Proceedings of The Samuel Griffith Society

Inaugural Conference

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Foreword

John Stone

In the Foreword to the initial volume of these Proceedings, deriving from the July, 1992 Conference of The Samuel Griffith Society held in Melbourne, I said that:

"... despite the earnest disclaimers of most of the principal actors, there appears little doubt that this campaign [to "reform" our Constitution] is coming from the same centralist quarter which, having been defeated in the debates of the 1890s, has worked throughout this Century to undo the original Federal compact, and whose efforts in that regard have been redoubled over the past twenty years."

It is therefore particularly apt that the opening paper in this volume constitutes an address by the Premier of Western Australia, the Hon. Richard Court, MLA on the topic Western Australia and the Federal Compact.

That address, and the other seven papers which make up the main body of this volume, were delivered to the Society's third major Conference, held at the magnificently restored Esplanade Hotel in Fremantle, Western Australia on 5–6 November, 1993. Coming as it did on the day following the introduction into the Legislative Assembly of Western Australia of the Land (Titles and Traditional Usage) Bill, both the timing and the venue of the Premier's address could hardly have been more apt.

On the following day, the Society heard two speakers on legal and political aspects of the fallout from the High Court's 1992 Mabo Case judgment; two other speakers on aspects of the shameful events summed up in the phrase W.A Incorporated; two more speakers on the Western Australian secessionist movement, and its "warning light" significance for those determined to destroy the Federal compact; and finally, the Hon. John Howard on the revival, and renewed retreat, of the republican issue in Australia during 1993.

In line with the precedent of our two previous Conferences, the Proceedings of this Fremantle Conference are now presented in this Volume 3 of the series Upholding the Australian Constitution.

Such fare alone would have been attractive enough. Since however the Fremantle Conference was somewhat shorter than its predecessors, the opportunity has been taken to incorporate into this volume five other papers which, at one time and another, have also been delivered to gatherings of the Society.

Thus, Appendix I comprises three papers associated with the launching of the first volume in this series. These papers, by Sir Harry Gibbs, Mr Justice Meagher, and (sadly, now the late) Sir Paul Hasluck were previously published by the Society in booklet form under the title Native to Australia, and are now reproduced here as part of the Society's more formal records.

In like fashion, Appendix II comprises two papers, not previously published, by Sir Walter Campbell and the Hon. Ian Medcalf, QC who, in Brisbane and Fremantle respectively, honoured the Society by launching Volume 2 of Upholding the Australian Constitution. Apart from their intrinsic merit, and the proper place which this will give them in the Society's records, their inclusion here will also make them available to all our members who were unable to be present on the occasions of their delivery.

In the Foreword to Volume 2 in these Proceedings I noted that all the issues with which that volume was concerned "come back, in the end, to one simple question: do we, or do we not, wish to see more power being exercised in Canberra?".

Irrespective of whichever side may be governing there, this Society's answer to that question is a resounding negative. That was, indeed, the basic reason for its foundation; it continues to be the central thread running through its deliberations; and it is thus the objective to which this volume, like its two predecessors, is dedicated.

Dinner Address

Western Australia and the Federal Compact

The Hon. Richard Court, MLA

Premier of Western Australia

Mr Chairman, distinguished guests and members of the Society:
I very much appreciated the Society's invitation to give the opening address to this conference. The conference is timely and the topic you asked me to speak about could not be more apt.
The Federal Compact has come under severe strain at several points in our history, but never more than it is now. This strain embraces a very wide spectrum of issues and inter–governmental relationships which are hard for those close to events to grasp, let alone the people of Australia. I will attempt to show the breadth and depth of the forces threatening the Compact by using concrete examples familiar to most of you.
While my topic may allow, or even suggest, that I should include the republic issue in my remarks, I will in fact not do so. How the Commonwealth and State Governments deal with the republic matter is certainly related to the Federal Compact. But the republic idea is a major topic in itself and better left for another day.
Last month, I announced that the Government had appointed a Western Australian Constitutional Committee. It comprises prominent Western Australians from diverse walks of life. Each has made important contributions to the State. Collectively I am sure they will offer the Government sound advice on important constitutional issues. The Committee will operate for twelve months.
The republic issue is a major part of the Committee's terms of reference, but its brief extends much wider than this. They will be looking at how the Constitution and the Federal Compact operate from Western Australia's point of view, and how the State's own Constitution could be made more effective in the face of unrelenting Commonwealth efforts to diminish the State.
Copies of the Committee's terms of reference and membership are available to participants at this conference.
The Samuel Griffith Society is concerned with Australia's Constitution. The Constitution sets out the terms and conditions on which the self–governing colonies agreed to enter the Federal Compact. By agreeing to the Compact, the colonial Governments created Australia as a nation. This meant a national Government able to represent Australia on the world stage. The men and women framing the Constitution understood this very well. But they never anticipated successive national Governments, presided over by leaders of various political persuasions, which would relentlessly and systematically subvert, undermine or ignore the Compact they had just made.
The colonial leaders who agreed to the Compact showed a profound faith and trust in both their counterparts in other States and in the future leaders who would govern the Commonwealth. Their faith and trust were all the more remarkable given the tyranny of distance then applying, and the long communication delays. It is difficult enough in modern times to make sure that parties communicate accurately with one another. Imagine the task then of discussing and reaching agreement on the many complex matters which needed to be considered.
How has this faith and trust been rewarded? I am sure the founding fathers would accept that they did not get everything just right in the Constitution. They would not claim to have second

sight or an ability to foretell the future. Indeed they made sensible provision in the Constitution to change it if all parties to the Compact agreed. Like any other agreement, it can be changed if the parties wish it.

But few if any of the Founders would have anticipated the consistent will on the part of successive Commonwealth Governments to erode the very basis of the Federal Compact. In the light of this unabated Canberra power grab, the Constitution can now be seen as seriously weakened from the States' viewpoint. The parties to the agreement have proved not to be equal.

This inequality stems from four key elements in the Constitution which have been used and mis-used to entrench ever greater power in Canberra. The key elements are:

1. The external affairs power of section 51(xxix) of the Constitution, which if deployed by a wilful and hungry Commonwealth Government, can be used to encroach on almost every aspect of State Government policy and administration. The Racial Discrimination Act, the Environment (Impact of Proposals) Act, the World Heritage legislation, the Tasmanian Dams Case and the emerging biodiversity, species preservation and climate protection conventions are prominent examples. A Universal Declaration on the Rights of Indigenous Peoples is being negotiated. Stand by for further developments.

