, in his first few years on the Court, he tended to side more with Holmes and Brandeis than with McReynolds on constitutional cases. As a result, McReynolds cut off all pleasant social relations with Clarke, meting out only curt sarcasm to him.²⁶

Joseph Menez concurred in the observation that judges on the same court can have an impact on each other. He stated: "Switching is not unusual and it has not infrequently occurred that Justices, on the basis of dissents, have changed sides. The Court is a collegial body and, of course, the justices influence one another. No Justice starts out from an absolutely fixed position."²⁷

The central element of Christopher Smith's argument relating directly to this broad explanation is outlined by him in the following manner:

Legal scholars may examine Justice Scalia's role on the Supreme Court by focusing solely on his strident opinions, but a more comprehensive assessment of Scalia must include

analysis of his colleagues' reactions to those opinions and to the other aspects of Scalia's behaviour on the Court.²⁸

Smith located more specifically those key aspects of Scalia's personality that may have acted as a source of potential conflict amongst some of his colleagues:

. . . Scalia has strongly held views about the proper approach to constitutional and statutory interpretation – views that sometimes clash with those of his usual allies among the Court's conservatives. In addition, the strength of Scalia's belief in the rightness of his views and the professorial style of lecturing his colleagues diminish his ability to participate effectively in the Court's interactive process. If Scalia merely disagreed with his colleagues about specific cases, he might be able to persuade justices about other issues and otherwise perform effectively within the Court's collegial decision-making environment. However, the tone of Scalia's opinions and his style as a participant in the Court's decision making processes have reduced his effectiveness by actually deterring like minded colleagues from joining his opinions.²⁹

In referring to the importance of "judicial temperament," Rosen argued that Scalia's lack of this quality was the main determinant underlying his approach towards his colleagues:

. . . perhaps the main reason that Scalia was never as influential as Rehnquist involved not intellectual inconsistency but judicial temperament. Although his jurisprudential premises were unobjectionable, Scalia seemed, like Thomas Jefferson, to view every disagreement as a form of apostasy. As a result he had no volume knob. Every dissenting opinion predicted the apocalypse and every colleague who disagreed with him was denounced as a politician or a fool.³⁰

Rosen concluded with an analysis of what qualities he believed prove to be the most valuable in influencing the legal methodology of one's judicial colleagues. In emphasising the importance of "temperament", Rosen stated:

The brilliant academic is less appealing, over time, than the collegial pragmatist. The self centred loner is less effective than the convivial team player . . . The narcissist wields judicial power less sure-handedly than the judge who shows personal as well as judicial humility. The loose cannons shoot themselves in the foot, while those who know when to hold their tongues appear more judicious. (On the Court, a justice often achieves more by saying less).³¹

So, briefly, in conclusion, determining the lifetime "reliability" of a judicial nominee can be a delicate matter for a President to contend with. It is a high stakes gamble for such positions are powerful prizes – yet judges are only human and their judicial philosophy is susceptible to change over time – often to be very different from what it was when the nominee was first appointed.

In this paper I have outlined a number of factors that can affect the reliability of a judicial nominee – from the power and connections of the home State senators to the broader political pressures that existed at the point of their selection. There are other factors I have not canvassed for reasons of time. In the end, regardless of how much effort is made or the confidence one has that a judicial nominee will exhibit the reliability expected – it can all simply be undone by that judge's individual judicial temperament, especially in reaction to the approach of his colleagues and the manner by which he adjusts to the personality and thinking of his peers.

Endnotes

1. Jeffrey Segal, Richard Timpone and Robert Howard, "Buyer Beware? Presidential Success Through Supreme Court Appointments," *Political Research Quarterly*; vol 53, (3), September 2000, 557.
2. *Ibid.*, 2.
3. Harold Stumpf, *American Judicial Politics*, New York: Harcourt, Brace Jovanovich, 1988, 210.
4. Donald Songer, Reginald Sheehan and Susan Haire, *Continuity and Change on the United States Courts of Appeals*, Ann Arbor; University of Michigan Press, 2000, 24.
5. Maltese, John, *The Selling of Supreme Court Nominees*, Baltimore; The Johns Hopkins University Press, 1995, 33.
6. Orrin Hatch, *Square Peg: Confessions of a Citizen Senator*, New York; Basic Books, 2002, 138.
7. Maltese, *op. cit.*, 143-4.
8. Joseph Menez, *Decision Making in the Supreme Court of the United States*, New York; University Press of America, 1984, 113.
9. Hodding Carter, *The Reagan Years*, New York; George Braziller, 1988, 144.
10. US Constitution, Article II, Section 2, paragraph 2.
11. See Donald Songer and M. Humphries Ginn, "Assessing the Impact of Presidential and Home State Influences on Judicial Decisionmaking in the United States Courts of Appeals," *Political Research Quarterly*, vol 55, (2), June 2002, 302; and Ashlyn Kuersten and Donald Songer, "Presidential Success through Appointments to the United States Court of Appeals," *American Politics Research*, vol 31 (2), March 2003, 109.
12. Opening Statement of Senator Leahy in U.S. 108th Congress, 1st Session, Hearings Before the Committee on the Judiciary, *Confirmation Hearings on Federal Appointments*, June 22, July 30, September 3, September 17 and October 1, 2003, Senate Hearing 108-135 Part 4, Washington, DC; U.S. Government Printing Office, 2004, 591.
13. Richard Hardin, "How Two Senators Molded A Court: Thurmond and Helms Left A Conservative Mark On The Fourth Circuit," *Richmond Times Despatch*, 11 July, 2004, A-1.
14. *Ibid.*
15. Chris Weston, "Genetics, Exercise and Passion for Politics the Keys to his Longevity," *The Greenville News*, 5 December, 2002.
16. Lou Cannon, *Reagan*, New York; G. P. Putnam's and Sons, 1982, 313.
17. Lee Epstein and Jeffrey Segal, *Advice and Consent: The Politics of Judicial Appointments*, New York; Oxford University Press, 2005, 48.
18. John Massaro, *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations*, Albany NY; State University of New York Press, 1990, 195.
19. Robert Katzmann, *Courts and Congress*, Washington D.C.; Brookings Institution, 1997, 30.
20. Paul Simon, *Advice and Consent: Clarence Thomas, Robert Bork and the Intriguing History of the Supreme Court's Nomination Battles*, Washington DC; National Press Books, 1992, 75-76.

21. Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations*, New York; W.W. Norton, 1994, 98.
22. See Walter Murphy, *Elements of Judicial Strategy*, Chicago; The University of Chicago Press, 1964, Christopher Smith, *Justice Antonin Scalia and the Supreme Court's Conservative Movement*, New York; Praeger, 1993; and Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries that Defined America*, New York: Henry Holt and Company, 2006.
23. Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries that Defined America*, New York; Henry Holt and Company, 2006, 6.
24. Walter Murphy, *Elements of Judicial Strategy*, Chicago; The University of Chicago Press, 1964, 50.
25. *Ibid.*, 53-54.
26. *Ibid.*, 55.
27. Joseph Menez, *Decision Making in the Supreme Court of the United States: A Political and Behavioral View*, Lanham MD; University Press of America, 1984, 79.
28. Christopher Smith, *Justice Antonin Scalia and the Supreme Court's Conservative Movement*, New York; Praeger, 1993, 123.
29. *Ibid.*, 61.
30. Rosen, *op. cit.*, 6.
31. *Ibid.*, 237.

Chapter Nine

Indigenous Recognition

Some Issues

The Honourable Robert Ellicott

Indigenous recognition in the Constitution of Australia involves numerous issues, some of which are quite complex. To mention a few:

- Should there be any recognition at all in the Constitution?
- If so, should it be inserted in a preamble or in the body of the Constitution itself?
- What should be the purpose of a preamble to our Constitution, there being none at the moment?
- How far should recognition extend? Should it be limited to recognition of our indigenous peoples' prior occupation and cultural identity? Should it recognise custodianship? Should it extend to matters such as discrimination, equality of rights with other Australians, the formulation of a treaty?
- If there is to be a successful referendum, what limitations does this impose on the extent of recognition?
- Is there any point in having a referendum on the issue if the indigenous people do not substantially agree with any proposal, or are split on the issue?
- What steps should precede the determination of the proposal? Should there be a Constitutional Convention between the Commonwealth and the States?

I will touch on these issues in the course of my address. My point at the outset is that complex issues arise which require careful analysis, consideration and consultation before the preconditions of a successful referendum can be met. Not only the content of the recognition proposal is in issue but also whether and when it should be put.

The Expert Panel established by the Commonwealth Government on recognition has adopted four principles as to any proposal it recommends:

- It must contribute to a more unified and reconciled nation;
- It must benefit and accord with the wishes of our indigenous peoples;
- It must be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums;
- It must be technically and legally sound.

These are demanding principles and, I think, can be accepted as a test to be met by any proposal.

Before expressing any views, so that you will understand my approach, may I mention some personal background.

I was born in Moree, a town which has been at the centre of indigenous issues and where there was, in my early life, active discrimination against Aboriginals.

As Commonwealth Solicitor-General in 1970 I was counsel for the Commonwealth in the first major land rights case, *Milirrpum & Ors v Nabalco & The Commonwealth* (1971) 17 F.L.R. 141 – which involved the claims of the Yirrkala clans that they had title to the land from which Nabalco was taking bauxite pursuant to a lease from the Commonwealth. Although they lost the proceedings the case established that there was a clear relationship between the Aboriginal people and their traditional land. It led to my making a submission to the McMahon Government that the Commonwealth should recognise this relationship by granting rights over the reserves on which aboriginal people lived. It also led to the setting up of the Woodward Royal Commission which recommended what in effect became the Aboriginal Land Rights Northern Territory Act.

In April 1975 Malcolm Fraser appointed me Shadow Minister for Aboriginal Affairs, a post I held till December 1975. I was responsible for developing the Aboriginal Affairs policy for the 1975 election.

The Liberal Policy included the grant of land rights in the Northern Territory and endorsed self-management by the Aboriginal people as the appropriate policy to pursue. It also opposed the setting up of large land councils recommended by the Woodward Commission. This was confirmed as policy for the Coalition after discussion with the National Party.

Labor introduced a bill for Land Rights in the Northern Territory which was debated in October 1975 but not passed. A bill in similar form was tabled and passed in 1976.

This experience has led me generally to be favourable towards recognition in the Constitution of the Aboriginal and Torres Strait Islander peoples, their occupation of our continent pre-1788 and the existence of their distinctive cultures and their contribution to Australian life.

Notwithstanding this view, I am also very conscious of the need, in any proposal, to ensure it is designed to overcome the difficulties of achieving constitutional change in this country.

As Attorney-General I was responsible with the Prime Minister for the conduct of the 1977 referendum which sought to amend the Constitution in four respects which had strong bipartisan support. First, in relation to casual vacancies in the Senate; second, introducing a retirement age for Federal Judges; third, including Territory residents in the determination of majorities under the amendment provision, section 128; and, fourth, requiring simultaneous elections for the House of Representatives and the Senate. Three of these proposals were adopted by a majority of electors in the Commonwealth and by a majority in a majority of States. One of them, the proposal for simultaneous elections, failed.

There have been 44 referenda proposals put to the Australian people since Federation. It has been notoriously difficult to have an amendment approved – only eight have been approved, three of which were approved in 1977. In 1988 a swathe of amendments recommended by the Byers Constitutional Commission were completely rejected.

In my view, for a referendum proposal to have a substantial chance of acceptance:

1. There must be bipartisan acceptance of it by the major political parties.
2. It should have become broadly acceptable to the Australian people as a result of broad consultation and the provision of information to the public as to its purpose and effect.
3. It should contain no element of possible substantial confusion on legal or other grounds or of the proposal possibly undermining existing rights, particularly State rights. The States of Western Australia and South Australia, Tasmania and Queensland wield great power in a referendum.
4. If it affects, as in this case, a particular group of people, it must have their broad acceptance.

A small group of senators in 1977 actively opposed the proposal for simultaneous elections. They were able to obtain a majority in sufficient States to reject the proposal based on its perceived threat, as they saw it, to the States. The fact that this proposal had been adopted by a Constitutional Convention representing the major parties and the States and would save considerable expense and inconvenience to the electors was not sufficient to obtain approval. It had an overall majority of 1.8 million votes but only three States supported it. A similar amendment had been rejected in a referendum in May 1974 by an overall minority of 247,000.

I would go so far as to suggest that except where a particular proposal is not complex, for example, requiring Federal Judges to retire at 70, it is almost essential that partisan support be obtained not by general expressions of view by Government and Opposition or by the consideration and recommendation of a broadly based and highly qualified panel but only by holding an actual Constitutional Convention between members of the parliaments of the Commonwealth and the States that can consider the proposal in depth and, in the course of so doing, consult relevant groups and interests including members of the public.

A clear example would be if there was to be a referendum on a republic. The 1999 referendum was the result of an *ad hoc* group of people, albeit some politicians and party representatives, academics and leading citizens. It could not possibly iron out the issues which a referendum on a republic would require in order to obtain the necessary approval. Non-inclusion of a reserve power or the difference between an elected President and an appointed President are clear examples of factors which could undermine referendum proposals for a republic. Academics, broad expressions of community views or leading citizens are not in charge of the process. The Commonwealth Parliament is in charge of the process and both political parties must agree.

In relation to the recognition of our indigenous people there are likely to be diverse views among the Aboriginal and Torres Strait Islander people as to what they would regard as a sufficient recognition of their relationship to the land, their cultures and their rights as indigenous people. Some may be satisfied with a general recognition of past occupation prior to white settlement with their separate cultural identities and their continuing contribution to Australian life. On the other hand, there will be others within the indigenous community, as the Expert Panel in its discussion paper suggests, who would take the view that an amendment to the Constitution of this character would be quite inadequate and that the Constitution should be amended to affirm principles of non-discrimination, equality, justice and fairness in relation to the indigenous people.

Further, a proposal which was limited to the first might well be seen as a token amendment by the indigenous people generally, and particularly by those who take the latter view. The debate could also generate a division of view within the wider community as to whether either approach was acceptable. The broader approach may also fail to have Coalition support.

It has to be remembered that, as was the case in the 1977 amendment, what seems to be a perfectly reasonable proposal, for example, simultaneous elections, agreed upon by all the political parties can surprisingly be the subject of a great division leading to arguments based on fear which sufficient people in sufficient States accept to rob the approval of acceptance by the majority which section 128 requires.

Incorporation in a preamble

This raises an important question. There is no preamble as such to our Constitution. The preamble currently relevant is the Preamble inserted in the Imperial Act which enacted and gave legal effect to our Constitution. A reading of that preamble shows that it has marked relevance to the process by which the Constitution came into effect. It states:

The people of the States humbly relying on the blessing of Almighty God agree to unite in one indissoluble federal commonwealth under the Crown of the United Kingdom of Great Britain and Ireland and under the Constitution hereby established.

The Constitution Act also contains covering clauses which provide *inter alia* for the proclamation and establishment of the Commonwealth, the commencement of the Imperial Act, the taking effect of the Constitution and the operation of the Constitution and laws made thereunder. Both the Preamble and the covering clauses were directed to the Constitution which was to take effect.

The Expert Panel is considering the insertion of a preamble which would deal with the recognition of indigenous people.

If there were to be such a preamble it would, in my view, need to be preceded by a broad debate about whether there should be a preamble and, if so, what it should contain. It does not seem to me to be consistent with the notion of a preamble to amend the Constitution solely for the purpose of inserting a statement in a preamble which only deals with indigenous recognition. To be appropriate it would need to be accompanied by general statements which describe the context within which the Constitution was framed and reveals the connection between a recognition of our indigenous people in that context. This is a very large, difficult and contentious task.

You will recall that there was a second question in the 1999 republican referendum which involved the insertion of a broadly based preamble which contained a statement by the Australian people acknowledging:

Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country.

The whole preamble was criticised for its ambiguities, lack of consultation, as well as a failure to go far enough in recognition of our indigenous people. It was soundly rejected. It received no majority in any State. In the light of this experience, the Expert Panel should, in my view, be slow to recommend that recognition be achieved by way of a statement in a preamble.

One of the problems in relation to the 1999 attempt at a preamble was that it did not have the benefit of being approved by a properly organised Constitutional Convention between the Commonwealth and the States. The so-called Constitutional Convention of 1998 was a failure. It was no doubt enjoyed by the very experienced and talented people who participated but it was clearly a very inadequate method of deciding the content of constitutional change.

The Commonwealth Parliament is in charge of the process of amending the Constitution. It has to adopt the relevant bills under section 128. A full Constitutional Convention incorporating representatives of all parliaments is essential to develop consensus between the Commonwealth and the States, the major political parties and among the Australian people and relevant groups of people where major complex issues like a republic are involved. Indigenous recognition, depending on the extent of it, could also be such an issue.

It is very helpful to have the views of an Expert Panel but the overall endeavour to give recognition to indigenous people could possibly be a waste of time if the politicians through their parliaments do not take charge of the process.

In all political matters what is called *"the art of the possible"* must be constantly in mind. As previously stated, the history of constitutional change in Australia is a warning as to what can be regarded as *"possible"*.

The popular approach to amendments is clearly conservative and unlikely to embrace propositions which can be used to sow doubts about the breadth and legal operation of a proposal. A proposal for a statement in the Constitution whether in a preamble or in the body of the Constitution which goes beyond recognising Aboriginal and Torres Strait Islander peoples' distinct cultural

identity, prior ownership and custodianship of the continent and seeks to embrace, for instance, a statement of values being a commitment to democratic beliefs, the rule of law, gender equality and an acknowledgement of freedoms, rights and responsibilities, as the discussion paper circulated by the Expert Panel describes, is in my view likely to be so contentious as to fail to obtain the required majorities.

There will be those, for instance, who think these matters should not be referred to; those who think the statement of values does not go far enough or too far; or those who think that it constitutes a backdoor method of introducing a Bill of Rights which they oppose or fear. Likewise, any proposal enabling the making of a treaty recognising the rights of, contribution of, and future treatment of our indigenous people.

Proposals which could upset or unsettle the current interpretation of the Constitution in important respects are candidates for rejection. The proposition, “*if it ain't broke don't fix it*”, is high in people's minds.

In other words, the wider the scope of recognition the more likely it is that the proposal will be rejected by the people. Framing a proposal for a successful referendum is not really about what one believes or a group believes should be found in our Constitution. It is about what a conservative majority of people in a majority of States are likely to support by way of amendment.

In my opinion, the recognition which should be accorded to our indigenous people which is likely to find broad public approval is one that acknowledges their past occupation, their past custodianship of the continent and the development of their own cultural identity and its continuing contribution to the life of the Australian people of which they are part. A statement of this character, carefully drafted, in my view, is unlikely to affect constitutional interpretation.

Section 51(xxvi)

Section 51(xxvi) confers power on the Parliament to make laws “*with respect to the people of any race for whom it is deemed necessary to make special laws*”.

In the case of *Kartinyeri v The Commonwealth* ((1998) 198 CLR 337) it was held by two Justices (Gummow and Hayne JJ) that section 51(xxvi) is not limited to all people of a race nor is it confined to laws which do not discriminate against a race. Therefore, laws which do not benefit Aboriginal and Torres Strait Islander people or a group thereof are not outside the scope of section 51(xxiv). It is suggested that this is unsatisfactory and the provision should be amended to confine it to laws which benefit indigenous people. I think it would be unwise so to limit section 51(xxvi). I think there are broad circumstances where a law may need to discriminate in a non-beneficial way in order to achieve some proposal which is of wider benefit to indigenous people.

Although opposed by some as discriminatory, provisions enacted to enable the Commonwealth to stop the payment of benefits to persons in Aboriginal communities in the Northern Territory may be seen by some as part of the achievement of a broader beneficial purpose introducing health, educational and other community reforms.

Noel Pearson, with whom Galarrwuy Yunupingu seems to agree, has had much to say in general support of the Northern Territory intervention as part of his view that the Aboriginal people must take control of their own destiny and eschew a welfare mentality. This is not a view which seemingly is shared by all other Aboriginal leaders and there is a great debate continuing both as to what is to be done and how it is to be implemented. The consensus between government and the Aboriginal people may well be that legislation which is directed to this end should be implemented and the decision in *Kartinyeri* may well have to be relied on if the Commonwealth is to enact the provisions.

My conclusion

Taking the view, as I do, that any statement of recognition should not be included in a preamble, it

is my view that the appropriate way in which to achieve the objective, if it is to be undertaken, is to amend the body of the Constitution itself.