2. The power of the purse, whereby under section 96 of the Constitution, the Commonwealth can make grants to States and impose conditions on those grants. In more recent times, the fiscal imbalance, whereby the Commonwealth collects more revenue than it needs and the States collect less than they need, has led to a wholesale Commonwealth push to control State Government policies through tied grants and other agreements. Too often these so–called agreements are made at the point of a fiscal gun held by the Commonwealth.

There are 87 special purpose payment agreements, of which 75 involve Western Australia. These strongly influence the policies and administration of many aspects of what should be the clear province of the State. They lead to bureaucratic duplication and extra costs.

Just recently, the Commonwealth has begun to insist that such agreements, when renewed, must now include statements in the recitals which recognise or acknowledge the joint aspirations of the parties concerning ecologically sustainable development and native title. Again, the Commonwealth is using its financial strength to impose its policy prescriptions on the States.

3. Section 109 of the Constitution makes invalid any State laws which are inconsistent with valid Commonwealth laws. I stress the words "valid Commonwealth laws". Not enough Commonwealth laws have been tested to verify their validity. But that too is an issue for another day.

Doubtless, the original intention of this was to avoid creating a legal limbo in cases where the Commonwealth had to make laws for its constitutional purposes which turned out to be inconsistent with State laws. But the Commonwealth too often has made laws which extend its involvement well beyond the intention of the original Compact. These laws can then be used to invalidate State laws dealing with the same subject. Combined with the external affairs power, section 109 has become a weapon in Commonwealth hands.

4. The High Court has consistently ruled in favour of extending the Commonwealth's powers at the expense of the States. Rather than being a protector and upholder of legal rights for all, it has become a de facto partner with successive Commonwealth Governments to increase Canberra's power and centralist Government authority. Too often the High Court has taken an expansive view in reaching its judgments, rather than asking itself what was the original intention of the parties to the Federal Compact. The High Court, a creature of the Compact, has become one of the chief threats to it.

I could add a fifth element – that is, the attitudes of the States themselves. All States, on too many occasions, have accepted Commonwealth offers of money in return for short term gains. They have failed to consider the long term implications of handing more authority to Canberra.

I have been discussing the four major threats to the Compact's continued existence, but what of the Compact itself? Should it continue? Is it outdated? Will our Constitution look quaint and dated in a 21st Century world? What has really changed in the past 100 years to justify such a wholesale attack on the original Compact?

Rapid transport and instant communications are blurring the distinctions between countries and generating a commonality of interest among diverse nations. Issues which could once have been confined comfortably within national borders, now cannot be.

But does this mean our Constitution is no longer adequate? Certainly not. Well designed constitutions are meant to last, without the need for frequent amendment. Given genuine good will by all parties, the sound principles on which our Constitution is based can readily accommodate scientific and social change. We should be very wary of change for change's sake, especially if such change is purported to "modernise" the Constitution.

SEK Hulme, in his amusing and penetrating address to the inaugural conference of your Society last year, put paid to the "modernisation" argument once and for all. He also set out the three simple criteria for justifying a change to the Constitution. The shrinking globe is not one of them. In deference to SEK, I will not mention "horse and buggy".

One of my principal concerns associated with the shrinking globe involves the environment. The Founding Fathers understood the land, the sea, the rivers, the air, the plants and the animals but they failed to actually mention the environment when conceiving and drafting the Constitution.

There is a perceived need for more international co–operation in environmental protection. I have no quarrel with this.

Unfortunately, the desire for international co–operation soon becomes translated into a call for an international convention or treaty. Why cannot nations simply agree to co-operate, based on a set of rules and criteria? Why go the next step to a formal treaty? What happens if a country fails to abide by the treaty? There may be a hollow referral to the International Court of Justice or to United Nations headquarters. There may be punitive trade sanctions imposed, which harm all parties.

Dr Colin Howard, in his paper to the last conference in Melbourne, pointed out clearly how Australia's sovereignty and independence are weakened each time the Commonwealth Government enters into such conventions and treaties.

Back home in Australia, such conventions and treaties take on sinister proportions for the hapless States. Here, the Commonwealth can argue that it has exercised its external affairs power legitimately, and not distorted the original intentions of the Constitution. The Commonwealth consults with the States about how the new convention or treaty is to be implemented. Indeed, to give it its due, the Commonwealth may even consult the States before signing. The end result is the same – an imposed regime of policy and administration concerning the environment, or species preservation, or air quality or whatever.

Another prominent example at the moment is the fallout from the High Court's decisions in the Mabo case. An international convention signed by the Whitlam Government led to the Racial Discrimination Act. This Act has been relied upon in a small number of cases since it was enacted in October, 1975. But for the most part, it did not assume a prominent position in Australia's legal framework. It lay dormant. Then we had the High Court's decision in the Mabo No 1 case. Combined with the Court's decision in Mabo No 2 concerning native title, we suddenly have a full scale national problem which, among other things, threatens the Federal

Compact by opening the door to a Commonwealth take-over of land management over a large part of our State.

Most significantly, the High Court's Mabo decision, and the Commonwealth Government's proposed legislative response to it, will affect mainly Western Australia. Under the Commonwealth's proposals, most native title would occur in this State.

So instead of leaving it to each State to address the implications of the High Court in its own way and offering to give appropriate legislative support where, and only to the extent required, the Commonwealth has used native title as a weapon against the States. As has happened so often since the Federal Compact was made, this response is very far indeed from the intentions and spirit of those who conceived it.

This week, my Government took decisive action to roll back this latest Canberra intrusion into State affairs. We introduced our Land (Titles and Traditional Usage) Bill into our Parliament. We believe it provides the only workable solution for Western Australia. It is a fair solution for all Western Australians. Copies of the Bill are available here tonight for those who are interested.

The most consistent and implacable departure from the Compact over many decades has been in financial affairs. If we look at other successful federations – Germany, the United States, Canada – we see that States, or provinces, and the national Government both collect revenues which are broadly in line with their expenditure commitments. All levels of Government are responsible for all the revenue collection and all the expenditure in their respective jurisdictions.