Section 25 provides that for the purposes of section 24, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

Section 127, which provided that in reckoning the numbers of the people of the Commonwealth or of a State or other part of the Commonwealth, Aboriginal natives shall not be counted, was repealed as a result of the 1967 referendum. Section 25 was allowed to remain but it is, in essence, a provision which should no longer stand in the face of that repeal. Its proper interpretation is open to debate. However, it is also perceived by many as racist and odious. It is certainly discriminatory and is clearly now otiose.

In my opinion section 25 has no useful role to play in the Constitution and should be repealed.

I suggest consideration should be given to substituting a new section 25 which could take the following form:

- 25 (1) The Aboriginal and Torres Strait Islander peoples were for many thousands of years prior to 1788 the occupiers and custodians of the Australian continent and adjacent islands and throughout that period they developed their own distinct cultural identities which have become part of and have enriched the life of the Australian people.
- (2) The provisions of the Constitution as originally framed which permitted the Aboriginal and Torres Strait Islander peoples to be excluded from reckoning the number of people of the Commonwealth or of a State for which this provision is substituted were in this respect discriminatory.
- (3) The Aboriginal and Torres Strait Islander peoples are entitled to the same voting rights as other Australian citizens.

A provision to this effect, in my view, can give recognition to the indigenous people and, at the same time, by its repeal of section 25, and, in its terms, acknowledge it was discriminatory, and, in relation to voting, acknowledge that their rights should be no different to those of other Australians. Such a provision should not have any effect on the interpretation of the Constitution in other respects and fulfils what I consider to be a reasonable course for the Australian electorate to take to meet the objective of both political parties.

I have framed it in the way I have to express the basic ideas I have in mind. A skilled draftsman or others may, of course, wish to state them differently.

Chapter Ten

Constitutional Facts

The Honourable Justice J. D. Heydon

“Constitutional” facts are part of a category of fact called “legislative facts”. Legislative facts are to be distinguished from adjudicative facts.

Adjudicative facts are facts which, being in issue or relevant to a fact in issue at a trial, are determined by the jury, or, if there is no jury, by the judge. The search for them is a search for answers to questions like: “Was the factory floor slippery? What did the parties say in conversations which one claims created a contract?”

In finding adjudicative facts the courts act on material received in compliance with the law of evidence. But they are not limited to it. They rely, also, on their knowledge of the English language as it is used in innumerable contexts, and of elementary mathematical principles, for without this knowledge they could not understand the evidence presented. And they rely on matters supposedly derived from the ordinary experience of human life shared by almost all adults. Those matters are often not controversial but they may be controversial either in their formulation or their application. These matters include simple physical and scientific facts about human and other behaviour; common experience of the ordinary world of cars, trains, aircraft, ships, telephones, computers, machinery, roads and physical objects; matters going to human motivation and credibility; and various types of informal reasoning derived from those sources and applied to the factual material received in conformity with the rules of evidence.

“Legislative facts” are sometimes called “premise facts” or “lawmaking facts”. Legislative facts are resorted to in order to determine what a law should be, or how it is to be applied. Legislative fact analysis can be employed in four categories of inquiry to be numbered two to five – category one being adjudicative facts. Category two concerns finding the facts relevant to the constitutional validity of enactments or executive acts. Category three concerns the facts relevant to the construction of statutes. Category four concerns the facts relevant to the construction of constitutions. Category five concerns the facts relevant to the development of the common law.

A given fact may be employed in more than one category. An example is *Brown v Board of Education of Topeka*.¹ From 1896 until that case, the received doctrine was that segregated educational facilities were constitutionally valid if they were “separate but equal”. The court examined material showing that segregated schools were separate, but not equal, because of the harm they did to black children. That illustrates use of the material in a category two way. The material showed that even on the received doctrine there was constitutional invalidity.

But another question in the case was whether the received doctrine was sound. That was a category four question: what did the Constitution mean? The material led the Court to depart from the received doctrine because the material showed that even if the schools were separate and equal, the harm they were causing to black pupils suggested that the received doctrine was wrong.

Another example is afforded by *Thomas v Mowbray*.² Thomas attended a camp run by Al Qa’ida. One question was – would an interim control order against Thomas assist in preventing a terrorist act? That was an inquiry involving the use of adjudicative facts within category one. Another question concerned the constitutional validity of the relevant statute. The attendance at the camp by Thomas was a category two fact, because the likelihood of the legislation being supported by the defence

power was increased if Al Qa'ida was running camps: this was material to the existence of a threat to Australia.

The expression “constitutional facts” is sometimes used to refer only to those in category two. Sometimes it is used to refer to those in category four as well.³

The thesis of this paper is twofold. On the one hand, it is virtually inevitable in constitutional law that the courts must rely on constitutional facts. On the other hand, there are dangers in the ways in which they do so. These dangers arise largely because constitutional facts in categories two and four (like the legislative facts in categories three and five) are often not proved by recourse to the conventional rules of evidence used in category one. Why does that create dangers?

For these reasons. One of the key points Dr Kelly made in her perceptive paper concerned the immense range of protections which the law gives quite independently of a bill of rights, and more effectively. One good example is the rules of evidence used in relation to category one. They require the proof of facts to take place through witnesses who are subject to cross-examination, or through documents, or through physical things produced to the court. They are restrictive rules which prevent some types of relevant evidence being received – because the evidence is hearsay, because it is prejudicial, because of how it was obtained. They have been worked out for 300 years or more by skilful judges and thoughtful legislatures responding to the teachings of an immense body of forensic experience. They may not operate perfectly but they do have advantages. They ensure that all factual material which the jurors (or the judge if there is no jury) are to consider will be methodically tendered in an orderly manner so that everyone understands what is going on; any objection will be ruled on immediately; any questionable testimony can be tested in cross-examination; debates about the significance of the material will take place in the presence of all parties and in public. The rules of evidence ensure that the parties who may lose will have been in a position to understand, call evidence about, and challenge the grounds on which they may lose. They thus reduce the chance of ill-informed and uncontrolled judicial frolics.

So far as material not complying with these rules of evidence, which have such beneficial effects in relation to category one, is employed in the other four categories, and in particular the two categories of constitutional fact, there are dangers. The dangers are unfairness to the parties, and excessive judicial power.

Before going to the dangers, it may be asked why constitutional facts are acted on without conventionally proved evidence. Why have the courts abandoned for categories two and four the advantages and protections which the rules of evidence bring for category one?

Dixon CJ said: “matters of fact upon which . . . the constitutional validity of some general law may depend” do not form issues between the parties to be tried like adjudicative facts. “They simply involve information which the Court should have” in order to decide on the constitutional validity of a statute or of an executive act under a statute.⁴ He said that, “[h]ighly inconvenient as it may be”, constitutional facts “must be ascertained by the Court as best it can”.⁵

Sometimes the high inconvenience can be sidestepped. The parties may rely on a case stated, or on some other document agreeing on all relevant facts.⁶ The parties may rely on admissions in the pleadings, or formal admissions. These “facts” cannot bind the court, but the court may accept them. The defendant may demur to the plaintiff’s statement of claim, and the validity of the demurrer may then be decided as a preliminary question on the assumption that the facts alleged by the plaintiff are correct. But sometimes these procedures for agreeing or assuming facts are not or cannot be used, or matters of fact later arise which are outside them. The question then arises: is material receivable only if it complies with the rules of evidence?

The High Court has answered that question in the negative. It adopts a less restrictive approach for constitutional facts than it does for facts in issue. Thus Brennan J said, speaking about the construction of a non-constitutional statute but extending his remarks to constitutional facts:

When a court, in ascertaining the validity or scope of a law, considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties. The validity and scope of a law cannot be made to depend upon the course of private litigation. The legislative will is not surrendered into the hands of litigants.⁷

Why is this so? The courts do not strike down legislation of their own motion, without one party taking the initiative. Statutes and subordinate legislation are presumed to be valid. But “to the extent that validity depends on some matter of fact, there is no onus on a challenging party which, being undischarged, will necessarily result in a declaration of validity.”⁸

Why is the task of factual proof not left in the hands of the party alleging invalidity? Why, if the party which alleges invalidity fails to prove the facts on which invalidity depends, does the court not simply treat the statute as valid and reserve the question of its potential invalidity to a battle to be conducted at another time, in a different field, and by a better-prepared litigant? While most private litigation is of great importance to the parties, it is not important to the public. Constitutional litigation has a different kind of importance, and to a much wider range of persons. Why is it that conventional private litigation is regulated by the strictness of the rules of evidence, while in constitutional litigation fact-finding is subject to a much more liberal regime?

One answer advanced in Canada proceeds in three steps. First, “the proper role of the court is to allow considerable leeway to the legislature to make the findings of fact upon which its constitutional power depends”. Secondly:

While a court must reach a definite conclusion on the adjudicative facts which are relevant to the disposition of litigation, the court need not be so definite in respect of legislative facts in constitutional cases.

Thirdly, it is said that if:

there is significant support among the professionals for the legislative facts which would justify the legislation, then it is plain that the legislators had a rational basis for [their] action [in enacting the impugned legislation, and it must be held valid].⁹

Whether or not parts of United States or Canadian constitutional law permit the reasoning just outlined, Australian constitutional law does not. The trouble with that reasoning is that it confuses two questions. One is whether courts should invalidate legislation merely because they strongly deny the wisdom of enacting it, or consider that some other method of achieving the goal desired could more appropriately have been employed. The answer to that question is in the negative, for the court cannot override a legislature acting within power.

The other question is whether legislation is within power merely because there is significant support for the view that the relevant constitutional fact exists, as opposed to the court experiencing an actual persuasion that the fact exists. The answer is in the negative. Section 51 of the Australian Constitution gives to the Commonwealth Parliament power to legislate with respect to, for example, lighthouses, aliens and corporations, not with respect to things which there is significant support for thinking are lighthouses, aliens and corporations, although they are not in fact so.

A better explanation is that sometimes not dealing with a constitutional question will create worse evils than dealing with it even though the factual foundation laid by the parties may be feeble. For a court to convict and punish an accused person for breach of a statutory provision alleged to be constitutionally invalid without deciding that allegation is a repugnant outcome. It is more repugnant than an inquiry into validity based on a factual examination conducted by the court

without effective assistance from the parties and unconstrained by the rules applying to facts in issue. This will not, however, explain every application of the doctrine, for often no question of criminal punishment is involved.

The other explanation commonly given is that the court has an overriding duty to enforce the Constitution for all citizens and other persons within its protection which it must fulfil even if the limited class of citizens or other persons who comprise the parties before it will not adequately assist it to do so. From the earliest times the High Court has seen itself as having, in general, a duty to determine the validity, one way or the other, of legislation alleged to be unconstitutional.¹⁰ Putting on one side the political consequences of a legislature embarking on the enactment of unconstitutional legislation, there is no body other than the judiciary capable of preventing an abuse of legislative power using the available mechanisms (for example, section 75 of the Constitution). These are factors seen as outweighing the difficulty of finding the facts relevant to validity.

Since final constitutional courts have ultimate responsibility for the enforcement of the Constitution, they have ultimate responsibility for the resolution of challenges to the constitutional validity of legislation, one way or the other, and cannot allow the validity of challenged statutes to remain in limbo. And they have ultimate responsibility for the determination of issues about constitutional facts which are crucial to validity. This approach has also been said to justify the view that non-compliance with either statutory or common law rules of evidence cannot prevent the court from full inquiry into the existence or non-existence of constitutional facts. A simpler justification for that view is that questions in relation to constitutional facts “cannot and do not form issues between parties to be tried like” ordinary facts in issue.¹¹ That is, for centuries, common law and statutory rules have grown up to regulate the proof of facts in issue; there are no equivalent rules for constitutional facts and it is wrong to import them from their proper sphere into a different one, to operate there as exhaustive mechanisms.

Thus Brennan J was correct to say, in relation to constitutional facts, that the “validity and scope of the law cannot be made to depend on the course of private litigation.”¹² Similarly, Williams J said: “[I]t is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the [challenged] legislation.”¹³ And Frankfurter J said that when “constitutional issues turn on facts, it is a strange procedure indeed not to permit the facts to be established.”¹⁴ In short, the approach of the courts to constitutional facts is wider than its approach to facts in issue because of a principle of necessity: adoption of that approach is necessary if the court is to fulfil its duty to conduct judicial review of the constitutional validity of legislation. That consideration explains not only the court’s involvement in constitutional fact finding of its own motion; it also accounts for the width of the principles pursuant to which it finds constitutional facts.

Sometimes constitutional facts are agreed. Sometimes they are proved by material complying with the rules of evidence other than the doctrine of judicial notice. Sometimes they are received through the doctrine of judicial notice, either because they are notorious, or because they can be incontrovertibly established by inquiry from works of authority.

Thus in the *Australian Communist Party Case*, Dixon J instanced certain “notorious international events” as matters of fact relevant to the existence of constitutional facts through being judicially noticed without inquiry:

The communist seizure of Czecho-Slovakia, the Brussels Pact of Western Union, the blockade of Berlin and the airlift, the Atlantic Pact, the passing of China into communist control, the events in reference to the problem of Formosa, the entry of the North Korean forces into South Korea and the consequent course of action adopted by the United Nations, and the sustained diplomatic conflict between communist powers and the Anglo-American countries and other western powers at meetings of the Security Council and the General Assembly . . .¹⁵

All those matters were notorious then. Some are not notorious now. There are other matters perhaps well known now but not then known at all – namely that the Russian menace was greater in 1951 than the High Court thought.¹⁶

Dixon J took judicial notice after inquiry in summarising the “accepted tenets or doctrines of communism . . . ascertained . . . from serious studies”:

. . . a political theory based upon the supposed irreconcilable antagonisms inherent in a capitalistic system, the inevitability of its decomposition, the necessity of a period of revolutionary transformation from a capitalist to a communist society, the struggle between bourgeoisie and proletariat, the dictatorship of the proletariat during a longer or shorter period of further evolution, the progressive extension of the revolutionary process over the earth and the need to assist and expedite its spread not merely that its supposed benefits may be more widely enjoyed but for the protection of existing systems of communism from counter action and the revolutionary process of development from delay and temporary defeat . . .¹⁷

Many other illustrations of notorious facts and facts judicially noticed after inquiry can be found in Callinan J’s judgment in *Thomas v Mowbray*.¹⁸ Facts are often judicially noticed after inquiry in relation to category four – the second type of constitutional fact – facts employed in working out the meaning of the Constitution. Until very recently most High Court judges thought that the meaning of the Constitution now is the meaning it had in 1900, and quite a number still do. For judges of this kind, as for Professor James Allan, the Constitution is not a “living tree”. And what mattered was not the intention of the framers, but the meaning of the words they used. That meaning could be ascertained by examining contemporary or near contemporary materials. The mischiefs with which the Court was dealing could be examined by looking at historical works which are regarded as authoritative. The main difficulty which arises concerns the determination of what is authoritative.¹⁹

However, many constitutional facts are incapable of being judicially noticed. But the doctrine has now developed that apart from agreed facts, facts proved under the rules of evidence and facts judicially noticed, all relevant material may be brought to the court’s attention, independently of whether any rules as to admissibility in relation to facts in issue have been satisfied.

Thus, in 1952, McTiernan J said assistance could be obtained from judicial “notice, or facts proved . . . or . . . *any rational considerations*”²⁰ [emphasis added]. In 1959, Dixon CJ said that constitutional facts must be ascertained by the court “*as best it can*”²¹ [emphasis added]. In 1975, Jacobs J said that “the normal procedures for the reception of evidence” had shortcomings, that the parties need not be confined to the pleadings or to the agreed facts, and that “[*a*]ll material relevant (in a general, not a technical, sense) to the matter under consideration may be brought to the court’s attention”²² [emphasis added]. In 1985, Brennan J said that the court could invite and receive assistance from the parties “but it is *free also to inform itself from other sources*”²³ [emphasis added].

However, where the court considers materials without being restricted by the rules of evidence, “it is obviously desirable that [they] should be previously exchanged between the parties”.²⁴ Underlying the process is perhaps the theory that “the nature and importance of constitutional facts” are such that even if they are not “utterly indisputable”, they may “be regarded as presumptively correct unless the other party, through an assured fair process, takes the opportunity to demonstrate that [they] are incorrect, partial or misused.”²⁵

However that may be, if reliance on controversial assertions is to be permitted, it is clear at least that the party against which they are to be used must have an opportunity properly to consider them before argument has closed. It would be astonishing if there were not a duty on the court to advise the parties of any material not tendered or referred to in open court upon which it proposes to rely.

It is scarcely satisfactory for a party to learn of some supposed fact by reason of which that party lost the litigation only on reading the court's reasons for judgment, without having any opportunity to dispute the accuracy of the fact or the trustworthiness of the sources from which it was taken. Callinan J has said²⁶ that he did not take Brennan J's remarks quoted above:

to be a warrant for the reception and use of material that has not been properly introduced, received, and made the subject of submission by the parties. What his Honour said cannot mean that the interests of the litigants before the court can be put aside. They retain their right to an adjudication according to law even if other, conceivably higher or wider, interests may ultimately be affected.²⁷

This is entirely correct, save that if the words "introduced" and "received" call for compliance with the rules of evidence applied to facts in issue, they are out of line with other authority.

Apart from reference to historical works, two other particular mechanisms for receiving constitutional facts may be noted.

One concerns "official facts". Although Callinan J, more than any other judge, has been sceptical about the employment of "legislative facts" not proved by evidence or taken into account pursuant to the doctrine of judicial notice, speaking in a case about constitutional facts, he excepted from these restrictions what he called "official facts". He gave the following examples: "[O]fficial published statistics, scrupulously collected and compiled, information contained in parliamentary reports, explanatory memoranda, Second Reading Speeches, reports and findings of Commissions of Inquiry, and, in exceptional circumstances, materials generated by organs of the Executive". But he said that, even so, a "deal of care needs to be taken with respect to 'official facts'."²⁸

A second mechanism is the derivation of constitutional facts from standard works of reference or other writings of experts on the physical, medical, social or other sciences.

The goal of the courts in examining material within these categories is to ensure that their decisions involving constitutional facts rest on more than mere intuition, hope, legend, cliché, guesswork, assumption or prejudice. The courts are not to make up the course of constitutional development as they go along.

It is now necessary to turn to the second thesis of this paper – the dangers in the use of constitutional facts. Enough has been said about the risk that courts which resort to "constitutional facts" may not give the parties a proper hearing. Some others are as follows.

One problem is this. Trial courts are most effective when their activities centre on the conduct of fair trials by finding adjudicative facts and applying to them well-settled law, and appellate courts operate at their most effective when their activities centre on ensuring that litigants received a fair trial. The evaluation of legislative facts causes different problems to intrude: "[J]udicial competence to evaluate . . . [constitutional] facts varies inversely with their distance from the facts concerning the parties."²⁹ It is a field in which they lack experience.

Secondly, the use of legislative facts in general and constitutional facts in particular is more legitimate in some fields than others. Categories two to five have similarities, but also differences. Use of legislative fact analysis in relation to the common law – category five – is less dangerous than its use in relation to statutory or constitutional interpretation (categories three and four). That is because the common law does legitimately change over time, but the interpretation of statutes, or the Constitution, is not supposed to change over time. The courts are supposed loyally to comply with the legislative or constitutional language. What of constitutional facts in category two? Changes in approach to facts relating to constitutional validity amount to changes in the application of the Constitution, and the application of the Constitution, too, is supposed to be constant. Excessive looseness may, as a practical matter, widen federal legislative power. And to widen federal legislative power is to narrow State legislative power, because of the operation of section 109 of the Constitution.

A third area of difficulty concerns the formal reception of constitutional facts. Two distinct but related questions arise. Should judges engage in private inquiries? Should material, particularly expert material, be given to the courts via testimony, or merely as part of written submissions? It may be argued that while evidence is necessary to prove adjudicative facts, the material used to establish constitutional facts is more like law itself – characterised by general ideas applicable beyond particular instances. Hence, it may be argued, constitutional facts should be treated in the same way as legal precedents, and if the parties fail to supply adequate material, the court should rely on its own researches.