Australia stands alone as an important, modern and advanced federation where Governments at State level are forced to go cap in hand to the Federal Government each year for major funding support. The process is demeaning and engenders bitterness and rancour. More importantly, it is not good government. Political responsibilities are blurred. State voters are disenfranchised to a significant degree. They have voted for State Governments on the basis of their declared policies. These policies can be greatly eroded or even overturned by a Commonwealth Government which imposes other policy prescriptions and gets its way through financial coercion.

Why have successive national Governments refused to negotiate a sensible, fair taxation arrangement with States to correct this fiscal imbalance? The answer is simple. Having seen and used the loopholes in the Constitution, all Commonwealth Governments have revelled in the extra powers thus afforded them. Instead of negotiating in good faith with the States and thus strengthening the Compact in the process, most Federal Governments have exploited this fiscal imbalance rather than acting to correct it.

They have used many and varied reasons to justify this blatant misuse of the Constitution. But they all boil down to two main headings: first, that the States cannot be trusted to behave in a financially responsible way and need a caring, paternalistic and wise Commonwealth Government to look after them; and second, that a country the size of Australia (in population terms) cannot afford three levels of Government. Let us look at these propositions.

If State Governments had access to revenue sources which could be predicted with reasonable certainty and which grew in step with population and living standards, there would be fewer attempts to engage in the dubious financial dealings which have so characterised most State Governments in recent years. State Governments will always come under political pressure to deliver more services and meet new needs, both real and perceived.

But if they are fully responsible for raising all their revenue, they will be better able to equate the political, as well as economic and social, costs of new initiatives. Moreover, the people themselves will be better placed to understand how their demands for improvements relate directly to taxation or other revenue–raising measures needed to meet those demands. At present the picture is blurred. Few voters really understand the complex interplay of Commonwealth – State financial arrangements. I don't blame them.

The ill–judged excursions into entrepreneurship by some State Governments during the '80s were explained in some quarters as symptoms of frustration. I think greed is a more convincing explanation. But if it existed, this frustration would stem directly from the imbalance all State Governments face between the demands placed on them for services and the ever–tightening financial squeeze they are subjected to by successive Commonwealth Governments. It is easy for the Commonwealth to appear more financially responsible than the States – it merely has to go on saying No. The Commonwealth does not have to face directly the frustrated demands for service delivery at the coal face. Nor does it face directly the political odium from saying No.

I turn now to the second proposition. The Labor Party has long held that Australia should be governed by a unicameral Commonwealth Parliament, supported by appropriately re-configured local governments, without any State Governments at all. This is, of course, a prescription for centralism. Indeed, a strong centralist theme pervades most of Labor's policies.

But we have seen what happens to excessively centralist government in the USSR and Eastern Europe. These were the ultimate centrally planned economies. Few Australians, if they stop and think about it, really believe that Australia would prosper better under a central Government in Canberra, dispensing money and policy guidelines to hundreds of local governments around the nation. I reject any such notion. It is not the right way or the best way for Australia.

Canberra is a remote place. It is not responsive to people at a local level. It must treat everyone uniformly, despite important regional factors in each State. There are second and third generation bureaucrats in the Commonwealth public service, many of whom have never visited a State in the course of their work.

To most Western Australians, the Eastern States consist of images on their television screens. It is hardly surprising that people in this State get angry when the Eastern States dominate the political and economic agenda to Western Australia's detriment.

In Government, small is beautiful. People must not feel alienated from their Government. They should feel they can participate directly in the political process. Government must be responsive to the reasonable needs of reasonable people.

The sharp economic, social and historical lessons learned from the centrally planned socialist economies are clear and unmistakable. Economic management works best when there is competition, authority and autonomy at a local level.

Enlightened Governments and major corporations are decentralising, not the reverse. We can achieve this local focus better through renewed attention on the Federal Compact in this country. We should be asking ourselves this question: "Would a revitalised Federal Compact, restored to its original noble intention, serve Australia better than the centralist model as we enter the 21st Century?"

I believe the answer is unreservedly "Yes". State Governments, given the political freedom and clear responsibility which goes with fiscal independence, and re–empowered by a return to the spirit of the Federal Compact, will deliver better government in this country. All that is required is a genuine spirit of co–operation on the part of Commonwealth Governments, realising at long last that grasping power by flouting the spirit and intention of the Federal Compact will only lead to centralism. This is a doctrine, like Marx himself, which is consigned to the graveyard of history. It is time to return to the Compact, not to change its foundations; much less destroy them.

It is the consistent refusal on the part of most Commonwealth Governments to honour the spirit of the Federal Compact which has fuelled the simmering threat of secession in Western Australia. This State was a doubtful starter in the Compact from the beginning. Since entering the Compact, Western Australia has harboured a lingering doubt that it made the right choice. There have been periodic upwellings of frustration and anger, triggered by repeated breaches of

the Compact and an apparent implacable resolve on the part of successive Commonwealth Governments to diminish the States in general and Western Australia in particular.

I often think that we need an embassy in Canberra more than many overseas countries do.

I can assure you that the secession sentiment is alive and well in Western Australia today. I have no doubt that an even better case could be put forward today than was advanced for the 1933 referendum for improving living standards of Western Australians by seceding. We have 9 per cent of Australia's population but produce a quarter of our nation's exports. We are self–sufficient in all essentials of life and major net exporters of agricultural products, minerals and petroleum. Our manufacturing and service industries are much stronger now than then.

I am not advocating the secession route, as popular as it no doubt would be. Instead, I have a responsibility as the Premier of Western Australia to ensure our Federation works more effectively and that is what I will continue to strive for.

But the voice of reason can be swamped if popular sentiment, fuelled by the frustration and anger I have mentioned, erupts in response to Canberra's continued flouting of the Federal Compact. In such circumstances, people tend to say to hell with the balance sheet, let's go our own way! People identify with their States. This sentimental attachment to State origins is here to stay, whether Canberra likes it or not. The latent potential for this up-welling of pro–secession feeling should sober any Commonwealth Government bent on further power grabs.

I would now like to mention what I see as the most sinister aspect of the Commonwealth's systematic undermining of the Federal Compact. By continuing to behave as they have done for decades, Commonwealth Governments are denying the people the very voice the Founding Fathers sought to entrench. The Constitution provides clear means of changing it.