This argument wrongly assumes that courts are entirely free to rely on legal materials not referred to by the parties. Legal points and at least significant authorities not raised in argument should not be relied on without the opportunity for further argument being afforded.³⁰ The position must be *a fortiori* where expert literature on factual issues is concerned. The argument also jumbles the roles of judge and party. It is normally for “each party to bring forward the evidence and argument to establish his/her case, detaching the judge from the hurly-burly of contestation and so enabling [the judge] to view the rival contentions dispassionately.”³¹ Judges are umpires or referees, not players. The pursuit by judges of independent lines of inquiry, unaided by the parties, distracts them from their quintessential role. On the other hand, to require oral evidence may be inconvenient.

The fourth problem concerns the fact that to reach a conclusion that a constitutional fact exists can involve speculation, or what Callinan J called the making of an “assumption”. The assumption, he said, “may be unsafe because the judge making it is necessarily making an earlier assumption that he or she is sufficiently informed, or exposed to the subject matter in question, to enable an assumption to be made about it.”³²

Fifthly, not only are constitutional facts speculative in that sense: they can be subjective. Adjudicative facts are relatively value-neutral. Legislative facts are not. Adjudicative facts are proved after compliance with fairly rigid rules of evidence and procedure, requiring in criminal cases and some civil cases high standards of proof. Constitutional facts need not be. The relative value-neutrality of adjudicative facts and the rigours of the litigation system tend to ensure that the outcomes of cases resting on adjudicative facts do not depend just on the personality and ideology of the judge.

That is much less likely to be the case with constitutional facts. Judges are not automatons. They have individual opinions. Their background experiences may differ. Yet the whole legal system has the goal of ensuring that it should not matter for a litigant whether the case is to be determined by one particular judge, with a certain personality, background and outlook, or another particular judge, who differs sharply in these respects. To engage too freely in a search for constitutional facts, particularly a search conducted without assistance or control from the parties, is to make that goal less attainable. There is a risk that a “living tree” approach to the Constitution creates a judicial desire to push the application of the Constitution in one direction and to assemble constitutional facts in fulfilment of it. The court which has long thought a certain approach desirable now perceives that opinion – whether of the public, the legal profession or quite narrow legal elites – has come to favour the change. But, even if the spirit of the age is relevant, as Justice Cardozo said, to see this opinion as the spirit of the age is dangerous. The spirit of the age can be merely “the spirit of the group in which the accidents of birth or education or occupation or fellowship” have placed the judges.³³

Courts can sometimes search for constitutional facts in order to support a conclusion about how the Constitution should apply. Hence critics of excessive resort to constitutional facts fear that the individual world-view of particular judges will influence not only the selection of relevant fields in which to search for constitutional facts, but also the form in which they will be found. This makes the processes under discussion untrustworthy and unpredictable. “Constitutional facts”, then, may sometimes only be window dressing. They may too readily permit the judges to make up constitutional law as they go along. That is why their establishment must be closely watched.

Endnotes

1. 347 US 483 (1954).
2. (2007) 233 CLR 307.
3. For examples of constitutional facts within category two, see *Cross on Evidence*, LexisNexis, 8th Aust ed, 2010, [3156]. For examples of constitutional facts within category four, see the same work at [3158].
4. *Breen v Sneddon* (1961) 106 CLR 406 at 411.
5. *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292.
6. *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 302 and 306-307.
7. *Gerhardy v Brown* (1985) 159 CLR 70 at 141-142.
8. *South Australia v Tanner* (1989) 166 CLR 161 at 179.
9. P. W. Hogg, "Proof of Facts in Constitutional Cases" (1976) 26 *UTLJ* 386 at 397.
10. *D'Emden v Pedder* (1904) 1 CLR 91 at 117.
11. *Breen v Sneddon* (1961) 106 CLR 406 at 411.
12. *Gerhardy v Brown* (1985) 159 CLR 70 at 142.
13. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 222.
14. *Zorach v Clauson* 343 US 306 at 322 (1952).
15. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 197.
16. *Thomas v Mowbray* (2007) 233 CLR 307 at 486-487 [533].
17. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 196-197.
18. (2007) 233 CLR 307 at 488-492 [538]-[553].
19. *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 511-513 [165]-[166].
20. *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177 at 227 [emphasis added].
21. *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292 [emphasis added].
22. *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559 at 622 [emphasis added].
23. *Gerhardy v Brown* (1985) 159 CLR 70 at 142 [emphasis added].
24. *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559 at 622 per Jacobs J.
25. B. L. Strayer, *The Canadian Constitution and the Courts*, 3rd ed, 1988, 292, quoted in *R v Bonin* (1989) 47 CCC (3d) 230 at 248.
26. *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 511 [164].
27. *Gerhardy v Brown* (1985) 159 CLR 70 at 142.
28. *Thomas v Mowbray* (2007) 233 CLR 307 at 483 [526] (footnote omitted). See also *Shaw Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 at 364.

29. Kenneth L. Karst, "Legislative Facts in Constitutional Litigation" [1960] *Supreme Court Review* 75 at 100.
30. See *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 398; *Friend v Brooker* (2009) 239 CLR 129 at 173-174 [118].
31. *Waugh v British Railways Board* [1980] AC 521 at 535 per Lord Simon of Glaisdale.
32. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 298 [252].
33. Benjamin N. Cardozo, *The Nature of the Judicial Process*, Yale University Press, 1921, 175.

Chapter Eleven

Local Government and the Commonwealth Constitution A Case Against Recognition

The Honourable Michael Mischin

Our Commonwealth's Constitution was the product of long and thoughtful debate among the then colonies to establish a national government that was paramount in what they thought were clearly defined and limited areas of responsibility. The negotiators did so as equals, recognising that a national government was desirable and important.

They were also vigilant to preserve the autonomy of their respective governments. They recognised then – possibly more clearly than many do now – the importance of keeping government at a level that is responsive to the needs and influence of local communities, rather than distant and potentially unrepresentative. It was with that in mind that the Senate was intended as the “States house”, providing the necessary balance against the interests of the more populous States.

Local government was not unknown in the colonies. The creators of the Commonwealth made a conscious decision, however, not to include reference to local governments in the Constitution. This was a sound decision, as a matter of principle. The Commonwealth Constitution was not a manifesto of rights and obligations between the new Commonwealth Government and its citizens; it was a compact defining and regulating the relationship between the colonies and the new, federal level of government they were establishing.

Local governments, such as they were, had no role to play in that decision-making and, understandably, no status. The levels – or, perhaps more accurately – facets, of government that were recognised were the Commonwealth, the States, and Territories.

Local governments were, and have remained, the creatures of the individual States, drawing their legitimacy, responsibilities and powers from State legislation.

Since federation, the role of local governments has expanded. So, too, has the power of the Commonwealth at the expense of the States. However, the fundamentals of our federation remain.

There continue to be moves to amend the Constitution in a variety of respects; some symbolic, some substantive. One proposal for amendment is to accord constitutional recognition to local governments.

This paper will present, for the purposes of encouraging discussion, an argument against such recognition.

Previous referenda

Section 128 of the Constitution has a “double majority” requirement; there must be both a majority of electors voting for the proposal in a majority of States, and also a majority of all electors in the States and Territories.¹

There have been two unsuccessful section 128 referenda – in 1974 and 1988 – on the question of including local government within the text of the Constitution. They are edifying not only as examples of how one might go about the exercise, but because of the arguments raised in opposition to them. Though different in approach, they nonetheless had in common a desire to increase Commonwealth power and influence at the expense of the States.

The 1974 referendum was initiated by the Whitlam Government and had its origins in Whitlam's

zeal to change the Australian body politic by increasing the influence of the Commonwealth Government in all levels of society. His objectives were not a secret. While in opposition Whitlam had advocated direct funding of local governments, whom he envisaged as “partners” in a “new federalism”.² He had also made it plain that this was to be at the expense of the States:

The State boundaries arranged at Whitehall (UK) in the middle of the last century, and the local government boundaries devised in the State capitals early this century, have little relevance to today’s needs. Ideally, our continent should have neither so few State governments nor so many local government units.³

Naturally, the architect of this new structure would not be the States that, as colonies, had created the Commonwealth of Australia, but the creature that had since evolved from their vision.

Whitlam sought to use the Commonwealth’s dominant financial position to achieve some of his national goals through local government channels, rather than work through or be impeded by the States. While lacking constitutional authority to intervene directly in local government, this did not prevent his Government from making “special purpose grants” to them, one example being the Regional Employment Development Scheme (an employment creation program to address unemployment at the local level).

The 1974 referendum was Whitlam’s attempt to ensure that the Commonwealth-local government vision he was developing was constitutionally sound. The amendment proposed to allow the Commonwealth to fund local governments directly, rather than “passing” funds through the States, by inserting two new provisions into the Constitution, namely:

s.51(ivA.) [the Commonwealth Parliament has power to make laws with respect to] The borrowing of money by the Commonwealth for local government bodies.

s.96A. The Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit.

Yet, despite purporting to improve the status of local governments, Whitlam seemed less concerned with strengthening them than with exploring various forms of “regionalism”. He created 68 notional regions nationwide through which to distribute local government grants, each consisting of several existing local governments, and implemented a competing vision of regionalism, the Australian Assistance Plan (AAP).⁴ In short, the recognition of and ability to fund local government “bodies” – whatever that term might embrace – was calculated to circumvent State governments and incorporate local governments into substitute quasi-States.

The electorate overwhelmingly rejected this proposal. It was passed in only one State, New South Wales, with a wafer thin majority of 50.79 per cent. The overall vote in favour of the proposal was only 46.85 per cent.

The voting was as follows:

State	Number on rolls	Ballot papers issued	For		Against		Informal
				%		%	
New South Wales	2 834 558	2 702 903	1 350 274	50.79	1 308 039	49.21	44 590
Victoria	2 161 474	2 070 893	961 664	47.38	1 068 120	52.62	41 109
Queensland	1 154 762	1 098 401	473 465	43.68	610 537	56.32	14 399
South Australia	750 308	722 434	298 489	42.52	403 479	57.48	20 466
Western Australia	612 016	577 989	229 337	40.67	334 529	59.33	14 123
Tasmania	246 596	237 891	93 495	40.03	140 073	59.97	4 323
Total for Commonwealth	7 759 714	7 410 511	3 406 724	46.85	3 864 777	53.15	139 010

Obtained majority in one State and an overall minority of 458 053 votes. *Not carried*

It is interesting to note that the greatest opposition to, and least enthusiasm for, the proposal was from the less populous States, Western Australia in particular being traditionally wary of Canberra-focussed centralism.

The 1988 referendum, initiated by the Hawke Government to implement one of the recommendations of the Constitutional Commission⁵ (1985-88), proposed to amend the Constitution to add a new section 119A which would have stated:

Each State shall provide for the establishment and continuance of a system of local government, with local government bodies elected in accordance with the laws of the State and empowered to administer, and make by-laws for, their respective areas in accordance with the laws of the State.

By its terms, it sought to recognise the reality of local governments as State-created entities and required the States to create and maintain a system of local governments, without granting them any special powers or autonomy. In its report the Commission, however, averred that

it is time for the recognition of Local Government as a third sphere of government in the Australian Constitution and that such recognition would “give Local Government *the necessary status* as a third sphere of government, and *the necessary standing* to enable it to play its full and legitimate role in the structure of government in Australia, and *as an equal partner* in consultations about the allocation of responsibilities and resources within that structure. [emphasis added]⁶

In short, the Commission was untroubled by the idea of elevating a myriad of local authorities – subordinate creatures of the States, drawing their legitimacy, responsibilities and powers from their parent State’s legislation – up to a level equal not only to that of their parent States but to that of the national government.

The result was more dismal than the earlier attempt. No State supported the proposed amendment and only 33.61 per cent of electors voted in favour of it:

State	Number on rolls	Ballot papers issued	For		Against		Informal
				%		%	
New South Wales	3 564 856	3 297 246	1 033 364	31.70	2 226 529	68.30	37 353
Victoria	2 697 096	2 491 183	882 020	36.06	1 563 957	63.94	45 206
Queensland	1 693 247	1 542 293	586 942	38.31	945 333	61.69	10 018
South Australia	937 974	873 511	256 421	29.85	602 499	70.15	14 591
Western Australia	926 636	845 209	247 830	29.76	584 863	70.24	12 516
Tasmania	302 324	282 785	76 707	27.50	202 214	72.50	3 864
Australian Capital Territory	166 131	149 128	58 755	39.78	88 945	60.22	1 428
Northern Territory	74 695	56 370	21 449	38.80	33 826	61.20	1 095
Total for Commonwealth	10 362 959	9 537 725	3 163 488	33.61	6 248 166	66.39	126 071

Obtained majority in no State and an overall minority of 3 084 678 votes. *Not carried*

Forthcoming referendum proposal and its genesis

As part of the agreement with the Greens and Independent members of the House of Representatives,

Tony Windsor and Rob Oakeshott, which enabled them to form government following the 2010 election, the ALP committed to two referenda to amend the Constitution, to be put to electors at or before the next Commonwealth general election – one relating to Indigenous peoples, and the other concerning local government.⁷

The latter is consistent with ALP policy, at the 2007 election, to recognise local government constitutionally and to elevate the status of local government to that of being equal partners in the ALP’s vision of “co-operative federalism”.

Recognition is supported by the Australian Local Government Association (ALGA), on the basis that including local government in the Constitution is “the best way to ensure the future stability of local communities across Australia”, as though that is somehow under threat. The argument in favour of recognition, at least from ALGA’s perspective, seems to be that constitutional status will not only preserve the existence of local governments, but will make them “sustainable” by making them financially independent of, or less reliant upon, the States.⁸

As yet, not even a preliminary draft of the form of the proposed amendment or referendum question has been circulated. It is, therefore, impossible to consider the possible effects of any proposal other than in a general sense, based on broad principles.

Local government recognition may arguably take three forms:

- (i) symbolic recognition in the preamble or body of the Constitution;
- (ii) practical recognition in the body of the Constitution, whereby symbolic recognition is accompanied by measures designed to protect local government interests;
- (iii) “financial recognition” in the body of the Constitution.⁹

All of these invite concern as to unforeseen consequences for the Federal compact.

A case against

Recognition of local governments in our Constitution would formally enshrine within this country’s constitutional framework a level of government additional to the existing Commonwealth, States and Territories. In the context of Australian history, politics and constitutional law, such recognition would have fundamental consequences for our federation.

Recognition is undesirable for the following reasons, although depending on the specifics of the proposal, some may be more compelling than others, and other objections may emerge:

1. It would distort the federal structure.

As mentioned, the Constitution is a compact between the States and the Commonwealth. Giving local government status within the federal structure redefines the federation and the Constitution becomes something other than a compact defining the relationship between the States and the Commonwealth.

There may be arguments for recasting our constitutional compact and redefining our federation. But if that is to be done,

- (a) it should be following comprehensive debate and with the full participation of the States, they being the parties to the Constitution; and
- (b) after an exploration of the full implications and consequences and not piecemeal and for expediency.

If the proposed recognition is intended to be merely symbolic, then there seems to be no point to it. However, ominously, symbolic recognition of local government is consistent with ALP and ALGA policy to elevate local governments to “equal partnership” with the States that created them and to

which they are subject, and from which they draw their legitimacy. To accord them equal status is necessarily to distort and change the character of the federation.

2. Its effects cannot be known and there is the risk of unintended consequences.

As we do not yet know the precise terms of the proposed amendment, we cannot begin to guess the consequences that may radiate from it.¹⁰ We do know, however, that the trend over the century or so since federation has been an increase in Commonwealth legislative and executive power, and momentum towards centralism, at the expense of the States, facilitated and aided by the High Court of Australia. The federation we have today would be unrecognisable to those who so cautiously negotiated it into existence in the late 19th century.

The 1974 referendum was a direct attempt to bypass the States. The 1988 referendum was not overtly so, but certainly did not demonstrate any change in philosophy or policy direction, and would have entrenched some form of local government as a legal obligation on each State.

How the High Court may have viewed the extent of that obligation, given its willingness now to discern in the Constitution implied “nationhood powers” and other concepts that were alien to the thinking of the drafters of the Constitution more than a century ago, is something upon which one can only speculate – but one finds no comfort in any educated speculation. It is not unreasonable to be concerned that any recognition of local government will be interpreted by the High Court in a manner that will attract to the Commonwealth legislative power and executive authority at the expense of the States.

To the extent that any such amendment expressly or impliedly enabled the Commonwealth Parliament to make laws about local government, section 109 of the Constitution would invalidate inconsistent State laws which also relate to local government – such as provisions in the *Local Government Act* 1995 (WA) and equivalent Acts in other States. The Commonwealth may well come to have a more direct role in the operation and control of local governments throughout Australia.¹¹

3. It would lead to the eclipse of the States and their eventual irrelevance as a balance against the centralised power of the Commonwealth.

The federal structure created by the Constitution is the only means of arresting the trend towards centralism. The dangers were clearly recognised even before the federation came into being. Consideration was given in the course of constitutional conventions to whether individual, sub-state localities might be funded directly by the Commonwealth. In arguing, successfully, against the idea, Edmund Barton, the future prime minister, observed:

The revenue and the financial position of the various colonies would be so impaired and hampered that they would become municipalities instead of self-governing communities.¹²

Campaigning against the proposed amendment at the 1974 referendum, the then Liberal-Country Party Opposition argued that it was calculated to increase Commonwealth centralisation and power at the expense of the States. As the then Leader of the Opposition, B. M. Snedden, pointed out:

Once that centralism is achieved we will find that the grant of money will have a whole series of conditions attached to it which will deprive local government of its own freedom of action, and some bureaucrat in Canberra will decide the way in which local government ought to conduct its affairs.¹³

With some refinement, these can still stand today as the fundamental arguments against the recognition of local government in the Constitution. It is critical to sound governance that no one level of government has too much power. Recognition of local government may well fatally

disrupt the already increasingly precarious balance of power and be the seed for the perversion, if not destruction, of our federation.

Local governments see financial recognition as an opportunity to receive funding directly from the Commonwealth and so enhance their operational capacity and, doubtless, their status as the third tier of government. But the gift of funds is a Trojan horse. They may enjoy the patronage of the Commonwealth for a time, but that will come at the cost of financial dependence upon a government in Canberra, not their State or Territory capital. The negation of the States will ultimately work to the detriment of local governments and the communities they represent.

When the States wither and vanish, so too will local governments as autonomous authorities capable of being responsive to the interests of their ratepayers.

First, there are some 160-odd local governments in Western Australia alone, some with only several hundred ratepayers, and in the order of 560 throughout Australia. It is fanciful to suppose that they could have the same bargaining power at a national level as the six States and two self-governing Territories.

Second, to the extent that the Commonwealth becomes directly involved in the control, regulation and funding of local governments, these local governments would have to liaise and seek approval on all relevant issues with Canberra, not their State parliamentarians and responsible State ministers. Not only will that access be geographically more difficult and expensive, it will also mean that local governments throughout Australia will, for example, have to direct their concerns and requests to one Commonwealth local government minister and department instead of to their respective State ministers and departments. This situation would obviously be more difficult, time consuming, costly, and less efficient or responsive than the current position.

Third, there would be no effective restraint upon a Commonwealth government of the day reshaping local governments to suit its political purposes; such as in the form of regional groupings designed with the imperatives of Canberra in mind, rather than the interests of local populations. Even limited “financial” recognition permitting direct funding would not prevent funds being tied to conditions that may not be desirable to local governments, such as amalgamation with neighbouring local government entities.

History suggests that the concerns that form the basis for the case against recognition are not fanciful. Indeed, one might think that from the Commonwealth’s perspective, they constitute the point of the exercise.

Successive federal governments, across the political spectrum, have pursued the objectives of centralism and expansion of power and federal authority at the expense of the States, some more overtly than others. The current federal government is no exception, except to be possibly more determined in its approach. It would not be engaging in a referendum to recognise local government if it did not see an advantage to itself beyond mere symbolism.

The arguments against local government recognition in 1974 and 1988 – and, indeed, in 1897 – are as apposite now as they were then.

The *Pape* Case and funding local governments

More recently, advocates of constitutional recognition have argued that the High Court’s decision in *Pape v Commissioner of Taxation*¹⁴ necessitates an amendment that will overcome any adverse consequences of the case for local government funding. It is argued that *Pape* raises serious doubts about the Commonwealth’s ability to apply monies from the Consolidated Revenue Fund directly to activities, programs and persons which are not within its legislative and executive powers.

On one view, if *Pape* has the effect of limiting the range of matters upon which the Commonwealth can expend money directly, it may, nevertheless, be a welcome check on its centralist ambitions. It is argued that the Commonwealth may be disinclined to devote funds to projects that may be of doubtful constitutional legality, thus putting many worthwhile programs at risk.