It is only the people themselves who can alter the Constitution. By its consistent use of financial muscle and cynical exploitation of its powers beyond anything the Founding Fathers ever intended, the Commonwealth has changed the Compact in a de facto way, without giving the people their right to decide.

In a democracy, the ultimate authority rests with the people, who bestow that authority on elected parliaments to govern within the limits of the Constitution. Governments which stray outside the Constitution lose the moral and legal authority to govern.

The Commonwealth has no moral authority to subvert the Constitution in the way it has. Of the many referenda held in Australia to change the Constitution, only a very few have succeeded. Those that did had bipartisan support and, significantly, support from State Governments. The Australian people have made their intentions unmistakably clear. They will not allow their Constitution to be changed without this bipartisan and State support.

Successive Commonwealth Governments, demonstrating a uniform desire for more power and a high– handed disregard for the people's decision, have exploited the loopholes I have mentioned. There is no moral basis for their behaviour and no basis in good government either.

In conclusion, I salute The Samuel Griffith Society. Its efforts to inform people about the Constitution and the dangers of departing from it are already being felt. The Society will grow in both numbers and influence in the years ahead. Not only will it be a bulwark against further erosion of the Compact, but it will also become an increasingly effective voice to persuade people, by force of sound argument, to restore the intended roles of Commonwealth and State Governments in Australia.

I support the Society's objectives. I encourage you to continue your important work. Make your voice heard in every State. Build your membership. Inform the youth of this country about the vital importance of the Compact. The intellectual quality of the Society's efforts is a strong force for good. In the end I am sure it will prevail.

I commend the Society to everyone here who is not already a member. I am sure you will have a stimulating and enjoyable conference. I wish you well and have much pleasure in declaring your conference open.

Introductory Remarks

John Stone

Ladies and gentlemen, welcome to this, the third major Conference to be held by The Samuel Griffith Society.

Before I come to my introductory remarks proper, I hope that you may indulge me if I venture some personal remarks.

First, as many of you are aware, I am myself a Western Australian – as is my wife Nancy – and have always described myself as such, even during the period when, briefly, I had the honour to serve the people of Queensland as a Senator for that State. (During that time I used to describe myself as "an honorary Queenslander".)

It is therefore a source of great personal pleasure to me that the Society should have chosen Western Australia as the place in which to hold our first Conference out of Melbourne.

As many of you will be aware, we also launched the first volume of the Society's Proceedings, Upholding the Australian Constitution, in Perth last November, when we were privileged to hear an address penned by one of Western Australia's most illustrious sons – now, I regret to say, the late Sir Paul Hasluck.

In saying "penned by" Sir Paul I was of course choosing my words carefully because, as those of you who were present on that occasion will recall, Sir Paul was at that time convalescing from a bout in hospital after a nasty fall resulting in a broken hip. His splendid address was therefore delivered on his behalf by his son Nicholas.

As I subsequently said in my Foreword to the Society's little publication, Native to Australia (itself a phrase taken from Sir Paul's address), in which that and two other such addresses were later published:

"As things have, sadly, turned out, his death on January 9, 1993 at the age of 87 means that this was the last public utterance by a very great Australian. Nobody reading it can fail to be moved, not only by its inherent qualities, but also by the thought that, lying in his hospital bed composing it, that possibility may not have been entirely absent from his mind".

Sir Paul was a very good man, whose life – and perhaps also death – may serve as an example to us all. On this, the first occasion on which the Society has met in Western Australia since his death, it seemed to me only fitting that we should honour him.

Having just referred to a very good man, let me now mention a good woman, and in doing so note the appropriateness of holding this conference in the splendid ambience which this beautifully restored Esplanade Hotel provides. If Australians could be trusted to be as careful in maintaining, and restoring, their heritage as a whole – including their constitutional heritage – as they have been in the case of this hotel, we should indeed be a proud people.

As many of you know, Mrs Marilyn Rogers, who nowadays is the fortunate owner of this hotel, is the daughter of the late Ric New, who was for many years a breath of fresh air within what can often be the somewhat stuffy ranks of corporate Australia. He was a man who believed passionately not only in freedom, including as much freedom as possible from the oppressive role of government, but also in the need to stand ready to fight for what you believe in. He was one of the early, and more notable victims of the Burke administration, which set in train those processes of WA Inc. to which we shall be devoting two papers later this morning.

The story of the governmentally–inspired attack on Mr New has been graphically told by Professor Paddy O'Brien and Mr Tony McAdam in their fascinating, and in many ways frightening, book The Burke Shambles. I mention it here not only for its relevance to our proceedings later today but also, as I say, because our host, Mrs Rogers, is the very fitting daughter of that redoubtable man; so that, in thanking her for the way in which her establishment is looking after us, I take the opportunity of honouring him also.

In this list of "credits" let me finally come to the man who honoured us by his presence, and his address to us, last night – the Premier of Western Australia, Mr Richard Court. Although I come to him last, I recall in doing so the Biblical text that "the last shall be first".

And first, indeed, in Australia today – at least where the Mabo matter is concerned – he is. Throughout these past four or five months in particular, there has been no other public figure of comparable standing who has emerged with such credit from the flames of Mabo, so recklessly ignited by those "Mabo Six" members of our High Court in June last year, than Mr Court.

Steadily, coolly, reasonably and above all, steadfastly, he has stood there while the shot and shell of both the malignant and the merely ignorant have rained down upon him. On Thursday of this week he introduced into the Western Australian Parliament his own considered response to them – the Land (Titles and Traditional Usage) Bill. Suddenly, some of the critics seem to be growing, if not (yet) silent, at any rate more muted in their criticisms, less violent in their dogmatism, more circumspect in their attacks.

These are however early days, and last night, naturally, the Premier did not speak principally about the Mabo issue, but about the more general topic which we had suggested to him, namely Western Australia and the Federal Compact. Of course, the Mabo matter, and its implications, also go to the heart of that Federal compact, but that was not, as I say, the chief gravamen of Mr Court's remarks.

Ladies and gentlemen, I think this Society may take some pride in the fact that when an exceptionally busy – even hard–pressed – Premier came to speak to us, he paid us the respect of giving us not some mere political speech (which I would not have expected in Mr Court's case anyway), but a serious, thoughtful and clearly carefully considered analysis of the chosen topic. In doing so he honoured us, and we in our turn now take this opportunity of honouring him.