Although a convenient pretext for those advocating constitutional amendment, there is no certainty

that there is a problem. Indeed, Commonwealth funding continues to flow to local governments via the States.

As recently as June 2011, the Senate Select Committee on the Reform of the Australian Federation took the view that “Commonwealth funding to local government is not as precarious as some have suggested.” Further, at paragraph 6.63:

The committee also believes that the issue of funding for local government cannot be looked at in isolation. It is actually the product of broader issues around the vertical fiscal imbalance experienced by the Australian federation. If states had a greater capacity to raise revenue in line with their responsibilities, the incentive for states to cost shift towards the local government sector would be reduced.¹⁵

I suggest that the *Pape* case does not have detrimental implications for the funding of local government, for two reasons. First, the Commonwealth Parliament can still appropriate money directly for, and the Commonwealth executive can spend that money directly on, local government, where the expenditure is for purposes within existing Commonwealth powers, which powers have been expansively interpreted by the High Court.

Second, *Pape* does not limit other avenues of funding such as section 96 grants of financial assistance. Commonwealth funding may continue to be made to the States on the condition that those funds are immediately and directly given to local governments. Such specific purpose grants of Commonwealth funds are a routine means by which the Commonwealth provides funds to activities, programs or persons and its ability to fund local government by this mechanism is effectively unlimited.

It may be argued that indirect funding is inefficient. That may be right, but one ventures to suggest that a federal system by its very nature involves some level of inefficiency. Just as it may be said that “in a democracy, sometimes the other side wins”, so it may be expected that in a federation, sometimes one or other of the tiers of government does not get to do what it wants in the manner that it prefers. Bicameral legislatures and separation of powers also give rise to inconveniences and inefficiencies for a government of the day, but that is not a sufficient reason to abolish them; quite the contrary. Diffusion of political power is essential to such power being used in a manner responsive to local conditions and local influence. Centralisation inevitably tends in the opposite direction and generally results in decision-making for the lowest common denominator.

The *Pape* decision, like other High Court cases (especially in the field of constitutional law), is open to varying and different interpretations. Government funding practices and further High Court consideration may provide clearer guidance as to the implications of *Pape* for Commonwealth funding generally.¹⁶

Relevantly, however, there is no imperative for constitutional amendment at this time based on *Pape*.

Endnotes

1. Until section 128 was amended by the *Constitution Alteration (Referendums) Act 1977*, the electors in Territories were not counted towards the majority of electors necessary to approve the proposed law.
2. Michael Wood, “The ‘new federalisms’ of Whitlam and Fraser and their impact on local government”, *Australian Journal of Political Science*, vol 12(2), 1977, 104.
3. E. G. Whitlam, “A new federalism”, *The Australian Quarterly*, vol 43(3), 1971, 11. However,

see the analysis of the conflicting themes articulated in the article by Geoffrey Sawer, “Towards a New Federal Structure?”, *Labor and the Constitution 1972-1975: The Whitlam Years in Government*, Heineman, 1977, 5-8.

4. Lyndon Megarrity, *Local government and the Commonwealth: an evolving relationship* (2011), Commonwealth Parliament Library Research Paper No.10, 6-7 & 9-10 and citing constitutional lawyer Geoffrey Sawer that the regional organisation was “little more than a post office for transmitting applications from the member local governments”, the successful applicants gaining Commonwealth funds via the States. The AAP provided regionally-organised funding for local social welfare programs such as emergency accommodation for women and children.
5. One member of the Constitutional Commission was the former prime minister, the Honourable E. G. Whitlam; the others were Sir Maurice Byers, QC, Professor Enid Campbell, the Honourable Sir Rupert Hamer, and Professor L. Zines.
6. Constitutional Commission, *Final Report of the Constitutional Commission*, vol 1, AGPS, Canberra, 1988, 442-443.
7. *The Australian Greens & The Australian Labor Party (“The Parties”) – Agreement*, (1 September 2009) (agreeing to “Hold referenda during the 43rd Parliament or at the next election on Indigenous constitutional recognition and recognition of local government in the Constitution.”)
8. ALGA website www.alga.asn.au and statement by the ALGA President Geoff Lake. At its December 2008 ‘Constitutional Summit’, ALGA resolved that “to ensure the quality of planning and delivery of services and infrastructure provided to all Australians, and the ongoing sustainability of local government, any constitutional amendment put to the people in a referendum by the Australian Parliament (which could include the insertion of a preamble, an amendment to the current provisions or the insertion of a new Chapter) should reflect the following principles:
 - The Australian people should be represented in the community by democratically elected and accountable local government representatives;
 - The power of the Commonwealth to provide direct funding to local government should be explicitly recognised; and
 - If a new preamble is proposed, it should ensure that local government is recognised as one of the components making up the modern Australian Federation.”
9. N. McGarrity & G. Williams, “Recognition of local government in the Australian Constitution”, *Public Law Review*, vol. 21(3), 2010, 164-187.
10. Advocates of recognition has suggested that the *Pape* “problem” could be overcome by an amendment to section 96 of the Constitution, which currently reads:

“The [Commonwealth] Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.”

by adding, after the word “State”, the words “or local government body”. But this alone begs a number of questions. Is a local government “body” a local government established by a State or Territory? Can it include something more or less? A regional council established by two or more local governments under the *Local Government Act 1995 (WA)*? A regional subsidiary established under the *Local Government Act 1999 (SA)*? An agency subordinate to and created by, or forming part of, a local government established under those Acts?

11. For example, the High Court may have ample scope for imaginative interpretation in deciding what is meant by a “local government” or a “local government body”.
12. E. Barton (speaking at the Australian Federal Convention, second session, 1897), cited in C Aulich and R. Pietsch, “Left on the shelf: local government and the Australian constitution”, *Australian Journal of Public Administration*, Vol 61(4), 2002, 18.
13. B. M. Snedden (Leader of the Opposition), “Constitutional Alteration (Local Government Bodies) Bill 1974”, Second reading speech, House of Representatives, Commonwealth Parliamentary Debates, 15 November 1973, 3437.
14. *Pape v Commissioner of Taxation* [2009] HCA 23. See generally Anne Twomey, ‘Pushing the Boundaries of Executive Power – Paper, the Prerogative and Nationhood Powers’, *Melbourne University Law Review*, vol. 34, 2010-11, 313.
15. Senate Select Committee on the Reform of the Australian Federation, *Australia’s Federation: an agenda for reform*, 30 June 2011, 99.
16. For example, it may be that their functions and services make local government councils “trading corporations” for the purposes of the Commonwealth’s section 51(xx) “corporations” power, so bringing them within the Commonwealth’s power to directly fund activities, programmes and persons. There are High Court cases which point to the affirmative, including *Ex parte St George County Council* (1973) 130 CLR 533 and *Commonwealth v Tasmania* (1983) 158 CLR 1 which have considered the interpretation of the words “trading corporation”. Otherwise, there are also implied Commonwealth legislative powers including the ‘nationhood’ power which was discussed in the *Pape* case, as well as legislative powers which may be applicable to specific purposes, such as that relating to interstate and overseas trade and commerce in section 51(i) and the external affairs power in section 51(xxix), the latter having been given an expansive interpretation by the High Court over the years.

Chapter Twelve

The Constitutionality of the Commonwealth's School Chaplaincy Program

Williams v Commonwealth of Australia & Ors (HCA: S307/2010)

A. J. Stoker

The challenge mounted by Mr Ronald Williams of Toowoomba, Queensland, to the constitutionality of federal funding of the National School Chaplaincy Program (NSCP) has sparked a public debate, led by those who share his views, about whether there is a place for those with religious beliefs to work in support roles in government schools.

At first glance, the matter appears to be a case that is just about section 116 of the Constitution. In fact, that was not the focus of the submissions made before the High Court, and the section 116 argument was not, in my view, the strongest in the Plaintiff's arsenal.

More importantly, the matter presents an important opportunity for the Court to re-evaluate the nature and scope of the executive power of the Commonwealth.

This paper, prepared at a time when the Court's judgment is reserved, considers the arguments mounted by the parties, their strengths and some potential implications of the decisions that are open to the Court.

The Funding Arrangements

The NSCP and Darling Heights State School Funding Agreement

The NSCP is not a creature of statute. It is an executive program administered by the Department of Education, Employment and Workplace Relations (DEEWR), formerly the Department of Education, Science and Training (DEST), through a series of funding agreements concerning specific schools. Upon its inception in 2007, the program made available funding to be distributed to government and non-government schools for the purpose of establishing school chaplaincy services or for enhancing such services where they already existed. Participation by schools in the NSCP is voluntary, as is participation by individual students if the school that they attend receives funding.¹

The definition of school chaplain under the NSCP Guidelines is a person who is recognised:

1. by a local school, its community and the appropriate governing authority of the school as having the skills and expertise and experience to deliver school chaplaincy services to the school and its community; and
2. through formal ordination, commission, recognised qualifications or endorsement by a recognised or accepted religious institution or a State/Territory government approved chaplaincy service.

The mandate of a school chaplain under the NSCP Guidelines is to provide general religious and personal advice to those students who seek it, to provide grief support where necessary, and to support the development of an environment of respect, tolerance and cooperation for the various spiritual practices of students at a school.

On 9 November 2007, the Darling Heights State School Funding Agreement (the Agreement)

was made between the Commonwealth and Scripture Union Queensland (SUQ) for the provision of funding under the NSCP. The Agreement incorporated the NSCP Guidelines for the conduct of school chaplains and contemplated the making of payments by the Commonwealth to SUQ upon compliance by the latter with various obligations relating to the provision of chaplaincy services at the school. The Agreement expired on 31 December 2011 and all payments due to SUQ under the Agreement had been made at the time the matter was heard.²

The challenge

The challenge brought by the Plaintiff, Mr Ronald Williams, was met with joint submissions from the Commonwealth as First Defendant, the Minister for School Education, Early Childhood and Youth as Second Defendant, and the Minister for Finance and Deregulation as Third Defendant. The Fourth Defendant, Scripture Union Queensland, made separate submissions. Each of the States and the Churches' Commission on Education Incorporated intervened and made submissions.

The proceedings were commenced in the original jurisdiction of the High Court conferred by section 75(iii) and 75(v) of the Constitution and section 30 of the *Judiciary Act* 1903 (Cth).

Issues before the Court

The Plaintiff called upon the Court to decide the following questions:

1. **Standing:** Does the Plaintiff, Mr Ronald Williams, have standing to bring a challenge and subsequently seek the relief claimed in his writ of summons?
2. **Appropriations:** Is the drawing and expenditure of funds from the Consolidated Revenue Fund for the purposes of the NSCP, and therefore for the purpose of making payments pursuant to the Funding Agreement, authorised by the relevant appropriation legislation?
3. **Executive Power:** Is the Funding Agreement beyond the executive power of the Commonwealth to the extent that the executive power of the Commonwealth includes:
 - a. the power to enter into contracts in respect of which the Constitution confers legislative power of the Commonwealth?
 - b. the power to enter into contracts in respect of benefits for students within the meaning of section 51 (xxiiiA) of the Constitution?
 - c. the power to enter into contracts in respect of trading corporations within the meaning of section 51 (xx) of the Constitution?
4. **Section 116:** Does the Funding Agreement breach the requirement in section 116 of the Constitution that “no religious test shall be required as a qualification for any office or public trust under the Commonwealth?”

Standing

The first issue considered by the Court was whether the Plaintiff had the necessary standing to bring a challenge.

Questions of standing are subsumed within the constitutional requirement that there be a “matter” or “justiciable controversy” for the Court to decide.³ Justice Gibbs (as he then was) in *Australian Conservation Foundation v Commonwealth*⁴ said that for a person to have standing before the Court they must have a special interest in the matter. That must be something more than “a mere intellectual or emotional concern.” As His Honour put it:

a person is not interested . . . unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds, or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.⁵

The arguments with regards to standing can be broken down into two components:

1. Does the Plaintiff have a necessary special interest in the matter?
2. Would success in the matter confer upon the Plaintiff the necessary advantage, given that all payments under the agreement had been made and it was due to expire?

Special interest

The Plaintiff's case was brought before the High Court in his capacity as a parent of students at the Darling Heights State School. The Plaintiff objected⁶ to the presence of chaplains at the school, and said that their work had resulted in there being a non-secular, pro-Christian culture at the school. He argued that there should be a "wall of separation" between the church and the state, and that the presence of chaplains in public schools has eroded that separation.

The Plaintiff said that he had the "special interest" necessary to challenge the Agreement, because his children attend a school in respect of which funds have been expended by the Commonwealth.⁷

The Commonwealth did not dispute the Plaintiff's standing to challenge the validity of the Agreement and the power of the Commonwealth to continue to make payments under it, relying on the principle that a contract which bound the Commonwealth to do something which it was not constitutionally permitted to do would be invalid.⁸ However, the Commonwealth contested the Plaintiff's standing to challenge the validity of the drawing of money from the Consolidated Revenue Fund. It argued that the Plaintiff's special interest in the *expenditure* of Commonwealth money does not give him standing to challenge the appropriation itself or to raise questions as to its scope. Further, the Plaintiff has no interest in the appropriation of money from the Consolidated Revenue Fund beyond that of any other member of the public – a class of persons too remote to have standing.⁹

The Commonwealth noted that the High Court in *Victoria v The Commonwealth (the AAP Case)* held that Appropriation Acts are fiscal rather than regulatory in character¹⁰ and, therefore, "a citizen has no interest in money standing to the credit of the Consolidated Revenue Fund such as to support a contention that a payment to another from the Fund is not authorised by an appropriation."¹¹ This submission was adopted by Queensland¹² and South Australia.¹³

Of course, the Attorney-General of Queensland was correct to observe that the concessions made by some parties as to standing do not bind the Court.¹⁴

The Plaintiff had relied on the decision of the Court in *Pape v Commissioner of Taxation*¹⁵ as it related to standing. In *Pape* it had been argued against the plaintiff that although he had sufficient interest to challenge the payment to him of a \$900.00 "tax bonus" from the Commonwealth, he did not have standing to seek a wide declaration that the Act providing for it was invalid. The Court held that Mr Pape did have the necessary standing for both purposes. It was noted by Heydon and Kiefel JJ that to hold otherwise would have serious implications for the rule of law.¹⁶

Queensland argued that the facts of *Pape* could be distinguished from the Plaintiff's circumstances. Mr Pape was a personal recipient of the payment he challenged. In contrast, Mr Williams is not a direct party to the Agreement or even an indirect recipient of its benefits.¹⁷ Mr Williams's children have never participated in the NSCP, nor do they have an obligation to do so. There was nothing before the Court to suggest Mr Williams wished to be a counsellor or a mentor to other children at the Darling Heights State School and that the Agreement provides an obstacle to him by imposing a religious observance.¹⁸

Effluxion of time

For a constitutional “matter” to exist, there must be a real, as opposed to theoretical, controversy between the parties. The Commonwealth and SUQ argued that, because the Agreement had been signed two years before Mr Williams’ children enrolled at the school, and all relevant monies had been paid by the time of the challenge, there was no longer such a controversy.¹⁹

The Plaintiff argued “that funds expended during financial years prior to the enrolment of any of his children at the School assisted in entrenching a program which now affects his children at that School”, such that there remained a justiciable controversy.²⁰

There can be no standing where the matter to be heard is one over which the Court could not grant a remedy. SUQ argued, “As no further payments are due to be made under the Agreement, and no further funds are to be drawn prior to the expiry of the agreement on 31 December 2011 pursuant to any Appropriation Act, there is no proper basis for any relief to be granted against the defendants.”²¹ Even if Mr Williams’s arguments were good, in circumstances where the contract had run its course there would be no remedy available to correct the wrong identified. If there is no legal remedy for a wrong, there can be no matter for the purposes of Chapter III of the Constitution.²²

The Plaintiff’s answer to this was that the mere fact of the Agreement’s expiry does not deprive him of standing to allege that there was no appropriation. As his Counsel expressed it, there is just a much standing in order to put an argument based upon the current arrangement and its efficacy and validity, given the obvious intention that the scheme continue, as there would be if there were still payments about to be made under the current arrangement . . . [because] there is no suggestion this is intended to be a one-off arrangement.²³

In my view there is some strength in the arguments made by the Commonwealth and Queensland, and the Court’s decision will be an interesting development in this field.

Appropriations

The Plaintiff argued that the Commonwealth had not passed a valid appropriation to authorise the funding of the NSCP. He said:

[T]he relevant Appropriation Acts, beginning with the 2006-2007 *Appropriation Act (No 3)* (Cth) and continuing with the 2011-2012 *Appropriation Act (No 1)* (Cth) – each entitled ‘An Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government and for related purposes’ – did not and do not authorise the drawing of money from the Consolidated Revenue Fund for the purposes of the NSCP on the basis that the NSCP was and remains outside of the concept of ‘ordinary annual services of the Government’ as understood between the Houses of Parliament.²⁴

The Plaintiff’s submission is based on the notion that there is an understanding between the House of Representatives and Senate to the effect that new policies, which have not been authorised by their own legislation, will not be provided for within Appropriation Acts, which are reserved for drawings for the “ordinary annual services of the Government.”²⁵ He argued that the 2006-2007 *Appropriation Act (No 3)* (Cth), which was the first Act to allocate funds for the NSCP, did so for a new policy initiative in breach of this understanding.

This argument must be considered against the background of section 53 and section 54 of the *Constitution*, which together relevantly provide that the Senate does not have the power to amend proposed laws appropriating revenue for the ordinary services of the government, and that such laws shall deal only with such an appropriation.

The understanding on which the Plaintiff relies is what is known as the “1965 Compact,”²⁶ an agreement between the Senate and the Government that arose from an attempt by the Government

to “place in the non-amendable annual appropriation bills provision for some matters which were traditionally regarded as not forming part of the ordinary annual services [of the Government].”

A statement was made on behalf of the Government, indicating that certain items would not be regarded as falling within the scope of the definition of the ordinary services of the government. Those items included construction of public works and buildings, acquisition of land and buildings, capital expenditure on plant and equipment, section 96 grants to the States and “new policies not authorised by special legislation, subsequent appropriations for such items to be included in the appropriation bill not subject to amendment by the Senate.”²⁷

The Compact was reaffirmed by resolution of the Senate in 1977²⁸ and adjustments to the inclusions have been made on a number of occasions since that time. Most notably, from 2005 to 2008 there were instances both of the inclusion of expenditure outside the definition of the ordinary services of the Government and calls from Senate committees to clarify and resolve the position in relation to spending of that kind.²⁹

The Commonwealth argued that the Plaintiff’s argument must fail because:

1. The relevant Appropriation Acts clearly and expressly authorised the drawing of funds for the purposes of the NSCP, such that there is no need to resort to the consideration of the long title to understand the operation of those Acts;³⁰
2. The history of the Australian Parliament does not support the existence of an “understanding” between the Houses which is so settled that it should be enforced. Rather, since 1965 there has been an “ongoing and unresolved dialogue” about this issue;³¹
3. Even if the first time an appropriation was made for the NSCP, in 2006-2007 *Appropriation Act (No 3)* (Cth), there had been reasonable cause for objection, the subsequent Appropriation Acts dealt with truly continuing, rather than new policies and so fall within that definition of the ordinary services of the government. To the extent that the Plaintiff has the right to challenge the appropriation (which was not conceded³²), he could only do so for the current one, which the Commonwealth argued was without defect.³³

The Scripture Union also observed that the practice enunciated in the 1965 Compact was variously adopted and abandoned in the period from 1901 to 1965, demonstrating that it was not a convention fixed for all time.

On balance, the first argument expressed by the Commonwealth is likely to be preferred.³⁴

Executive power

The most interesting, and potentially the most significant, arguments in the case centre upon the scope of the executive power.

The Plaintiff argued that neither:

1. the executive’s power to enter into contracts outside the scope of matters within the legislative power of the Commonwealth; nor
2. the executive’s power to contract in respect of benefits to students under section 51 (xxiiiA); nor
3. the executive’s power to contract in respect of trading corporations, under section 51 (xx);

were sufficient to support the Darling Heights Funding Agreement and by extension, all contracts to effect the NSCP are invalid.

Section 61 – the power of the Executive Government to enter into the Agreement

The first of the Plaintiff’s three questions is one of great significance. To use some of the words mentioned in the submissions made before the Court, it requires examination of the largely untested

assumption that executive power shadows the heads of legislative power in section 51 of the Constitution.³⁵

It is useful at this juncture to summarise the sources of Commonwealth executive power:

1. those conferred under section 61 (as supplemented by those conferred on the Governor-General);
2. those conferred by statute;
3. those derived from the prerogatives of the Crown;
4. those emanating from the status of the Crown as a person; and
5. those deriving from Australia's status as a nation.³⁶

This case particularly examined the power of the executive to contract, a power emanating from the status of the Crown as a person.

The executive power of the Commonwealth to enter into contracts is not unlimited, and extends at least to the capacity to contract in relation to matters which have been or could be the subject of valid legislation.³⁷ It also extends to those powers and capacities derived from the character and status of the Commonwealth as a national polity,³⁸ which include circumstances such as those which were considered by the Court in *Pape*.³⁹ This power is limited to engagement by the executive "in activities and enterprises peculiarly adapted to the government of the country," and does not extend to "any subject, which the Executive Government regards as of national interest and concern."⁴⁰

When considering the areas into which the executive power will extend based on that national character, regard must be had to the distribution of powers between the Commonwealth and the States. As Western Australia said in its submissions,

[t]he existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence.⁴¹

The Plaintiff,⁴² New South Wales,⁴³ Tasmania,⁴⁴ Victoria⁴⁵ and Western Australia argued that where there is no relevant head of legislative power, the Funding Agreement must be outside the scope of the executive power of the Commonwealth because it cannot be described as arising peculiarly from the status of Australia as a national polity.⁴⁶

In contrast, the Commonwealth and SUQ⁴⁷ argued that while the executive powers of a governmental nature and special privileges enjoyed by the Crown are to be exercised only to the extent that to do so is consistent with the division of legislative powers effected by the Constitution, that rule should not apply in relation to the capacity of the Commonwealth to spend money. That is because the power to spend is not something uniquely governmental or an aspect of the prerogative, but it is in the nature of an act within the power of *any* person. They added that Commonwealth spending does not displace the laws of a State or territory, such that it might impinge on the principle in *Davis v The Commonwealth*.⁴⁸

The Commonwealth relied upon the following comment by Gummow, Crennan and Bell JJ in *Pape*:

What are the respective spheres of exercise of executive power by the Commonwealth and State governments? We have posed the question in that way because it is only by some constraint having its source in the position of the Executive Governments of the States that the government of the Commonwealth is denied the power, after appropriation by the Parliament, of expenditure of moneys raised by taxation imposed by the Parliament. Otherwise, there appears to be no good reason to treat the executive power recognised

in section 61 of the *Constitution* as being, in matters of the raising and expenditure of public moneys, any less than that of the executive in the United Kingdom at the time of the inauguration of the Commonwealth.⁴⁹

Relying upon this statement, the Commonwealth contended that it was not excluded from spending in relation to certain areas to leave the field clear for the States, because its spending posed no “threat to the position” of the States’ executive governments.

The Commonwealth added that to confine its power to spend in line with the distribution of legislative power in the Constitution would ignore the effect of its broad taxing power. In doing so, it cited the same judgment in *Pape*.⁵⁰

Further, to say that the power of the Executive Government of the Commonwealth to expend moneys appropriated by the Parliament is constrained by matters to which the federal legislative power may be addressed gives insufficient weight to the significant place in section 51 of the power to make laws with respect to taxation.

In essence, the Commonwealth argued that because the power to tax is broad, so too is the executive’s power to spend.

It is worth examining the way in which the Court has, during recent decades, clarified (and to some extent expanded), the scope of executive power that may be exercised without a head of legislative power.

In 1975, Gibbs J in the *AAP Case* stated the principle as: “[T]he executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth.”⁵¹ In oral argument, at least Gummow and Hayne JJ commented that this was today “too narrow” a construction of the executive’s power.

By 1988, in *Davis v Commonwealth*, it was held by Mason CJ, Deane and Gaudron JJ that the executive could act beyond the legislative competence of the Commonwealth, where that action had the following character: “[T]he existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence.”⁵²

In the same case, Brennan J said that the process of determining whether a certain act lies within the executive power of the Commonwealth: “[I]nvites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question or the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit.”⁵³

By 2009 executive power had, by the decision in *Pape*, been expressed to include, as well, short-term fiscal measures to respond to a national crisis in economic conditions. Other cases had also held that it included the power to establish a body for commemoration of the bicentenary⁵⁴ and the making of a request to a foreign state for the detention of a fugitive.⁵⁵

In this case the High Court may decline to further fill out the meaning and scope of executive power. However, if it chooses to walk through the door opened ever-so-slightly by *Pape*, it could have a dramatic impact upon the relationship between the States and the Commonwealth.

In my view, it is this point that will provide the most fertile ground for the development of the law.

Benefits to students

The parties argued their cases upon the (reasonable) basis that if there were an intersection between section 61 and a head of legislative power, it would provide a footing for the exercise of the executive power to spend money on the NSCP.

In my view the strongest of the arguments made in favour of the validity of the arrangements for funding the NSCP was that which relied on the intersection between section 61 and section 51 (xxiiiA) which provides that the Commonwealth shall have power to make laws with respect to “the

provision of . . . benefits to students.” That is, the Commonwealth would have executive power to fund the NSCP under section 61 provided that the program could be shown to fall within the scope of this head of legislative power.

The case made against validity on this ground

The Plaintiff, Western Australia and Victoria argued that the intersection of section 61 and section 51(xxiiiA) would not support the constitutionality of the NSCP.

The meaning of “benefits”

First, it was argued that the use of the word “benefits” in that subsection should be understood to refer solely to payments of money directly to the party in individual need, as opposed to the payment of funds to a third party (SUQ) for it to provide services to students. The Plaintiff characterised appropriations of the latter kind as of general social benefit, rather than a direct benefit to a particular student.⁵⁶ In support of this view, the Plaintiff cited the decision of Dixon J in *British Medical Association v The Commonwealth*,⁵⁷ in which His Honour considered the history of the use of the word “benefits” in the vocabulary of friendly and benefit societies to refer to payments in money and provision of medical attention for contributing members and their dependants.⁵⁸

The Plaintiff contended that there was a distinction between “a benefit”, which refers to a particular result that is generally beneficial, and “benefits”, which is a reference to a monetary payment directed to a particular individual. It was argued that, to fall within section 51(xxiiiA), a benefit needed to be, first, a benefit in money or money’s worth to or for individual students and not simply students as a class or as a whole; and, second, it must be money directed to meeting a need in their capacity as a student.⁵⁹ The Plaintiff suggested that the manner in which section 51(xxiiiA) was discussed in the lead-up to the referendum regarding whether it should be inserted into the Constitution reflects an understanding that it was intended to encompass the payment of various social security-style benefits, rather than the indirect provision of social services.⁶⁰

Chaplaincy as the provision of education

Second, it was argued that the structure of section 51(xxiiiA) could not support the provision of educational services. This argument is closely related to the first, and is about whether or not the provision of the service has a sufficient relationship to the activity of being a student. The Plaintiff argued that the provision of chaplaincy services benefits students in the same way that the existence of the education system as a whole, or a school department, benefits students, but that it does not fall within the idea of “benefits to students” in the sense it is used in section 51(xxiiiA).⁶¹

Western Australia explained the argument thus: the use of the word “students” in section 51(xxiiiA) means that eligibility for any “benefit” under the section is predicated on the person being already enrolled in an educational institution. The implication is that the power cannot extend to the establishment of schools and other educational institutions, or the provision of education by the Commonwealth. As chaplaincy services comprise part of the operation of a school, they cannot be within the scope of the power.

A benefit to students alone

Third, it was argued by the Plaintiff and Western Australia that chaplaincy services cannot be characterised as a benefit that is given to students, because it is not given to students alone. Rather, it is provided to the whole of a school community, including teachers and parents.

This argument takes a practical view of the role of chaplains. SUQ argued that the availability of chaplaincy services in schools is a direct resource available to students in their journey of learning. Any assistance they provide to other members of the school community is a mere incident of their primary role and does not detract from the validity of the arrangement.

The case made in favour of validity on this ground

The Commonwealth,⁶² Scripture Union,⁶³ Queensland⁶⁴ and South Australia⁶⁵ argued that the NSCP came within the scope of the head of power in section 51(xxiiiA) such that the executive power could be used to give effect to the Agreement.

The Churches' Commission on Education Incorporated largely agreed with the submissions made by these parties.⁶⁶

The meaning of "benefits"

In essence this argument was that the word "benefits" should be understood to encompass direct payments to students as well as the provision of goods and services to them, whether conferred directly or indirectly.

In *British Medical Association v The Commonwealth*, Dixon J said:

The general sense of the word 'benefit' covers anything tending to the profit advantage or gain or good of a man and is very indefinite. But it is used in a rather more specialised application in reference to what are now called social services; it is used as a word covering provisions made to meet needs arising from special conditions with a recognised incidence in communities or from particular situations or pursuits such as that of a student, whether the provision takes the form of money payments or the supply of things or services.⁶⁷

This statement, in my view, provides some support for an understanding of "benefits" that encompasses both direct payments of money and the indirect provision of money for the supply of services. The Court expressed a similar view in *Alexandra Private Hospital v The Commonwealth*: "the concept intended by the use in the paragraph of the word 'benefits' is not confined to a grant of money or some other commodity. It may encompass the provision of a service of services."⁶⁸

In my view, this is the better view on the definition of "benefits".

Chaplaincy as the provision of education

The same parties argued that, upon an interpretation of the section using all of the generality that the words used admit,⁶⁹ the Commonwealth was not prevented from involving itself in the provision of education. In the event that such a limit existed, it would not prevent the provision of services to students that overlapped or interacted with learning itself.

In its submission, Queensland explained that the *Education Act* 1945 (Cth), which existed at the time of the insertion of section 51(xxiiiA), and the validity of which cannot have been intended to be disturbed by the amendment, provided for a Universities Commission with broad powers to arrange for the training of discharged members of the armed forces, and to assist other persons to obtain training. It argued that this suggests the section was intended to encompass a broad range of services and (perhaps less relevantly) a broad definition of "students."⁷⁰ This example weighs against Western Australia's argument that the Commonwealth must not fund the provision of education services.

A benefit to students alone

The Commonwealth further argued that where services were also provided incidentally to other members of the school community (such as parents or teachers) this would not mean the chaplaincy was any less a "benefit to students."

Conclusion on "benefits to students"

On balance, I think the view of the Commonwealth, SUQ, the Churches' Commission and Queensland should be preferred on this point. The remarks of the Court in *Alexandra Private Hospital*

and *British Medical Association*, along with the historical context of the *Education Act 1945* (Cth), support a meaning for the word “benefits” that is not so confined as was argued by the Plaintiff.

Is Scripture Union Queensland a trading corporation?

The High Court heard argument from the parties about whether or not the executive had power to enter into the Funding Agreement because it came within the scope of the head of power in section 51 (xx) of the Constitution.

With reference to its activities, objects and sources of income, the Plaintiff argued that SUQ could not be characterised as a trading corporation⁷¹ and further submitted that even if it could be so characterised, that alone would be insufficient for the Funding Agreement to come within the ambit of the Commonwealth’s power.⁷² The Plaintiff noted that the Funding Agreement does not require that a recipient of funding under its terms be a trading corporation, and that the Guidelines contemplate agreements with “school registered entities” and State and Territory authorities. He argued that it would be an absurdity for a funding arrangement to be valid purely on the basis of the structure of the entity receiving funding, rather than on the basis of the character of the arrangement.

Most of the States also argued that the Funding Agreement could not be supported on this basis.⁷³ New South Wales contended that even if SUQ is a trading corporation, that does not mean the Agreement is authorised by section 51(xx), because it is the subject matter of the contract, rather than the identity of the contracting party, which is relevant to determining whether section 51(xx) applies in the circumstances of the case. To hold otherwise would allow the executive to contract its way into power simply by entering a contract with a constitutional corporation.⁷⁴

The Commonwealth analysed the activities, characteristics and capacities of SUQ and determined that “both the Commonwealth’s entry into the Agreement and the payment of money to SUQ pursuant to that agreement are within the executive power of the Commonwealth, by reason of SUQ’s character as a trading corporation.”⁷⁵ SUQ made the same argument.

Without delving into the history of the authorities on the scope of the corporations power, the recent authority of the Court in *Work Choices*⁷⁶ makes it clear that the most substantial limit on the corporations power is the character of corporations with respect to which laws may be made. In my view, SUQ’s true character is charitable. Its objects are for the advancement of religion, all of its income is applied to that purpose, and there is no mechanism for the distribution of profit to members, as would be the case in a commercial enterprise. Taking into account the activities of the SUQ,⁷⁷ the limited degree to which trading activity characterises its overall operations and the purposes for which that trade occurs, in my view, the Court is unlikely to hold that the Funding Agreement is supported on this basis.

Section 116

It is this facet of the case that has most captured public debate.

The Plaintiff argued that section 116 of the Constitution, which provides, *inter alia*, that “no religious test shall be required as a qualification for any office or public trust under the Commonwealth,” prohibits the federal funding of school chaplains.

The Plaintiff argued that school chaplains, as defined by the NSCP (that definition is set out under the heading “The NSCP and Darling Heights State School Funding Agreement”), hold an office under the Commonwealth, and that there is effectively a religious test for the role.

Office under the Commonwealth

The Plaintiff contended that the NSCP Guidelines and Code of Conduct regulate interactions between chaplains and consumers of their services to such an extent that DEEWR has effective power to control the commencement and cessation of chaplaincy services. The Plaintiff contended that this level of control is consistent with the proposition that school chaplains are holders of offices

under the Commonwealth within the meaning of section 116 of the Constitution.⁷⁸

The Commonwealth, SUQ, Queensland and South Australia all contended that a SUQ chaplain does not hold an office “under the Commonwealth” within the meaning of section 116 because the chaplains are not engaged in the exercise of public power, nor are they under the effective control of the Commonwealth.⁷⁹

The Commonwealth explained that “office . . . under the Commonwealth” is to be understood as meaning a position in which there is a direct relationship between the Commonwealth and an office. It argued that, “school chaplains are not paid by, do not report to and have no direct relationship with the Commonwealth, but rather school principals are responsible for overseeing the delivery of chaplaincy services within schools. Accordingly, there is no warrant in section 116 for such a broad notion of ‘office’ and this approach, if accepted, would also radically expand the scope of section 75(v).”⁸⁰

On this score, the Commonwealth is right. Were this arrangement to constitute an office under the Commonwealth, one could expect consequences rippling across every entity with which the Commonwealth contracts.⁸¹ It is unlikely to succeed.

Religious test

SUQ referred to the NSCP Guidelines and asserted, “In any event, the Agreement and the NSCP do not require a chaplain to satisfy a religious test . . . as in order to qualify for funding under the Agreement and NSCP, chaplains can be from any religious persuasion or may be a secular pastoral worker.”⁸² Although the NSCP Guidelines indicate that persons of any religious affiliation can be a chaplain, it could be argued that the requirement for chaplains to state their religious affiliation in general could constitute a religious test.

Even if this were to be the case, SUQ rightly notes that: the fact that the Commonwealth is the source of funding for the engagement of the chaplain by SUQ cannot transform the chaplain’s legal relationship with the SUQ and the Darling Heights school principal into a relationship under which the chaplain is holding any office under the Commonwealth. Likewise, because the State of Queensland also provides funding for chaplains . . . this does not result in the chaplains holding any office under the State.⁸³

Conclusion on section 116

Mr Williams’s argument on section 116 must fail. For it to succeed, “an office under the Commonwealth” would be defined to include a person neither appointed by the Commonwealth, nor with powers conferred upon him or her by statute. Here, the chaplain was employed by SUQ and provided services as determined between the school and SUQ. If the argument were to succeed, it would have an absurd result for a whole range of circumstances in which people are employed to provide a service by non-government entities that receive some government funding, or who work for entities that contract with the Commonwealth.

This part of section 116 of the Constitution was based on Article IV of the United States Constitution.⁸⁴ While there is little Australian jurisprudence on the meaning of the word “office” in this context, in United States jurisprudence the term has been understood as a delegation of sovereign power to the person in question for the service of the public.⁸⁵ An NSCP chaplain does not meet this definition.

One also observes that the definition of chaplain in the NSCP Guidelines contemplates the inclusion of secular but appropriately qualified pastoral care workers, not merely those provided through religious organisations. This provides a further practical reason why the challenge on this ground should not succeed.

There is some irony in the fact that this is the argument that has most members of the public

interested in the case. The misconception of many commentators is that section 116 demands a complete separation of church and state in Australia, and in public debates and commentary about the case, this is the issue that dominates. In reality, section 116 provides a far narrower restriction.

Further Observations

What is the current status of the NSCP?

The case arises in an interesting political context. Both major parties have during their time in government supported Commonwealth funding of school chaplains. The program was announced by then Prime Minister, John Howard, in 2006, and re-affirmed in 2009 by then Prime Minister, Kevin Rudd.

In August 2010, Prime Minister Julia Gillard announced that a further \$222 million would be provided so that schools with existing funding arrangements under the NSCP would have their programs funded up to the end of 2014. This will also allow the program to expand to up to 1,000 additional schools, including those in rural, remote and disadvantaged locations. In August 2011 major changes to the Program were announced and the program was subsequently renamed the National School Chaplaincy and Student Welfare Program.

Conclusion

Given the nature of Mr Williams's complaint, one might have expected the challenge to centre on section 116 of the Constitution. Although this ground is argued, the real prospects of the case lie in the scope of the power of the executive.

The High Court's decision on the validity of the arrangements in place for the federal funding of school chaplaincy have the potential to have a substantial impact on the economic relationship between the Commonwealth and the States. Furthermore, if the Court were to take the opportunity to walk through the door opened by Gummow, Crennan and Bell JJ in *Pape*, it would widen the scope of the executive power of the Commonwealth.

Finally, it is worth noting that, whilst the work of school chaplains would be disrupted by a finding that the NSCP is unconstitutional, there is no barrier to the continuation of funding using tied grants under section 96 of the Constitution. The only obstacle would be political will, and if the major parties stay true to their previous public statements, that should be a hurdle easily overcome. In contrast, however, the effect upon the federal balance arising from a finding of a broad executive power would be an egg not easily unscrambled.

* Amanda Stoker gratefully acknowledges the assistance of Stephanie Nielsen in the preparation of this paper.

Endnotes

1. Plaintiff's Amended Submissions, 24 June 2011, p 2.
2. Ibid, 3.
3. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 68 (Gummow, Crennan and Bell JJ).
4. (1980) 146 CLR 494.
5. (1980) 146 CLR 494, 530-31.