When the Board of the Society chose not only Western Australia for the venue of this Conference, but this weekend for its convening, we could hardly have predicted that both place and timing would prove to be so marvellously apt so far as the Mabo issue is concerned. Our first two papers this morning are, as you know, focussed on that issue, and the first of them, The Racial Discrimination Act 1975 and Mabo, will be given by Dr Colin Howard.

Colin Howard, as many of you will know, has already made a distinguished contribution to the Proceedings of this Society, having delivered papers to each of its previous conferences. For reasons which may not be totally unconnected to that, he has recently been serving as an adviser to the Premier on the Mabo matter, and as a consequence he has been enjoying the experience of being, for a time at least, "an honorary West Australian" – and a very good one too. So let me now, more formally, introduce him.

Chapter One

The Racial Discrimination Act 1975 and Mabo

Dr Colin Howard

There is a tired old cliche that journalists and other commentators on the ephemeral trot out with appalling reliability whenever they feel the need to enlighten us about law and the legal system. It is always misquoted and invariably taken out of context. It concerns a Dickensian character who, in a moment of understandable frustration at being thwarted by anything as piffling as the law of the land, took it upon himself to characterise the law as an ass.

Now, whatever people in general may think about that profound observation, it is usually overlooked that the vast majority of the laws are not made by lawyers but by politicians. In that capacity they rejoice in calling themselves lawmakers and frequently claim mandates to that effect, or, as a cartoonist recently suggested, persondates. How the law can be an ass without the lawmakers sharing that character is unclear.

Nevertheless, if we put the tired old cliche aside we can surely agree that the legal system sometimes throws up, if that be the appropriate expression, conundrums of intricate intellectual beauty. They remind me of such matters as the arithmetical theorem which proves the existence of at least one more undiscovered prime number; or the spectre of the Brocken; or the phantom of the opera; or the Himalayan Yeti: everyone knows there is something there, but no–one knows what it is.

Most of you will have assumed by now that the something I have in mind is native title according to St Mabo. As Winston Churchill once remarked about the former Soviet Union, native title is a mystery wrapped in an enigma. Actually Mabo in itself is not what I have in mind. My concern today is with one of the more weirdly beautiful intellectual structures to which even Mabo has given rise.

Note that I say "given rise". Not even Mabo actually created it. It took the Commonwealth lawmakers to actually create it but Mabo put the idea into their heads. So on this occasion you have a fair range of candidates for the 1993 Ass of the Year prize. The mystery that I am about to unfold is the relation between Mabo and one of our best known Acts of Parliament: the Racial Discrimination Act 1975 of the Commonwealth.

The starting point is that, leaving aside the federal Territories, Australia has seven Parliaments: the Commonwealth Parliament and the Parliaments of the six States. The Commonwealth Parliament can make laws on certain subjects set out in the Constitution. The States can make laws on almost anything. A Commonwealth law normally applies to the whole country. A State law applies only to the State which enacts it. It follows that a Commonwealth law may conflict with a State law on the same subject which says something different.

The framers of the federation foresaw this difficulty and sought to deal with it in s.109 of the Constitution. This section says: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." This rule is often mis-stated as saying that the Commonwealth can override State laws. In the Mabo debate it has even been put in the form that the Commonwealth Government can override State laws.

This is quite wrong. As the Keating Government has discovered on a number of recent occasions, it is the Parliament that makes the laws, not the Government. Also, s.109 does not talk

about a law overriding another law. It talks about inconsistency between the two. You can have a Commonwealth law on the same subject as a State law without the least inconsistency between them. Even if there is an inconsistency, s.109 says that the State law is invalidated only to the extent of the inconsistency. If the inconsistency can be removed without bringing the whole of the State Act down, the rest of it survives.

The last point to be made about the operation of s.109 is that, although the section does not say so, it necessarily assumes that the Commonwealth law is valid, for if it were not valid it would not be a law. For the Commonwealth law to be valid it has to fall within the scope of one or more of the subjects upon which the Commonwealth has power to make laws. This is yet another reason why it is a gross exaggeration to say, as journalists usually do, that the Commonwealth can override State laws.

Against that background I turn now to the Racial Discrimination Act of the Commonwealth, which came into operation on 31 October, 1975. I shall refer to it for short as the RDA. One looks first for the head of power on which the Parliament relied in passing that Act. It is in s.51(xxix) of the Constitution. This confers power on the Parliament to make laws for the peace, order and good government of the Commonwealth with respect to external affairs.

I do not pause to repeat here comments that I have made in previous addresses to this Society on the extraordinary manner in which the High Court has expanded the scope of this modestly worded subsection to convert it into a major source of Commonwealth power to legislate on almost anything. Suffice it to say that, as now understood, it will support a law which carries into effect in Australian domestic law any international obligation entered into by a Commonwealth government.

In the case of the RDA the obligation rejoiced in the name of the International Convention on the Elimination of all Forms of Racial Discrimination, which is an accurate enough description of what it purports to do. I shall refer to this document as the Convention.

Personally I find it distinctly odd that Australia can in all solemnity adopt the Convention at the same time as it retains in its Constitution s.51(xxvi), which gives the Parliament power to make laws with respect to "the people of any race for whom it is deemed necessary [by the Parliament] to make special laws". Any law which applies to people on the basis of their race is a racially discriminatory law. If it benefits the people of that race it necessarily discriminates against everyone else.

The generosity with which the High Court has developed the interpretation of the external affairs power is not entirely open-ended. It includes the limitation that the Act of Parliament that relies for its validity on an international obligation combined with s.51(xxix) must adhere reasonably closely to both the letter and the spirit of the obligation relied on. This is the beginning of the intricate mystery to which I referred at the outset of this paper.

At this date I need hardly refer to what the great Mabo debate is all about. The only time in the past 15 months that the media have not been full of it was in the lead-up to the federal election in March, 1993, when all political parties tacitly decided to leave Mabo in the too hard basket and fight about tax instead. It came to life again when the Prime Minister, searching no doubt for emotive issues which might take people's minds off unemployment, took it up with missionary fervour.

Whatever anyone originally intended, what has now happened is that the Prime Minister has launched a sustained attempt to bring into being a Commonwealth statutory regime to deal with native title which he appears determined to force on the States whether they like it or not. One of the many practical difficulties that he has encountered is the effect of the RDA on titles to land granted by the States on or after 31 October, 1975, the date when the RDA came into effect.