6. On his website: www.highcourtchallenge.com, and in media interviews.
7. In contrast to the non-state parties in *Attorney-General (Victoria) ex rel Black v Commonwealth* (the DOGS Case) (1981) 146 CLR 559, 597. Plaintiffs Amended Submissions, 24 June 2011, 10 at [41].
8. Submissions of the First, Second and Third Defendants, 11 July 2011, 6.
9. *Ibid*, p 2; *Anderson v Commonwealth* (1932) 47 CLR 50; *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.
10. *Victoria v The Commonwealth (AAP Case)* (1975) CLR 338, 386-87 (Stephen J), 392-93 (Mason J).
11. Submissions of First, Second and Third Defendants, 11 July 2011, p 2; *AAP Case* (1975) 134 CLR 338, 402 (Mason J); see also *Attorney-General (Vict.) v The Commonwealth* (Pharmaceutical Benefits Case) (1945) 71 CLR 237, 248 (Latham CJ).
12. Written Submissions of the Attorney-General for Queensland (Intervening), 20 July 2011, 2.
13. Written Submissions of the Attorney-General for South Australia (Intervening), 20 July 2011, 2.
14. Queensland submitted that the Court has never been bound to accept the concessions of parties as to constitutional issues and referred to *Coleman v Power* (2004) 220 CLR 1, 231-32 (Kirby J), 298 (Callinan J), 318 (Heydon J) and *Croome v Tasmania* (1997) 191 CLR 119, 127 where the Court considered the “correctness” of concessions that were made, and contended that a concession made by the parties should never be determinative.
15. (2009) 238 CLR 1.
16. (2009) 238 CLR 1, 99 at [274], although their Honours did not find it necessary to finally decide the matter.
17. The Plaintiff further argued that “being a stranger to a contract does not, of itself preclude one from obtaining a declaration that the contract is wholly or partly void, provided one can establish the requisite interest to support such relief.” Plaintiffs Submissions in Reply, p 4; *Adamson v New South Wales Rugby League Limited* (1991) 31 FCR 232, 265-66; *Buckley v Tutty* (1971) 125 CLR 353.
18. Written Submissions of the Attorney - General for Queensland (Intervening), 20 July 2011, p 4.
19. Plaintiffs Amended Submissions, 24 June 2011, p 3 “The plaintiff has had children enrolled at the School since 5 October 2009.” Submissions of the First, Second and Third Defendants, 11 July 2011, p 6.
20. Plaintiffs Amended Submissions, p10.
21. Fourth Defendant’s Submissions, p 4 at [18].
22. *Ibid*, pp 3, 5.
23. Transcript of Proceedings, *Williams v Commonwealth of Australia & Ors* [2011] HCATrans 198 (9 August 2011), p14 at [542] – [547].
24. First, Second and Third Defendant’s Submissions, 20 July 2011, 2 – 3.
25. Plaintiffs Amended Submissions, 24 June 2011, 12 – 15.
26. A detailed history of the Compact can be found in Odgers, *Australian Senate Practice*, 6th Ed

- (1991), 580 – 83.
27. *Odgers' Australian Senate Practice*, 12th Ed., chapter 13, available online at http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers/chap13
 28. 17 February 1977, see *Odgers'*, *ibid.*
 29. *Odgers'*, *ibid.* See also the Fourth Defendant's Submissions, 26 July 2011, 12 - 16.
 30. Submissions of the First, Second and Third Defendants, 11 July 2011, 3.
 31. Submissions of the First, Second and Third Defendants, 11 July 2011, 3 – 4. As the Fourth defendant described it at p 13 of its submissions, "The Compact of 1965 does not, by any means, represent the final word on the ordinary annual services of Government."
 32. Submissions of the First, Second and Third Defendants, 11 July 2011, 6.
 33. Submissions of the First, Second and Third Defendants, 11 July 2011, 5 – 6.
 34. Also advanced by SUQ and Queensland: Fourth Defendant's Submissions, 26 July 2011, 17-19; Submissions of the Attorney-General for Queensland (Intervening), 20 July 2011, 2. Tasmania, Western Australia, South Australia, New South Wales and Victoria made no submissions with respect to this ground.
 35. *Williams v Commonwealth of Australia & Ors* [2011] HCATrans 198 (9 August 2011), p 6, [181]-[183].
 36. A. Twomey, 'Pushing the Boundaries of Executive Power – Pape, the Prerogative and Nationhood Powers,' (2010) 34 MULR 280.
 37. *AAP Case* (1975) 134 CLR 328, 362-63 (Barwick CJ).
 38. *Davis v The Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ).
 39. (2009) 238 CLR 1, 83 (Gummow, Crennan and Bell JJ) at [214] – [215].
 40. (2009) 238 CLR 1, 88 (Gummow, Crennan and Bell J) [228].
 41. Written Submissions of The Attorney-General of Western Australia (Intervening), 1 July 2011, 3 citing *Davis v The Commonwealth* (1988) 166 CLR 79, 93 – 94, (Mason CJ, Deane and Gaudron JJ).
 42. Plaintiff's Amended Submissions, 24 June 2011, 5.
 43. Submissions of the Attorney-General for New South Wales (Intervening), 18 July 2011, 11.
 44. Tasmania adopted New South Wales Submissions; Written Submissions of the Attorney-General of Tasmania (Intervening) 20 July 2011, p 2; Submissions of the Attorney-General for New South Wales (Intervening), 18 July 2011, 11.
 45. Submissions of the Attorney-General For Victoria (Intervening), 20 July 2011, 18.
 46. Written Submissions of The Attorney-General of Western Australia (Intervening), 1 July 2011, 3.
 47. Fourth Defendant's Submissions, 26 July 2011, p 15.
 48. (1988) 166 CLR 79.
 49. (2009) 238 CLR 1, 85 (Gummow, Crennan and Bell JJ) at [220].
 50. (2009) 238 CLR 1, 91 (Gummow, Crennan and Bell JJ) at [240].
 51. *Victoria v The Commonwealth & Hayden* (the AAP Case) (1975) 134 CLR 338, 362.

52. (1988) 166 CLR 79, 93-94.
53. (1988) 166 CLR 79, 111.
54. *Davis v The Commonwealth* (1988) 166 CLR 79.
55. *Barton v The Commonwealth* (1974) 131 CLR 477.
56. Transcript of Proceedings, *Williams v Commonwealth of Australia & Ors* [2011] HCATrans 198 (9 August 2011), p 28, at [1145] – [1151], [1179] – [1185].
57. (1949) 79 CLR 201.
58. (1949) 79 CLR 201, 259.
59. Transcript of Proceedings, *Williams v Commonwealth of Australia & Ors* [2011] HCATrans 198 (9 August 2011), p 29 at [1216] – [1223].
60. *Ibid*, pp 32 – 33, at [1370] – [1411].
61. Transcript of Proceedings, *Williams v Commonwealth of Australia & Ors* [2011] HCATrans 198 (9 August 2011), p 30 at [1253] – [1269].
62. Submissions of the First, Second and Third Defendants, 11 July 2011, 7 -9.
63. Fourth Defendant's Submissions, 26 July 2011, 6 -9.
64. Written Submissions of the Attorney-General for Queensland (Intervening), 20 July 2011, 4 -7.
65. Written Submissions of the Attorney-General for the State of South Australia (Intervening), 20 July 2011, 14 – 16.
66. Proposed Submissions on Behalf of the Churches' Commission of Education Incorporated (Applicant For Leave to Intervene), 29 July 2011, 6-15.
67. (1949) 79 CLR 201, 260.
68. (1987) 162 CLR 271 at 279.
69. *Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479, 492 at [16].
70. Written Submissions of the Attorney-General for Queensland (Intervening), 20 July 2011, 6-7.
71. Plaintiff's Amended Submissions, 24 June 2011, 9.
72. *Ibid*, 8.
73. Submissions of the Attorney-General of Western Australia (Intervening), 1 July 2011, 4-15; Submissions of the Attorney General for Tasmania, 20 July 2011, 2; Submissions of the Attorney-General for the State of South Australia (Intervening), 20 July 2011, 9 -13; Submissions of the Attorney-General for Victoria, 20 July 2011, 4 - 10; Submissions of the Attorney General for New South Wales, 18 July 2011, 12 - 15.
74. Submissions of the Attorney General for New South Wales, 18 July 2011, 13 – 14.
75. Submissions of the First, Second and Third Defendants, 11 July 2011, 14.
76. *New South Wales v The Commonwealth* (2006) 229 CLR 1 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
77. *R v Trade Practices Tribunal; ex-parte St George County Council* (1974) 130 CLR 533.
78. Plaintiff's Amended Submissions, 24 June 2011, 19-20.

79. Submissions of the First, Second and Third Defendant, 11 July 2011, p 17 – 19; Fourth Defendant’s Submissions, 26 July 2011, 16 – 17; Written Submissions of the Attorney-General for Queensland (Intervening), 20 July 2011, 7 – 8; Written Submissions of the Attorney-General for the State of South Australia (Intervening), 20 July 2011, 16-20.
80. Submissions of the First, Second and Third Defendant, 11 July 2011, 18.
81. Submissions of the First, Second and Third Defendant, 11 July 2011, 19.
82. Fourth Defendant’s Submissions, 26 July 2011, 17.
83. Fourth Defendant’s Submissions, 26 July 2011, 17.
84. Quick and Garran, *Commentaries on the Constitution*, 952.
85. Opinion of the Justices, 3 Greenl. (Me.) (1822) 481 at 482.

Chapter Thirteen

Concluding Remarks

The Honourable Ian Callinan

This is an opportunity for me to make some personal observations, if I may, as well as to sum up. I think we have had an interesting and particularly diverse conference. The papers covered a very wide range of topics. Let me say something briefly about each.

Bill Cox gave us a particularly profound insight into the way in which the reserve powers of a State Governor may be exercised. It was valuable to hear those views from a person who had made a study of them and been involved in that office in the exercise, both actual and potential, of those powers.

We were similarly fortunate to have some equally valuable insights from Michael Field. His paper gave us a view of the difficulties of governing, and of the compromises made in minority government – the *realpolitik* of actually being there and having to govern. I was amused by his account of how his cabinet would receive submissions, quite detailed submissions, from the Greens. On some occasions, the cabinet acted upon them. Then Mr Brown, a week later, would make a public statement contradicting the stance that had earlier been taken. You really have to feel a great deal of sympathy for anybody having to govern in those circumstances.

That paper related well to Scott Bennett's informative account of the Hare-Clark voting system. It also illustrated the compromises involved in the exercise of power and raised for me the consideration of at what point is a compromise to be made.

Compromise is inevitable in a democracy. That is the whole idea of a democracy, that nobody has too much power, and that there are checks and balances both practical and legal.

It seemed to me that under the Hare-Clark voting system, perhaps compromises are made too early. They are really made early by the voters. Now that *sounds* more democratic. The voters have more say, but what happens in practice is that a mixed parliament emerges in which it is very difficult for power to be effectively exercised at all. Now we all want to see power carefully curtailed, and no extremes of power, but it needs to be possible to exercise power. Under the Hare-Clark system, power is exercised, I am inclined to think, too early. Under other systems of voting – perhaps, especially, preferential voting – the compromises are made in the parliament. The deals have to be done there, in the upper and lower Houses. If you do not control the upper House, therefore, legislation is not going to pass without some changes to it. The ultimate threat, of withholding supply, may or may not be carried out. But those are the points at which the compromises are made.

Paul Pirani's paper was on the workings of the Australian Electoral Commission. One of my briefs, just before I took silk, was in about 1977. I was to appear for the Australian Electoral Commission in Brisbane in a Royal Commission conducted by Justice McGregor, a Federal Court judge, which related to – even by Mr Malcolm Fraser's standards – a spectacular piece of political miscalculation. The boundaries were being drawn for a new electorate in Southeast Queensland. It was a time of great expansion in Southeast Queensland. Eric Robinson, the Minister for Finance, was an influential member of the Liberal Party, and a member of the House of Representatives. The Liberal Party in Queensland was divided, and some people thought Mr Robinson had too much factional power. There were three members, who were not ministers – one of them was Mr Kevin Cairns – who were at war apparently with Mr Robinson. The idea began to circulate in party circles – this is what I was

told – that Robinson had in some way improperly influenced the drawing of the boundaries of the new electorate.

It was a total misconception. Robinson had nothing to do with it at all except that the new electorate happened to adjoin his electorate. In any event the Inquiry was set up on that false basis. Apparently these three members went to see the Prime Minister, Mr Fraser, and convinced him that there was a possibility of impropriety. It does not seem as if the Prime Minister seriously examined those things in detail at all before he established the Royal Commission.

Royal commissions have a habit of turning round and biting their instigators. And that is exactly what happened.

It was the case in which I think Murray Gleeson, QC, had a first major brief as a silk. He was Counsel Assisting. Mr Tom Hughes, QC, acted for Robinson. The redistribution panel under the Electoral Commission, for whom I was acting, was constituted in those days – and quite sensibly so – by the State Electoral Officer, the Commonwealth Electoral Officer and by a senior retired Commonwealth public servant – in this case, a man who had been a distinguished airman during the Second World War and had also been, I think, a senior official in the Department of Civil Aviation – all people of impeccable propriety and competence. People in these offices conventionally constituted the commission's panel for redistribution and naming purposes. There were, however, all these rumours swirling around that they may have allowed themselves to be improperly influenced, and that Robinson had done it. It was internecine war within a political party and not a matter of any real public interest. Nonetheless, as I say, Mr Fraser established a Royal Commission to inquire into the affair.

As the evidence unfolded, it became more and more obvious that nobody had done anything wrong. But there has to be a culprit – Royal Commissions are expensive – otherwise the money is not properly spent. It is, rather often I fear, the trap of needing to have a culprit into which a Royal Commissioner can fall. Senator Withers, the Minister in charge of electoral administration, became the culprit. For his political power and ruthlessness, he was sometimes referred to as the toe cutter. It turned out that, perfectly properly, he had rung the Chairman of the Electoral Commission and said words to the effect, “When you are giving a name to that electorate, you might care to consider X.” There was no reference to boundaries. Everyone agreed that the name of the electorate was entirely without any political significance. And that is all he did.

Even so, Justice McGregor found, contrary to the submissions of every counsel who appeared in that inquiry, including I think, Mr Gleeson, QC, that Mr Withers had been guilty of impropriety. That was the end of Mr Withers's ministerial career. He was forced to resign. His resignation weakened the Fraser Government because he was regarded as a powerful “machine man”, a political enforcer. It is an interesting piece of political history which came to my mind listening to Paul Pirani.

Years later I appeared in a challenge to the result in the Mundingburra electorate. There had been considerable ineptitude on the part of the State electoral office there: among other things, in failing to get voting papers on time to Australian soldiers who were serving, I think, in Africa. I was acting for the candidate who had missed out and who subsequently won at the by-election ordered by the Court of Disputed Returns because the challenge succeeded. As a consequence, the Coalition returned to government in a minority government, for some two or so years with the support of an Independent, Ms Liz Cunningham. There had really been considerable inefficiency on the part of the State electoral office because, as it turned out, there were enough votes, among those serving soldiers – perhaps soldiers tend to be conservative – to affect the outcome. Indeed, when they had their votes in the by-election for that electorate later, it became obvious that they were largely voting for the conservatives.

Let me say something about Dr Margaret Kelly's paper on the repeal of the Bill of Rights in Victoria. I was struck by her reference to Deakin's statement, “What are states' rights anyway?”. That was not the only disingenuous statement that Deakin made from time to time. I could easily answer the question, and so could Deakin, of course.

What are States' rights? States' rights are the rights that the colonies insisted on retaining as the price of a federation. States' rights were the rights to exercise all of the powers which were not expressly given by the Constitution to the central government. There is no difficulty about the question at all. It was the price that the people of the colonies accepted and paid for, and the condition of the division of power, and the renunciation by them of some of their powers.

People forget that at the time of federation some of the colonies often had their own navies. They were small navies. They also had their own military forces. Again, there were all sorts of cross-continent or inter-colonial agreements to the use of them, and as to various other matters. But the idea that there were no States' rights, and that States' rights should be disparaged or diminished over the years is a startling proposition.

In any event, almost all of us would agree, I think, that Dr Kelly had the right idea about Bills of Rights. I have nailed my colours to the mast. I really do not like the idea of judges exercising any more power than they presently exercise. Indeed, I think on occasions, the High Court has exercised too much power. I have been there. I have sat there. I understand the dispositions and, dare I say it, understand the egos of some judges of the Court over time. I myself was often concerned with the amount of power I had. A degree of humility is important. Sitting there, having the final say on so many matters, does not always do what it should for humility.

On another occasion I gave a paper opposing a Bill of Rights to a conference. An English Law Lord, now a judge of the UK Supreme Court, also spoke at it. He was very much in favour of the exercise of the power conferred by the European Charter, a Bill of Rights. In my paper, which preceded his, I balked at the idea of me determining what I saw as essentially political questions. I said, "I do not think I am qualified to do this. I do not think I have the right to do this, and I do not think the people with whom I sit are as well qualified as parliamentarians, or have the right to do it either." Lord Walker saw no problems about this at all. He said, "I can do this;" he added, "We can do this." And I thought, "Well, if ever I need confirmation that my view is right, that is it." So much for Bills of Rights!

Ben Jellis gave a paper on the Howard High Court. I would not have described the Court on which I sat as the Howard High Court. Ben's paper fitted neatly with the paper by Dr Murray Cranston regarding United States Supreme Court appointments.

There is much about the American political process that I admire. But their manner of making judicial appointments is quite different from ours. The United States Supreme Court itself does different work from the High Court of Australia. The work of the High Court, while I was a member, probably consisted of about twenty per cent criminal work and it was usually not "Human Rights" type of criminal work. It was rather different from the criminal work that the United States Supreme Court does – for example, whether the death penalty should be applied or not. (I might say I am totally opposed to the death penalty. I just do not believe in death penalties for the reason that the system is fallible. That is, however, another matter.)

The way in which the United States Supreme Court reasons is to look, amongst other things, but in particular, at the number of States that have the death penalty. It is almost as if it were undertaking a legislative process. The Court says, "Well, there are now enough states in favour of the death penalty to indicate that is the right view and that therefore is the way it should be." However you look at it, I do not think you can see that as a judicial exercise.

Whenever I had a criminal appeal, I wanted to read the whole record. Sometimes that would be thousands of pages because one of the questions is: has there been a serious miscarriage of justice? And you can only answer that by knowing what the evidence is, and what the summing up was. That is just sheer, hard legal drudgery. It is not a political exercise. That is the sort of work the High Court does. Often there are discrete, neat legal questions in criminal law, but the ultimate question is, miscarriage of justice or not. The United States Supreme Court does not do that. The Supreme Court does not do commercial work as the High Court does. The Supreme Court does not do

administrative law to the same extent as the High Court does. Certainly the Supreme Court does do some, but overwhelmingly the work of the United States Supreme Court is Bill of Rights type of work.

The work of the High Court of Australia, on the other hand, is essentially legal work by legal method. The High Court of Australia is a court of general appeal; that is how the Constitution reads and that is what it is. And although members of The Samuel Griffith Society and politicians probably tend to be much more interested in the constitutional work of the Court, about eighty per cent of the work is not constitutional.

The fact that it is not constitutional is very, very important. The legal discipline involved in doing conventional legal work does, I think, have an impact upon the legal method of the High Court. I like to think it does. I hope it does. It makes the process much more of a true legal process than the process that the United States Supreme Court goes through when it decides its human rights cases.

The point can be underlined in this way. Never once has anybody ever asked me – Australian lawyers do not speak in these terms – how I voted in a case. People will ask, “Well, what did you decide in that case?” In the United States, the question is, “How did you vote in that case?” That says a great deal.

That brings me to the appointment of judges. The first point to remember is that in the United States, most States – I think it is something like 45 or more – elect their judges. Federal and Supreme Court judges are appointed but they are all subject to a confirmation process. In some of those States when the judges are not elected, usually to an appeal court or to fill a vacancy, there is a kind of confirmation process in a subsequent election.

The confirmation process in the Senate is one of the most excoriating processes I have ever seen. I happened to be in the United States when the Bork confirmation hearings were taking place in 1987. I watched them in fascinated horror. I thought that was an experience that I could not have gone through. It was altogether too agonising. I felt so sorry for Bork. I felt sorry for his family. I thought, frankly, the price was too high to pay. I do not think it achieved anything. The candidates try to be very reserved in what they say. The process is designed to bring out their legal, political, social, racial, feminist, religious and other philosophies. They are damned if they do bring them out; they are damned if they do not.

Australia does not have that. I think that our process is better. Appointment is by the Executive. The Executive is answerable to the Parliament. Judicial appointments can be debated in the Parliament. If a government appoints the wrong candidate, then the Government has to suffer. I do not see any problem with that. At the moment I myself am serving on a committee that makes recommendations to the Federal Attorney-General about appointments to one court. I had some reservations about doing it but they are only recommendations to the Attorney-General and ultimately to the cabinet. The Federal Executive Council makes the appointments and has the responsibility for them. That is still a better procedure than the American process.

In the United States the confirmation hearings themselves are so political that it would not be surprising for the judges to act politically. There are two illuminating books; one is called *Closed Chambers*, by Edward Lazarus; the other, *The Brethren*, by Bob Woodward and Scott Armstrong, and both are written in breach of protocol by former clerks (associates) of the judges of the United States Supreme Court. They discuss what happens in the process of reaching decisions there. Usually there is one majority decision and one minority decision. All sorts of compromises are made. One has the impression that judges endlessly negotiate, by and through their clerks and by circulating memoranda, and in direct discussions. It has the effect of a lobby in parliament – you vote for me on this issue and I will be with you on something else.

Let me assure you that, in all the time I was on the High Court, nobody ever suggested anything like that, and nobody would have dared to do so. I would be confident that it has rarely or never happened during the history of the High Court.

We might argue and debate expressions or particular propositions. I remember once, when I wrote a judgment, Justice Dyson Heydon came to see me about it. Unfortunately I had used the cliché, “resonate”. Dyson said to me, “I will join your judgment if you substitute some other word for ‘resonate’.” This you can see was intense bargaining. I said to Dyson, “I was about to join your judgment in such-a-such a matter but I will only do that if you substitute ‘continuing’ for ‘on-going’.” Dyson said to me, “I feel like a man who had been caught with his fly undone.” And that was the only ever bargain Dyson and I made.

Robert Ellicott, QC’s speech was seductive but not, with respect, convincing for me. Indeed, I thought that his proposal was not a viable solution. I would be surprised, indeed, I would also be disappointed, if anybody in this room were not saddened by what is the great tragedy of Indigenous life in this country. Nothing that has been tried seems to have worked. There are still so many disadvantaged Indigenous people. There are almost as many theories on how that position should be changed. Some people are strongly in favour of intervention. Some people are in favour of other things. Nothing seems to have worked.

I do not think that the sorts of statements which Mr Ellicott would include in the Constitution – as well-intentioned as they are – would achieve anything. Indeed, they could be worse than achieving nothing. They are aspirational statements. They are not appropriate for the body of a document which has to be construed. The fact that they might be in the body of the document would mean they would have to be given operation in the way in which a preamble might not, although I would be concerned that it would not matter where you put them, they might still give an opportunity to an expansionist Court to do all sorts of things with them.

Leaving all that aside, it seems to me the greater mischief is that arguments about semantics serve to be a distraction, a diversion from the tragedy of Indigenous life in this country. It is rather like 200 000 or so people walking across the Sydney Harbour Bridge on Reconciliation Day. It may have given all those people a warm feeling, but I suspect it did absolutely nothing for the day-to-day life and despair of Indigenous people generally. Of course, Indigenous people should be recognised for their much longer connexion with the country than western people who have come here. But I myself am more interested in practical solutions than I am in what I think are symbolic ones. It was an interesting speech and it was an expression of a new and interesting point of view.

Justice Heydon spoke on a topic very dear to my heart – constitutional and legislative facts. The dangers in the use of legislative facts are in some ways even greater than the dangers in the use of constitutional facts. One of the speakers yesterday mentioned a case of *Brodie v Singleton Shire Council*. The common law had developed in the United Kingdom and Australia to this point, that statutory authorities (or, as they called them, highway authorities, which really meant local authorities, bridge-building authorities and the like), were liable only for misfeasance and not nonfeasance. That is to say, they were liable for bad execution, which caused injury on roads and the like, but they were not liable for injury as a result of, as it were, the gradual deterioration of those works. The principled basis for that distinction was that there was only a certain amount of revenue available to be spent and nobody would ever have enough money to keep everything in a hundred per cent condition all the time. It was a distinction criticised by a number of people, but through the cases, by the processes of the common law, it had worked out over the years. There were difficulties in marginal cases as there are in other areas of the law but, by and large, we knew what the position was.

In *Brodie v Singleton Shire Council*, the High Court said we are going to get rid of that distinction. I was in dissent in that case. I preferred the distinction to be maintained. The Court relied on a whole lot of legislative facts about what local authorities could do and could not do, in effect how they could and should spend their budgets. What I foresaw was that courts would be substituting themselves for the elected local authorities. The courts would be determining how the budget was to be spent, which I thought was wrong in principle. It also had this practical consequence, that the courts would have to hear longer cases because the local authority or particular authority would need

to call officials to explain and justify the budget allocations. That was exactly what happened. It is not surprising that some, if not all, the States promptly enacted legislation, with some improvements – to restore the well-settled and accepted law to largely what it was. It was an example of overreach by the Court. And it was done in reliance in part at least upon legislative facts.

Let me just say one thing about constitutional facts. I was taught at university, as we all were, that the *Communist Party Case* was a landmark of freedom. We never critically examined the case when I was at the university. And in academia it is rarely critically examined. It is simply there and it is said to be a great case. It was a case decided by a Court that one would say was on the conservative side philosophically. The only dissident was Sir John Latham, the Chief Justice. But the decision nonetheless needs careful analysis. I am not unhappy with the result because I react strongly to the idea of a ban of a political party – any political party.

As we know, the Communist Party was never banned, it never got control of any government in Australia, and it was never, as it turned out, a real threat to democracy in this country.

But that is not really the point. The point was the extent of the defence power. Did the defence power extend, at that time, at that moment in time, to enable the banning of a political party?

On reflection, and when I had to re-examine it, as I did in *Thomas's Case*, the answer to the question would be, "I am not too sure". I am not too sure that the Latham view was not correct. He was a very worldly experienced man. Apparently he was a difficult personality. He had a lot more experience of world affairs than Sir Owen Dixon. Few would doubt that Sir Owen Dixon was the superior jurist. But Sir John Latham had been in public affairs, had been Attorney-General, Minister for External Affairs, and had almost been Prime Minister. He had all sorts of interests outside of the law, which Sir Owen Dixon did not have. He served as Minister to Japan. He had great knowledge of Asia, and probably a better knowledge of Asia than most Australian politicians of his generation. On the other side, Sir Owen Dixon had served as Minister to the United States during the war. Apart from his time in the early 1950s as a mediator for the resolution of the Kashmir question, that was his only direct involvement in public life.

If the way in which each of them looked at the constitutional facts is examined, you can see great differences. Sir Owen Dixon, as Justice Heydon pointed out, referred to, for example, the Berlin blockade, and to a number of other contemporaneous events. He concluded in the end that, in effect, the war was over, the occasion for exercise of the defence power to ban the Communist Party had passed or never existed.

Sir John Latham, on the other hand, said, "Look, we are still at war. Let us be realistic about this. We have to be more sophisticated about it. There is a Cold War and that Cold War can break out into a Hot War at any moment." He took a much more global view. He was aware, and it comes through in several passages, that almost all of Eastern Europe was controlled by a totalitarian communist power, the Soviet Union. The COMINTERN may have been disbanded, but it had been replaced by other subversive organisations.

There has been a very interesting book recently published, *The Family File* (2010), which I am in the course of reading. It is about the communist Aarons family. It tells how the Soviet Embassy delivered a suitcase of money to the Aarons family, who represented the Communist Party in Australia, and of that money being distributed for various clandestine purposes. We also know from the *Venona* transcripts that there were spies in Australia working under the aegis of the Communist powers against Australian and Western interests.

Some of those things were not well known at the time, but it is plain, if you read the judgments, that Chief Justice Latham had a better sense of these sorts of things than Sir Owen Dixon. That shows the latitude, which the use of constitutional facts may allow, and that is why we should be very, very cautious of the use to which courts should put them.

The interesting thing about the defence power is that, unlike other constitutional powers, it waxes and wanes. It rises and falls, expands and contracts, according to the emergent state. And just

as we have had really no adverse effects from the non-banning of the Communist Party, had it been banned, and when world conditions changed, the ban could have been, as it were, reversed: unlike the Kurt Vonnegut fantasy, referred to yesterday, using, I thought, the imagery of a conservative fantasy.

It was said yesterday that it was a conservative fantasy to think that, no matter what the State governments put or did not put in the *Work Choices Case*, the Court was not going to reverse the *Engineers' Case*: it would not have mattered what anybody had said from the Bar table, the result was almost preordained because of the legal philosophies of most of the Court.

But restoration, return, or review, is not entirely a conservative fantasy. The history of the *Engineers' Case* is that Robert Menzies, as he then was, was regarded as the most promising barrister of the Bar in Australia. He appeared for the winning side, for the union. Sir Owen Dixon appeared (later) unsuccessfully for the losing side. Sir Owen Dixon sat on the High Court later in a case of Victoria and the Commonwealth. The Court held there that constitutional power of the Commonwealth can only be exercised subject to the qualification that it not interfere with essential State functions. Now, that, I thought, was a case of Sir Owen Dixon achieving a result, in part at least, that he could not get at the Bar table. That case does serve as a basis, to put it at its lowest, for re-examination of the *Engineers' Case* and some of the following cases.

Let me give one practical example of the way in which legal and political affairs played out. The *Fraser Island Case* (1976) was one of the first, if not the first, big environmental case. It was also the first occasion, I think, in which the Commonwealth intervened in environmental affairs. A company was mining mineral sands on Fraser Island. The Green movement was just becoming very active and opposed the sand mining. It got the support of the Commonwealth, which banned the mining, notwithstanding that it was said on the other side that the regulation and ownership of minerals are matters for the State, matters currently relevant to the mining tax that is being debated now, and competition between State royalties and the Federal mining tax. I remember the judgment of Sir Ninian Stephen. He said that everybody knows [as a constitutional fact] that mineral sands are largely exported. Therefore the Commonwealth has an interest in them because of the trade and commerce and the external affairs and export powers. Therefore it can intervene in an environmental matter and stop a State mine. That really is the genesis of many Federal interventions, intrusions I would say – find some Commonwealth foothold really quite remote from the matter in question like the *Tasmanian Dam Case* (1983) Michael Field spoke about yesterday.

Australia had signed up for World Heritage. Therefore, once the Franklin Dam area is declared a world heritage area, the Commonwealth can ban a dam, just as the Commonwealth minister, Mr Peter Garrett, recently banned the Traveston Dam in Queensland. Who knows: if there had been a Traveston Dam in Queensland there might have been more available water and not as much need to store as much water, that led to some of the dreadful floods in Southeast Queensland. You can see how Commonwealth powers are extended. The Court says these are constitutional facts, to gain some sort of foothold, albeit one remote from the point. One hopes there may be an opportunity in the future to try to restore Victoria and the Commonwealth to the authoritative position that I think it should command.

Michael Mischin spoke about local government and the possibility of its recognition in the Constitution. I would draw the same conclusions. But I only ever voted “Yes” in two referendums in my life. I voted “Yes” in relation to the race power to give the Commonwealth that power. And I voted “Yes” in favour of compulsory retirement of judges at the age of 70. I do not regret either. Would you want a judge to be judging your case when he or she is 90 years of age, as has happened in the United States? No, no. Every institution needs reinvigoration.

A suggestion was made that there were efficiencies in central control. I think anybody who has in the past flirted with that idea would have a different view now. Leaving aside all questions of whether it was good policy or bad policy to insulate homes and to build school halls, what we now know

demonstrates that there was gross inefficiency on the part of the central executive in giving effect to those policies. On any view, it was a failure, and that failure must in part be by reason of remoteness, of distance, from the task at hand. Central command economies are not more efficient. China's rising living standards seem to me to have a lot to do with the fact of some loosening and quite deliberate, conscious, perhaps slow, but loosening nonetheless, of central command.

I enjoyed Bob Carr's intervention to the effect that one of the few, but very exquisite, pleasures of State government is being able to dismiss recalcitrant local councils. I understand that entirely. We have problems with the demarcation of power in this country. I think it was an American politician who said, "all politics are local". You want them to be local, but not too local. I would not create another layer of uncertainty by giving local authorities more power and more recognition than they have.

Julian Leeser, when he was adviser to a federal minister, grumbled about having to deal with State governments. I have heard, I might say, ministers on both sides of politics express their frustration with dealing with State governments as if, in some way, if you could get rid of State governments all your problems would be resolved by dealing with regional and local authorities.

My instinctive response, but I was too courteous to say – perhaps I should not have been – would have been the Scalia response: "Get over it!" My sympathies lie with Bob Carr on the retention of the status quo. That is what conservatives are supposed to be, I suppose – in favour of the status quo.

There is something in what Lord Palmerston said in the nineteenth century. You might remember Lord Palmerston, a *bête noire* of Queen Victoria, who preferred the refined Lord Melbourne and later the much more seductive and arresting Disraeli. She disliked Palmerston. Palmerston said: "If it is unnecessary to change, it is necessary not to change." That is probably going a little too far, but not too much so.

This brings me to Amanda Stoker's paper. It may be politically incorrect to say what is the truth in this country, that it does not matter what your religion is, whether Mormon or Muslim or Hindu, or Christian or Judaic, or whether you are an atheist or an agnostic, our law has at least been influenced, heavily influenced, by Western values. And you ask what are Western values? Western values are generally Judaeo-Christian values. Those are good ethical values; they do not dominate our law or dictate it, but they heavily influence it. We seem to have reached the stage where it is politically incorrect even to suggest that.

Thank you all for your attendance. It has been a most stimulating conference, certainly the most interesting I have been to. I very much appreciate the attendance of experienced politicians – Bob Carr, Richard Court, Michael Field and Ray Groom. They added a dimension of reality and practice.

The Samuel Griffith Society, in supporting the Australian Constitution, subscribes fully to the ideal of democracy. Democracy itself depends upon a contest of values, views and ideologies. Nobody is a hundred per cent right. Thank you all for attending. I look forward to seeing all of you and more at the next conference.

Chapter Fourteen

Andrew Inglis Clark and the Making of the Australian Constitution

L. J. Neasey

In the Mitchell Library in Sydney there is a letter from the Registrar of the Supreme Court of Tasmania to A.P. Canaway, an author of a number of commentaries on the Constitution.¹ The letter, written in 1921, was in response to a request by Canaway for the Registrar's assistance in identifying the authorship of a document held in the Library. The document was entitled, "Draft of a Bill for the Federation of the Australian Colonies".²

From Canaway's description of the document the registrar was able to inform him that it had been prepared by Inglis Clark, then Attorney-General of Tasmania, early in 1891. The registrar wrote that a copy had been sent to each member (that is, Tasmanian member) who was to attend the first Constitution Convention, to be held in Sydney in March of that year. That the Mitchell Library had custody of Clark's draft bill but was not sure of its authorship is perhaps indicative of Clark's role in the federation process, having been quickly forgotten since the event.

Members of The Samuel Griffith Society are no doubt aware that Clark had prepared a draft constitution for the assistance of delegates to the first Convention. That document was the genesis of our Constitution. It was Clark's draft that Sir Samuel Griffith, for whom your Society is named, used as the template for his own great drafting efforts during the course of that Convention. It is a reasonable proposition to make, that Clark was Sir Samuel's collaborator, albeit in a subordinate role, in the drafting of the Constitution.

For that reason, and also because The Samuel Griffith Society is meeting in Tasmania for the first time, it is fitting that Clark is the subject of a paper at this conference.

Background

Before I discuss in more detail some aspects of his role as a maker of the Constitution, I should say something of Clark himself. He was born Andrew Inglis in Hobart in 1848. His parents had migrated from Scotland 16 years before. His father, Alexander Clark, was an engineer and established a business as such soon after arriving in what was then Van Diemen's Land. Prior to Inglis's birth the Clarks and their children lived for several years at Port Arthur, where Alexander supervised the construction of the building which later became the infamous penitentiary.

As a youth, Clark was apparently studious rather than sporting; in size he was short and he suffered poor health. The exact nature of the chronic condition which plagued him is not known but illness was to have significance at key points in his life. Contemporary descriptions of his personality indicate he was of an active but nervous disposition, possibly impulsive, perhaps what might today be called "a live wire". Clark was certainly an inspiration to his fellows, even a father figure to some, who called him Padre. While the substance of his speeches was often uplifting it may not, however, have been matched by their delivery, as by all accounts he was not a great speaker.

A passion for noble causes first arose in Clark in his early teen years during the time of the American Civil War. He and his family were supporters of the Northern cause and celebrated reports of that side's advances when the news of such reached Hobart. It may be recalled that the established press in both Britain and Australia, including Hobart, tended to support the Confederate cause and recognition by Britain of the Southern side had been a near thing.

Clark's ambition from school days had been to become a lawyer and enter politics but his matriculation studies had apparently been interrupted by illness, necessitating removal from school and leading him to work in his father's workshop for the next several years. He became apprenticed as a mechanical engineer in the family foundry and qualified in that trade.³

While Clark's father was nominally Presbyterian, his mother, Ann, was a strict Baptist. She raised her children according to that faith. In his mid-twenties, Clark changed both his profession and his religion. He resumed the course he had set himself as a youth to study law, becoming articled to the Solicitor-General. He was admitted as a barrister and solicitor in 1877, at the age of 29. Despite having been baptised at 22 years, he developed an interest in, and then adopted, the religion of Unitarianism. His adoption of that creed was probably influenced by his fervent admiration of anti-slavery campaigners such as William Channing, Theodore Parker and others who were Unitarians.

Perhaps his greatest American hero was another abolitionist, United States Senator Charles Sumner. Sumner had close Unitarian connections though not one himself. Other men Clark deeply admired included Italian patriot, Giuseppe Mazzini, and French political historian and author, Armand Carrel. Clark's youngest son Carrel, named after the Frenchman, in an unpublished biography of his father, described portraits of Sumner, Mazzini and Carrel hanging on the walls of the library in the family home, Rosebank, in Battery Point, each draped with the flag of his nation.⁴ Clark's admiration of these men reflected his own moral and political position, perhaps best summed up by F. M. Neasey in relation to Mazzini; "The Italian's ardent, lifelong pursuit of republican ideals and his belief in the essential goodness and perfectibility of humanity were exactly the qualities Clark most admired".⁵

Inglis Clark believed the doctrine, which he described as "essentially republican",⁶ that men are possessed of natural or inherent rights. He approved of the expressions of those rights in the American and French Declarations, which embody the right to life, security and the pursuit of happiness. Clark himself, in an article published in an American journal, categorized natural rights as rights which permit "every man to live the most truly human life which his nature and capacities make possible for him in the social environment in which he is found".⁷

Following his admission to the Bar, Clark worked exclusively in the profession only briefly before standing successfully, in 1878, for a seat in the Tasmanian House of Assembly. At this time Tasmania had been known by that name and had been self-governing for some 20 years. Upon taking up his seat, despite being in opposition, Clark immediately set about introducing several reforming bills. His proposals enjoyed a measure of success as the government in due course took up some of the bills as its own. Clark served two terms with the opposition before losing his seat in 1883. He was returned in 1887, for the first time with the government and was appointed Attorney-General in the Fysh administration. Clark immediately embarked upon an ambitious program of legislative reform in diverse fields including criminal law, local government, taxation and electoral law. His role as a reformer continued when he was again Attorney-General in the 1890s under Edward Braddon. History has best remembered him for one of his electoral reforms, the introduction of the Hare system of proportional representation, first used in Tasmania in 1897 and now known in this State as the "Hare-Clark system".

From the early 1870s Clark and some friends of like-mind had met regularly to discuss politics, religion and other topics of intellectual interest. They called their small group The Minerva Club. In later years the group continued to meet in the library at Rosebank. Incidentally, Rosebank, in particular the library, would have been familiar to Griffith, Deakin and others⁸ who frequently visited Hobart for meetings of the Federal Council and, most likely, also to Barton, whom Clark entertained when Barton visited the State as prime minister.⁹

Associated with The Minerva Club was the publication of several issues of a magazine entitled *The Quadrilateral*. While it had a relatively short life, Clark contributed several essays including one in which he discussed at length the desirability of a confederation of the Australian colonies and the form that that might take, including a discussion of the relative merits of the United States and Swiss

systems.¹⁰ That article was published in 1874, showing that at the relatively young age of 26 he had already thought deeply about the prospect of federation.

Clark had an abiding interest in things American. Each Fourth of July some of those associated with The Minerva Club, including Clark, would gather for dinner to celebrate American Independence. Passionate speeches were made extolling the virtues of the principles upon which the Republic was founded. Clark made many American friends, with whom he kept up a lifelong correspondence. Perhaps his first meeting with Americans that was to result in lasting friendships occurred when the USS *Swatara* came to Hobart in 1874 on a scientific expedition to observe the Transit of Venus. Clark and his fraternity made welcome members of the ship's company, entertaining many of them in their homes.¹¹ Another friend and correspondent of Clark was American abolitionist and author Moncure Conway, whom he met in Hobart in 1883, when Conway was on a speaking tour.