The argument runs as follows. The RDA prohibits discrimination on the basis of race, including discrimination in matters of property. A title to land which derives from native laws and customs is as much an item of property as any other title to land, but it has the peculiarity that it can be held only by people of a certain race. These are Aborigines who have certain connections with the land in question. Hence if you abolish or curtail native title, you are necessarily discriminating on the basis of race, for the only people affected are people of the Aboriginal race.
Now, when the RDA came into force exactly 18 years and one week ago, no-one had ever heard of native title. For this very good reason it never occurred to anyone that the RDA had any relevance to the normal course of issuing titles to land, be they freehold ownership, leases of one kind or another, or mining tenements or whatever. For the next 17 years or so everything went on as usual. This happy state of affairs came to an end shortly after 3 June, 1992, the day on which the High Court, in Mabo v. Queensland [No.2] (1992) 175 CLR 1, broke the news that the common law recognised this new type of claim to land called native title.
Ever since then quite a lot of people have been trying to work out what it is, what it does and what can be done about it. I do not need to go into all this today, fascinating though it is. I need add only that, having invented native title, the High Court, in its inimitable way, went on to say that all sorts of events could extinguish it and indeed, in many parts of the country, had done so already. One of the ways was by the Crown granting a title inconsistent with the continued existence of native title over the same land, the standard example given being freehold title.
Except for the fact that the court was a trifle coy about precisely which common law titles had this effect and which did not, at least we had a comprehensible rule, at all events in principle. Not for long. Anyone who had the simple-minded idea that the quickest way of disposing of native title was to freehold all the land in sight was confronted by another High Court observation. It received so little discussion that it amounted almost to a throwaway line. It said that State action on the matter would of course have to be consistent with relevant Commonwealth laws, particularly the RDA.
Let us consider what this observation meant in terms of the idea that a State could solve the Mabo problem by granting freehold titles all over the place (freehold having the effect, according to Mabo, of extinguishing native title) or simply passing an Act abolishing native title. There is no doubt that were it not for the inconsistency rule of s.109 of the Constitution, combined with the RDA, the States could easily get rid of native title. The question therefore became whether State action to this effect would be inconsistent with the RDA.
The fascination of this question was not lessened by the course of events in the first Mabo case in 1988. Even now not everyone is aware that the 1992 decision was actually Mabo number 2. Its fame has tended to obscure the significance of Mabo number 1. The immediate cause of the earlier case was an attempt by Queensland to do exactly what I have just mentioned: abolish native title by legislating it out of existence. In Mabo 1 the High Court by a majority of 4:1, 4:2 or 4:3, depending whether you believe the headnote or the judgments, held that the attempt failed.
The reasoning was interesting and arose to a considerable extent out of the way the case was structured as a technical matter. What eventually became Mabo 2 had been progressing slowly through its preliminary stages in the courts when Queensland interrupted this progress by passing its native title abolition legislation. As soon as that happened, the Queensland legal team amended their defence to rely on the Act as a complete answer to the claims for native title. The claimants hit back by arguing that Queensland could not do this because the Act was inconsistent with the RDA and therefore ineffective under s.109 of the Constitution.
The court then decided, at the request of the claimants, to settle this question as a separate issue because if the claimants were wrong, the rest of the case could not proceed. The Queensland Act

would be a complete defence. In order to give the case a notional factual basis however, the court proceeded on the assumption, for the purpose of deciding the inconsistency argument only, that the claimants did indeed have the native titles they were claiming.

The outcome of this distinctly artificial proceeding was that one member of the court found that there was no inconsistency between the Queensland Act and the RDA, four found that there was an inconsistency and two decided that the question could not be answered at that stage because, notwithstanding the assumption on which the court was proceeding, there were not enough facts.

The judge who decided that the Queensland Act and the RDA were not inconsistent with each other, Sir Ronald Wilson, did so on a commendably straightforward basis. He pointed out that the RDA required the elimination of discrimination on a racial basis and that this was exactly what the Queensland Act did. By abolishing native title it put the claimants on a basis of equality with everyone else in matters of land ownership.

The majority said that the RDA was intended to protect human rights as well as legal rights. The right to own and inherit property was a human right. By depriving the claimants of their right to hold and inherit land according to their own laws and customs the Queensland Act would deprive them of that human right. They did however lay repeated emphasis on what they called the arbitrary nature of the deprivation. By this they seemed to mean removing native title without compensation.

The apparent result was that it was inconsistent with the RDA to extinguish native title but not inconsistent with the RDA to convert native title into a claim for compensation. This presented everyone with a problem when Mabo 2 on 3 June, 1992 confirmed that native title did indeed exist. The problem was what to do about native title that had been extinguished without compensation by actions taken on and from 31 October, 1975, the date on which the RDA came into operation.

Only one thing seemed to be certain: that no native title that had been extinguished since the RDA came into operation had been compensated, for at the time no–one knew that native title existed, let alone been extinguished. But what was the result of non–compensation? Did it mean that none of the supposedly extinguished titles had been extinguished after all? Or did it mean that the native titles had indeed been extinguished but someone was liable to pay unspecified compensation?

Once puzzles like these began to appear, a clamour arose for the Commonwealth to do something about the RDA so that, whatever the future held in store, at least the past title situation could be cleared up. It was pointed out, reasonably enough, that until 3 June, 1992 the grant of titles to land in the usual way had proceeded without any intention to prejudice native title because no–one knew native title existed. Were people to whom normal titles had been granted to find themselves at risk of either paying substantial compensation or else perhaps losing their titles after expensive litigation? The cry went up, "validation of titles".

Various ways of responding to this cri de coeur were debated but the general conclusion reached was that the validity of titles granted by the States since the RDA came into operation should be confirmed. To the extent that State legislation to that end might be inconsistent with the RDA, the Commonwealth should restrict the operation of the RDA. After dithering for a while over this last point, the Prime Minister, Mr Keating, personally assured the nation that that would be done.

The way in which it was going to be done however was not by any such commonplace method as amending the RDA. Heaven forbid! To do that would be discriminatory, which was absolutely unthinkable. No, the magic formula was to be the inclusion in the proposed Native Title Act of the Commonwealth of a section that said that State validation of title Acts would be valid "notwithstanding any law", including the RDA.