As well as being a fervent admirer of its great men, Clark made a close study of American political institutions and of its Supreme Court, particularly the Court's decisions on constitutional matters. Clark's depth of knowledge of such matters was later to stand him, and arguably the coming nation, in good stead and was noted by his contemporaries. Deakin later wrote of Clark's "large fund of legal and constitutional knowledge which he brought to the conferences" (of 1890 and 1891).¹² Respected federationist and author, Bernhard Wise, an observer at the first Constitution Convention, wrote: "No one in Australia, not even excepting Sir Samuel Griffith, had Mr. Clark's knowledge of the constitutional history of the United States".¹³

Clark made three trips to the United States during his life. On the first of these, through Moncure Conway's good graces, Clark was able to meet the eminent jurist, Oliver Wendell Holmes, author of the classic work, *The Common Law*, which Clark admired. Holmes was later appointed to the Supreme Court where he served for more than 30 years.¹⁴ Clark and Holmes commenced a correspondence which continued for the remainder of Clark's life. It is also worth noting that during that first trip abroad, the main purpose of which was to represent the government before the Privy Council in London, Clark stopped off in Italy where he took the opportunity to visit the grave of his hero, Mazzini.¹⁵

The Council, the Conference and the Convention

Clark's journey to Europe and the United States took place between his attendances at the Federal Conference held in Melbourne in 1890 and the Convention in Sydney which began in March the following year. But his first appearance on the inter-colonial stage speaking in favour of federation was at meetings of the aforementioned rather impotent Federal Council, which met during the 1880s and 90s, each time in Hobart. Clark, one of two Tasmanian representatives, frustrated by the caution and timidity with which the Council acted, which had resulted in very little legislation being passed, took an opportunity at the Council meeting of January 1889 to express his federation hopes. He said he "saw no half way house between the Council and a complete federal parliament, with a federal executive" and that "federation was not as far off as some believed".¹⁶ New South Wales had declined to be a member of the Federal Council, which largely explains its ineffectiveness. But it was Sir Henry Parkes who, with renewed federation fervour, later that year took the initiative to bring all the colonies together for a conference with a view, Sir Henry hoped, to the drafting of a federation bill.¹⁷

The Federal Conference was held in Melbourne in 1890. Clark again was one of two Tasmanian representatives. Most delegates to the Conference discussed to some extent the respective seminal British models for federation found in Canada and the United States. While the immediate view might have been that it was Canada with which the Australian colonies had more in common, there was general consensus in favour of the United States model. The most distinguishing feature between the two models was that, under the United States Constitution, the States retained all powers other than defined powers specifically given to the central government. The reverse was

the case in Canada under the provisions of the *British North American Act* which was, in effect, the Canadian Constitution.

The United States Constitution was certainly the model Clark preferred. He raised the subject in his address to the Melbourne Conference, saying that each of them there should “state more or less precisely what kind of confederation” each representative and his colony would be satisfied with. For his part, Clark said, he would prefer the lines of the American to those of the Canadian. What the Australian colonies want, he said, “is a federation in the true sense of the word” and he said he regarded Canada as more of an amalgamation, or a unification, than a federation. Referring to a popularly held view that the American division of powers was a cause of the Civil War, Clark said that as there was no such question here he “did not think we need fear to go upon the lines of the United States in defining and enumerating the powers of the central legislature and leaving all other powers to the local legislatures.”

Clark clearly regarded the American system as that which would best establish the kind of national life he saw for a federated Australia while at the same time preserve the local identities of the respective provinces, as he termed them. He remarked upon the “merits of the American system in preserving the local public life of the various states” which he did not think could have “flourished under any other system.” He drew parallels with Australia with its “large territory and variety of industrial and social life (saying) that we also ought to have a system which will preserve local, public and national life in the same manner.” Later in his speech Clark touched upon Italy, again drawing parallels between the Australian colonies and the Italian states, telling delegates they had, in their time, “witnessed the birth of the Italian nation where, long before unification, there was one Italian people, one language, one literature and a common aspiration to live a national life and to obtain political independence and unity”.¹⁸

Wise later wrote that Clark’s speech at the Conference contained “the germ of the ideas” that would dominate the Convention the following year.¹⁹

The Federal Conference of 1890 had been an essential step along the road to federation. It was the first opportunity representatives of all the colonies had to meet and discuss “exclusively” (to use Clark’s word)²⁰ the prospect of federation. It was understood that a convention must follow, with authority to be given by each colonial parliament to its delegates to consider the detail of a constitution; the Conference passed a resolution to that effect.

In concluding his address, Clark expressed the hope that such a convention would “within a very short period produce a Constitution”²¹ and so, following the Conference of 1890, he would have expected the prospective convention would produce the draft of a constitution for an Australian federation. He therefore decided to prepare his own draft, and sent it to the Tasmanian delegates who were to attend. F. M. Neasey opined that,

The fact that he took the trouble to draft a constitution at all suggests he meant it for a wider audience. Indeed he might have thought that his draft could serve, as in fact it did, as a starting point for the kind of federal constitution that he knew was likely to emerge from the Convention.²²

According to esteemed historian J. A. La Nauze, Clark did provide a number of other delegates to the Convention with copies, including Parkes, Barton and Kingston, and possibly still others.²³

The expected Convention began in Sydney in March 1891. Following the first general sessions of debate a drafting committee was appointed. There is no official record of the committee’s creation or proceedings. According to the *Argus*, Sir Samuel was asked to head it²⁴ and he took Clark as his “lieutenant”.²⁵ Charles Kingston of South Australia was also appointed. After a couple of days’ work on dry land the committee adjourned to the Queensland Government vessel *Lucinda* and the solitude of the Hawkesbury River, where preparation of a draft federation bill for later discussion by

the Convention continued. (It will be remembered that Clark missed the first three, of possibly five, days of the committee's meetings on *Lucinda*, suffering from the flu. Barton was appointed to the committee during Clark's absence).

Sir Samuel himself, as leader of the committee, assumed the role of chief draftsman and he used Clark's draft as his starting point. La Nauze has given a step-by-step account of Griffith's work on the Drafting Committee, as has F.M. Neasey more recently,²⁶ relating how Griffith skilfully moulded Clark's draft into the constitution bill that emerged from the Convention.

Aspects of Clark's draft constitution

I do not intend in this paper to examine each clause of Clark's draft and show to what extent it survived the conventions of 1891 and 1897-98 to become part of the Constitution. Suffice to say that of 96 clauses in Clark's draft, 86 find a recognizable equivalent in the ultimate document,²⁷ many with only relatively few changes in terminology.

What I would like to do at this stage is refer to some of the significant features of Clark's draft that appear in our Constitution, albeit not necessarily as he drafted them.

As the Court Registrar had explained to A. P. Canaway in 1921, Clark had sent a memorandum with his draft to the Tasmanian delegates to the Convention of 1891, explaining his reasoning behind some of the provisions.²⁸ He said in that document that he had adopted the "distinctive feature" of the United States Constitution where specific powers are given to the central government and that powers not so granted are reserved for the States. He said this feature was "antithetic" to the Canadian Constitution and would be much more agreeable to Australasians. In so stating, and as he acknowledged, he was following the majority view of delegates expressed at the Federal Conference. He went on to explain that as the Australasian Colonies would be continuing as dependencies of the British Empire, it was inevitable that he should follow the framework and language of the *British North American Act* "in providing for matters such as the location, nature and exercise of the Executive power under the Federal Constitution". In all other matters, he said, he had followed closely the Constitution of the United States.

Clark, therefore, in his draft enumerated the powers of the federal government and provided that the "Provinces" retained all other powers. He listed thirty powers which he had taken from both the *British North America Act* and Article 1, s.8 of the United States Constitution. All but one yet remain in our Constitution.²⁹

With respect to the provisions adopted from the *British North America Act* regarding Executive Power, he said in his memorandum that he was presuming that, while he did not personally favour the system of responsible government, a system of Cabinet Government would be established with the Federal Parliament. He said he was not prepared to adopt the American practice where members of the Cabinet are selected from outside the legislature and excluded from Congress, because such a system would be "too radical a departure from the practice the people of the colonies were accustomed to".

He suggested, however, that the desirability of continuing the system of responsible government should be "exhaustively considered" at the Convention and, as F. M. Neasey noted, he framed his constitution in such a way as to leave room for a different system to be adopted in the future.³⁰ In essence, Clark made no requirement for ministers to sit in parliament or retain its confidence. The matter was discussed extensively both in 1891 and 1897. At the first Convention Sir Samuel himself expressed a view similar to Clark's that, while he said he favoured the system of responsible government, he did not think it should be specifically required, warning that it might not work where there were two Houses of equal authority but with ministers having to have the confidence of only one.³¹ In 1891 Griffith and Clark's view held sway, but it was not to last.³²

It is well known that neither Clark nor Griffith attended the Convention of 1897, but Clark sought, by way of suggestions, formally made to that Convention by the Tasmanian House of

Assembly,³³ that a minister might simply have a right to address either House, but not to vote unless he were a member. Barton read Clark's reasons to the Convention, the substance of which was that to attain responsible government it was not necessary that ministers should sit in parliament, and that the system of responsible government should not be adopted for all time.³⁴ Griffith had also communicated his views to the second Convention and they were heard again, asking "why should the use of a recent invention never tried in a federal state be prescribed for all time?" and that "the history of most countries where responsible government has been tried is against it". The end result, however, was that the practice of responsible government was effectively assured by the requirement that ministers become members of either House.³⁵

Clark's influence on the ultimate form of the Constitution was probably most significant with respect to the provisions for the establishment and powers of the High Court. In his explanatory memorandum Clark said that he had followed the American model for his federal "Supreme Court", but with the addition of what he termed an "innovation".³⁶ His innovation was to give the court an appellate jurisdiction over the Supreme Courts of the "provinces". This was a significant jurisdiction that the United States Supreme Court does not have and, as F. M. Neasey noted:

The fact that the High Court of Australia is such a court has had an immensely beneficial effect in developing and unifying Australian law and setting standards for the whole country in relation to civil liberties, safeguards in criminal procedures and similar matters. In many ways this general power of the Court fills the gap left by the absence of Bill of Rights clauses, such as those in the US Constitution.³⁷

Clark also provided in his draft that the new court's decisions should be final and that appeals to the Privy Council from State supreme courts should be abolished. At the 1891 Convention, in arguing for the new Court to be the final court of appeal in all matters not involving Imperial interests, he referred to the reputation in England of the decisions of the United States Supreme Court and said, "there is no reason why our supreme court may not produce the same beneficent results and enrich the stock of common law of the Empire by being an independent centre of interpretation".³⁸

His proposal met considerable opposition in 1891 and, while it appears to have come through the first days of general debate unscathed, it was excluded at the committee stage. It was re-introduced in Adelaide in 1897, as Clark had drafted it, but was again deleted in the final session in Melbourne in 1898, thus maintaining the *status quo*. Appeals to the Privy Council from the High Court were finally abolished in 1975 and from State supreme courts in 1986.

Three aspects of Clark's draft provisions relating to the Judicature are of particular interest because they were either significantly altered or discarded during the course of the Conventions, but were later restored. The first and most significant is that Clark had made the new Court a constitutional requirement, his clause 59 providing that judicial power "shall be vested in one Supreme Court". In the draft bill that resulted from the 1891 Convention, it was provided that the Court was to be a creature of the legislature, providing "the Parliament shall have power to establish a Court".

During the course of the second Convention in 1897, Clark was pleased to note, the constitutional requirement had been restored. He told the Tasmanian House of Assembly that year that the Drafting Committee had "tinkered" with the clause on *Lucinda*, while he had been ill with influenza and, in his opinion, "messed it".³⁹ In retrospect, his flippant comments underscore the possible consequences had the provision not been restored. Despite the establishment of the High Court being a constitutional requirement, Attorney-General Deakin apparently struggled in 1903 to persuade Parliament to appoint the first justices to the court.⁴⁰ F. M. Neasey opined that Parliament might have been inclined to leave the creation of the court to some indefinite future time had it been in its hands to do so, especially given its power to invest State courts with federal jurisdiction.⁴¹

The second aspect of interest is the provision in his draft giving the Court original jurisdiction in cases where a writ of mandamus or prohibition is sought against an officer of the Federal Government. While that power remained in the 1891 Draft Bill it was omitted during the final session of the second Convention in 1898. Delegates there (remembering of course that Clark did not attend the second Convention) decided it was not necessary, persuaded by arguments that, while it was not in the American Constitution it was assumed that the Supreme Court of that country would have the power in such matters. Clark became aware of this change and telegraphed Barton, drawing his attention to a US Supreme Court decision of 1803, *Marbury v. Madison*, to the effect that the United States Court did not in fact have the power. It was the very reason Clark had included it in his draft. The power was subsequently restored at the Convention, through the efforts of Barton.

The third aspect, which was discarded but later included, is that in his draft Clark had provided that the Court should have original jurisdiction to hear disputes between residents of different States. That power did not survive into the 1891 Draft Bill and there appears to be no reference in the Records of the Debates explaining why it was omitted. It might be inferred that that change also occurred on *Lucinda*, during Clark's absence. He does not appear to have noticed its omission until 1897 when he mentioned in a memorandum to Barton that he had become aware of it.⁴² Clark told Barton that the provision was in the United States Constitution and that he thought it desirable that it should be included here, and gave his reasons. The power was subsequently restored at the Convention.

I should not leave discussion of his Judicature provisions without mentioning the Federal Court. Clark might rightly be regarded as the father of the Federal Court. He had provided in his draft for the creation of "Inferior Courts" by the Federal Parliament at the appropriate time. In speaking to an early resolution, moved by Sir Henry Parkes, to establish only a federal supreme court and to that court having only an appellate jurisdiction, Clark told the 1891 Convention that he "wanted much more than that"; he "wanted a whole system of federal judiciary". He said he hoped to see a complete system of federal courts "independently of and in addition to, state courts".⁴³ Probably owing to his being leader of the Judiciary Committee at the 1891 Convention, the provision for additional courts included in the 1891 draft bill, and ultimately in the Constitution, was in accord with Clark's vision. The fruits of this provision were the eventual establishment of the Federal Court and, later, the Federal Magistrates Court.

Other provisions of the Constitution which were significantly influenced by Clark, although not to the extent that he had desired, are the so-called "Rights" clauses. The process of his basing his draft on the American model would have necessitated Clark considering which, if any, of the rights provisions in the United States Constitution he should include. In his draft he included only those pertaining to "trial by jury" and "freedom of religion." His trial by jury was not as encompassing as the US example and was limited, in effect, to federal crimes. He had two freedom of religion clauses, one for Federal effect and one for State. They were a curious mixture of prohibitions and probably reflected Clark's strong personal position on separation of Church and state, and according to F. M. Neasey were "poorly thought out".⁴⁴ Clauses protecting both "rights" are in the Constitution (sections 80 and 116 respectively). The religion clause relates to the Commonwealth only, but otherwise take parts from both Clark's clauses. The jury clause remained virtually as he had drafted it, save for it now referring to "indictable offences" rather than "crimes".

Clark had also vainly endeavoured to have included in the Constitution a general rights clause, the equivalent of the 14th Amendment to the United States Constitution. Clark had not included a similar clause in his draft but such a clause was introduced by the drafting committee in March 1891, most likely at his instigation, and remained in the final Draft Bill that was produced by that Convention. The 1891 clause was similar to the United States clause but of narrower scope; for instance, there was no reference to the prohibition against deprivation of "life, liberty and property without due process of law".

The clause was the subject of much discussion and debate at the second Convention. By then Clark had proposed, again by way of formal suggestions to the Convention from the Tasmanian House of Assembly, to have the 1891 clause deleted and replaced by a much wider provision, which would in effect have provided the same protections as provided for in the United States Constitution by the 14th Amendment. Clark's proposed new clause included the provision that a State "shall not deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws."

Probably again to assist the Tasmanian delegates to the Convention, Clark had prepared another memorandum⁴⁵ in support of this and the other amendments suggested by the Tasmanian Parliament. But none of the Tasmanians spoke during debate either on the extant rights clause or on Clark's proposed amendment.⁴⁶ Bernhard Wise was Clark's advocate for the amendment. Wise had, however, mislaid his brief and spoke from memory, albeit ably. In the event, while a number of notable delegates, including Isaac Isaacs, agreed it was an improvement on the original draft clause and the best of the amendment clauses proposed by various colonial legislatures, Clark's new clause was not adopted. Led by Isaacs, the majority considered much of it unnecessary. Instead, in place of the 1891 draft clause, an amended rights clause was inserted (now section 117), which prohibits, more succinctly than did the clause it replaced, discriminatory legislation against residents of different States, but does not have the "equal protection" or "due process" provisions.

Conclusion

On reviewing what I have said to this point, I fear that I may have spoken as much on Clark's ideas that did not reach the final document as those that did. But if I have done so, it is not intended to detract from what he achieved. Clark's draft was the first and largely successful meld of the British approach allowing for responsible government, with a government for a federation, exemplified by the United States, balancing the interests of the small and large States.⁴⁷ His draft provided for the new nation's continued ties with the Crown while for all practical purposes, it was to govern itself, free of Imperial interference. The scheme of government set out in his draft, and much of the detail, became the Constitution at Federation.

Sir Samuel himself publicly acknowledged Clark's role in the course of an address to the Federal Council in 1893, saying the draft constitution of 1891 was,

not the work of one man but the work of many men in consultation with one another, and it was ultimately prepared from a draft submitted by then Attorney-General of Tasmania, Mr. Clark, which was taken as the basis of our labours".⁴⁸

After 1891, only detail of the draft from the Convention of that year changed. The substance and form remained. La Nauze wrote:

After that year, the great parts which Sir Samuel Griffith and Inglis Clark played in framing the first definitive and, as it turned out, enduring version of the Australian Constitution could never be repeated afterwards, either by them or anyone else."⁴⁹

Endnotes

1. MLQ 342.901/C.
2. *Ibid.*
3. Carrel Clark, unpublished biography of Inglis Clark ch 14, Tasmanian State Archives.
4. *Ibid.*, ch 8.
5. F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, University of Tasmania Law School, 2001, 116.
6. A. Inglis Clark, *Studies in Australian Constitutional Law*, 386.
7. A. Inglis Clark, "Natural Rights", *Publications of The American Academy of Political and Social Science*, 1900, vol. 282, 49.
8. Alex C. McLaren, *Practical Visionaries*, Centre for Tasmanian Historical Studies, University of Tasmania, 2004, 112.
9. John Reynolds, *Edmund Barton*, 1948, 184.
10. "Our Australian Constitutions" Part I (1874), *The Quadrilateral* 57, 58-9; F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, 31-2.
11. *Ibid.*, 32.
12. Alfred Deakin, *The Federal Story*, 32.
13. B. R. Wise, *The Making of the Australian Commonwealth 1890-1890*, 1913, 75
14. F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, 117.
15. *Ibid.*, 115.
16. *Federal Council of Australasia: Official Record of Debates 1886-1899*, 78-9.
17. F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, 100.
18. *Federal Council of Australasia: Official Record of Debates 1886-1899*, 105-107, 113, 114.
19. B. R. Wise, *The Making of the Australian Commonwealth 1890-1890*, 1913, 75.
20. *Official Records of the Proceedings and Debates of the Australasian Federal Conference 1890*, (1990) 113.
21. *Ibid.*, 114.
22. F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, 126.
23. La Nauze, *The Making of the Australian Constitution*, 1972, 336.
24. *The Argus* (Melbourne), 24 March 1991.
25. *Ibid.*, 1 April 1991. See also La Nauze, *The Making of the Australian Constitution*, 1972, 48.
26. La Nauze, *The Making of the Australian Constitution*, ch 4 and 5; F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, 163-177.
27. F. M. Neasey, "Andrew Inglis Clark Senior and Australian Federation", *Australian Journal of Politics and History*, vol 15(2), 1969, 7,8.
28. MLQ 342.901/C.
29. F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, 138.
30. *Ibid.*, 130.
31. *Official Record of the Debates of The Australasian Federal Convention 1891* 1 (1986) 33-38.
32. *Ibid.*, 765-776.
33. National Archives of Australia, Series R216 item 307.
34. *Official Record of the Debates of The Australasian Federal Convention 1897* 2 (1986) 794.
35. *Ibid.*, 796.
36. MLQ 342.901/C.
37. F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, 139.
38. *Official Record of the Debates of The Australasian Federal Convention 1891* 1 (1986) 254.
39. F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, 195.
40. J. M. Bennett, *Keystone of the Federal Arch*, 1980, 15.

41. F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, 171.
42. This memorandum was the memorandum tabled and ordered to be printed. *Official Record of the Debates of The Australasian Federal Convention 1891 1* (1986) 594.
43. *Ibid.*, 499 and 253; also 474.
44. F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, 147.
45. National Archives of Australia, Series R216 item 310.
46. Although Edward Braddon did remind delegates of it much later, *Official Record of the Debates of The Australasian Federal Convention 1898 5* (1986) 1791.
47. For example, F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, 2; *Boilermakers' Case* (1955-1956) 94 CLR 254 at 273; La Nauze, *The Making of the Australian Constitution*, 1972, 278.
48. F. M. Neasey and L. J. Neasey, *Andrew Inglis Clark*, 176.
49. La Nauze, *The Making of the Australian Constitution*, 1972, 278.

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