There is an expression in the English version of the English language that disparages excessive ingenuity. It describes people who go in for that sort of thing as too clever by half. I do not know who thought up the "notwithstanding any law" device, but I suspect that in England he or she would have been rather unkindly called too clever by half. I say "unkindly" because the officer concerned would only have been doing his or her best to work miracles for a Prime Minister who apparently takes them for granted if the facts displease him.

The legal system however is a prosaic institution not given to the miraculous, as opposed to the unexpected. As far as the law is concerned, an Act which modifies the effect of an earlier Act prevails to that extent over the earlier Act. It follows that the "notwithstanding any law" formula would have restricted the RDA just as effectively for the purpose in hand as if it had been amended.

With most statutes the discovery that the magic formula was no more than a misleading device would have been the end of the matter. The earlier statute would have been modified in its effect and life would have continued as usual. With the RDA however the discovery merely brings us to the heart of the conundrum of intricate intellectual beauty to which I referred earlier.

The RDA is an unusual Act in several ways. One of them is its dependence on the power of the Parliament to make laws with respect to external affairs. You will recall that I also mentioned earlier that any Act dependent on that power has to conform reasonably closely with both the letter and the spirit of the international obligation that it is enacting into Australian domestic law. You may now be beginning to perceive the havoc that the "notwithstanding any law" formula threatened to wreak. Consider what it was intended to do.

It was intended to restrict the scope of the RDA in a manner that would permit State Acts to retrospectively confirm the extinguishment of native title by any extinguishing event that occurred on and from 31 October, 1975 to the present day. The extinguishment of native title is in itself a racially discriminatory act: the High Court said so in Mabo 1. Admittedly the majority in that case also implied that this might be all right if compensation was given in return for the extinguishment; but they did not actually say so.

Furthermore, although compensatory damages for past extinguishment were envisaged by three members of the court in Mabo 2, the other four disagreed. So there was, and is, some uncertainty about the healing powers of compensation. All one can say is that, constitutionally speaking, compensation makes State legislation safer. The Commonwealth of course has no choice. Under s.51(xxxi) of the Constitution it can legislate with respect to the acquisition of property only on just terms, which means fair compensation.

The significance of these matters for the RDA is that for that Act to remain valid it has to continue to conform with the International Convention on the Elimination of All Forms of Racial Discrimination. Yet here was the Commonwealth proposing to enact a statutory formula that would inevitably result in the RDA not applying to State title validation Acts of a racially discriminatory character. It might get away with it by trying to insist on compensation, but then again, it might not. It is not at all clear that the Commonwealth can so manipulate the statute book as to pick and choose among the States to dictate the terms on which their own legislation will or will not be inconsistent with Commonwealth legislation.

The "notwithstanding any law" formula raised the possibility therefore that it might bring about the validation of titles for which everyone was clamouring, but only at the cost of invalidating the RDA, either wholly or in part, for failure to adhere to the international obligation upon which it depended for its validity. For those who enjoy irony, that would have been a pleasing instance of a Prime Minister hoist with his own petard. Unfortunately Mr Keating is not famous for rejoicing in irony at his own expense. Neither was it a result likely to appeal to Aboriginal

interests or those who regard the Racial Discrimination Act as the foundation of civilisation as we know it.

The Aboriginal lobbyists in particular became very upset at the prospect of any tinkering with the RDA and made their views known in no uncertain manner. This appears to have wounded the Prime Minister's feelings. Indeed, he was wounded so deeply that he became inspired to make a timely but remarkable discovery. He suddenly announced that everyone could live happily ever after because, upon further reflection, he had realised that there was no need to tinker with the RDA after all. It is wonderful what the attentive study of French clocks and Siamese tables can do for you.

Upon hearing the announcement, the media with one voice proclaimed that our great leader had achieved a triumph and a victory. He then departed to Cyprus trailing clouds of glory. He also trailed some fair-sized clouds of obscurity. In spite of the media, omniscient though it no doubt is, some of us remained a trifle puzzled about the precise character of the PM's latest insight into the nature of things. The triumph was not obvious. The victory did not leap to the eye. Particularly elusive was the reason why the RDA no longer hampered the validation of past titles.

The answers to these questions remain in doubt. I do however have a concluding suggestion to make. It derives from the possibility that someone has advised the Prime Minister to the following effect.

Some confusion has appeared in the public debate owing to the imprecise use of the words "validate" and "invalidate" in relation to grants of land titles, the RDA and s.109 of the Constitution. The idea has gained currency that the RDA of its own force can invalidate land titles. This is a misapprehension which probably derives from lack of understanding of s.109. The section has no direct effect on any grant of title. The inconsistency rule is directed to laws, meaning Acts of Parliament and subordinate legislation (that is to say, regulations) made under them.

A grant of land title is not a law but an executive action taken under the authority of an Act. The grant therefore is invalid only if the law authorising it is invalid. This means that the Mabo problem about past titles is not whether the RDA invalidates them but whether it invalidates State land title Acts. As far as I can see, the only way this could happen would be by arguing that to the extent (and to the extent only) that the State Act authorises a grant of title (eg. freehold) which extinguishes native title otherwise than on just terms, it is inconsistent with the RDA. But this argument encounters the difficulty that no State land title Act either is or ever was discriminatory in the Mabo 1 sense.

The majority in Mabo 1 held that the Queensland legislation there in question could affect no-one but the Meriam people and was clearly directed at them. State land title Acts affect everyone and are not aimed at any section of the community. Moreover, although the majority in Mabo 1 stressed the "arbitrary" (ie. non- compensatory) nature of the deprivation of native title, only a minority in Mabo 2 were prepared to hold that past loss of native title should be compensated.

It may be therefore that the Prime Minister has been advised that existing State titles are in no danger from the RDA and hence do not need to be validated. If that is the advice he has received, it may explain his present position. More importantly, it may be right. Personally I have the greatest difficulty in envisaging that even the present High Court would retrospectively invalidate either wholly or in part State land title statutes of general application for authorising grants of title issued in good faith.

Nevertheless, this remains speculation. So does the wider question, what will happen next? It is less than two days since I had the privilege of sitting in the chamber of the House of Assembly of this State listening to the Premier of Western Australia, Mr Richard Court, read the second

reading speech with which he introduced his Government's Land (Titles and Traditional Usage) Bill. If I may be permitted to express the opinion, that Bill represents by far the most constructive response to the Mabo situation thus far.

In saying as much I have to make clear that I may be a trifle biased because I had the honour of being a member of the team that brought the Bill into existence. Notwithstanding that handicap I still think it is a good Bill. I am comforted in that opinion by the fact that the senior member of the team in recent weeks has been Mr SEK Hulme QC, who finished up as the principal author of the second reading speech. He was sitting next to me in Parliament House on Thursday. I believe that we both thought the speech sounded rather well.

Chapter Two

The Social and Economic Realities of Mabo in the Federal Electorate of Kalgoorlie

Graeme Campbell MP

I have been asked to talk to you about the social and economic realities of Mabo as it will affect the federal electorate of Kalgoorlie. Although I am certainly as good an authority as any on this subject in as much as no one really knows, I cannot comment in detail until we have the legislation. However, I am quite prepared to make some general comments on the process to date.

What can be said with the utmost authority is this: any negative effect on Kalgoorlie will quickly affect the entire nation. The State of Western Australia earns in terms of export dollars twice as much as the State of Queensland, which is the next biggest net export dollar earner. The mining industry cannot operate in a climate of uncertainty. The mining industry has to know what the rules are and have secure title to land. It knows that the Federal Government cannot manage land. Even if some of my more emotional colleagues think that setting up a Commonwealth Lands Department in parallel to the States is an option, Paul Keating is well aware that it is not.

It should be clearly understood that it is not the High Court decision itself, but the government response to the Mabo judgment, which is the crucial issue before us at present. As I say, we will have to wait for the legislation before we can comment in detail, but the impression given by the Government to date has hardly been encouraging.

There is anecdotal and specific evidence that on the basis of the pitiful and confused response so far, we have already lost opportunities for investment. I have been told that a $10 million tourist project in Broome has had the finance pulled because of Swiss concerns about Mabo. I was talking recently to the Chairman of what must be one of Australia's most exciting new mining ventures. He advised me that on a recent trip to Europe, he was told that while they had the greatest respect for our technical expertise, they were concerned about the Mabo outcome.

It is interesting to note that one of the factors affecting the viability of the Kimberley cattle industry is the fall in productivity or cattle turn off in the area. This is due to the increasing number of stations coming under Aboriginal control. There is no reason why this should be so but it is. It could be remedied and God knows that the Aboriginal owners would like it remedied! There are lots of reasons for it and I won't burden you here with the mechanics of it all.

The government is talking about a land acquisition package as part of its response to Mabo. We do not know how big this package will be, but given the power of the guilt industry, it is likely to be substantial. In my view the money is likely to be administered through the Land Councils. If these generally unrepresentative bodies, driven by their legions of white lawyers and Aboriginal activists, do get control of this money, then you will see the buy-up of stations, but on an emotive, not on an economic basis.

The uneconomic buying up of stations will undermine hope of Aboriginal self–determination. The lowest common denominator will be the measure of productivity. We will be told by the New Class manipulators that community and social values are much more important than the mere economics of the properties.

High–sounding moral arguments will be put forward. White guilt will be manipulated to extract funds for schemes which had no hope of economic viability to begin with. The schemes will only

remain afloat by the injection of ever–more funds extracted from the long–suffering taxpayer. All this will be done in the name of reconciliation.
This of course will totally deny Aboriginal people any chance of self–respect, self–management or sense of achievement, which is absolutely necessary if their social and economic position is to be improved. It will keep them in the position of the eternal mendicant that I believe is exactly what the Aboriginal industry wants. They want a captive constituency which has to deal through them. People who are independently minded and who are economically viable would have no use for the industry.
This land acquisition package will also provide an excuse for a separate black state. As the non–viable ventures fail, the Aboriginal industry will claim that the reason has nothing to do with their management, but can be put down to 200 years of subjugation. Only breaking free of this subjugation by a form of sovereignty will free the Aborigines. So ironically – and as we have already seen if people are honest enough to look at the process – the more special treatment that is afforded, the more will be demanded. The complaints against white society will grow no matter what is given, until we reach this demand for what is effectively a separate black state. Let there be no doubt that under such a system, ruled over in effect by the Aboriginal industry and their white side–kicks, Aboriginal people will be far more repressed than ever.
They will cop it both ways, because the response of white public opinion to all this can be imagined.
Before you all get twitchy and think I am alarmist, I suggest that you think about it. This is a credible scenario. I personally am actually more optimistic and I do not think things will get that far, primarily because there are many Aboriginal people who see this scenario, fear this outcome and will resist it. If however, the endeavour of the majority is thwarted by bureaucratic action, aided by government ministers with bleeding hearts and small understandings, then society – or rather, long suffering middle and working class Australia – will make its voice heard. If that happens, things could become very messy.
I hope that the voice of reason, common sense and uniting force of shared objectives will triumph within the Aboriginal community. The voice of the majority of Aborigines is presently thwarted by government and ignored by the media, but these Aboriginal people are determined and I am happy to back them.
Well, that is the end of the speech on what I was asked to talk about, and this is the beginning of the new one on what I want to talk about. I take this liberty because, as I said at the outset, what happens in the Kalgoorlie electorate – which is, as you all know, the centre of the universe – will radiate to affect all of the nation.
I only did Latin for two terms of my first year in High School and I failed miserably. Mercifully I transferred to an agricultural high school in Adelaide and Latin was not on the curriculum. I wanted to be a pastoralist and own a big station, an ambition I achieved. Having achieved it, I found that it was not enough and I left it to a rather more determined brother who still perseveres.
In a life of regrets, I do regret that I did not persevere with Latin. I have found the little I did very useful and I am sure that more would have been better.
Terra Nullius, terra pertaining to land, nullius meaning nothing, void. No mention of no people. Yet we have seen Paul Keating, the Attorney General, Michael Lavarch and Minister Walker continually asserting that the High Court had overturned the outrageous fiction perpetrated by those unspeakable British that there was no one here before they came. In this they have been constantly abetted by a slothful, ignorant and sycophantic Canberra press gallery and of course by a High Court that, having caused the problem in the first place, seeks to walk away from it.

Terra Nullius means no use of the land. The American Supreme Court, the Canadian High Court, the Privy Council and until recently our own High Court have all held that occasional traversing of the land by nomadic people did not constitute use of the land.

The habit of the British was to seek treaties with the indigenous people wherever they went. This is why treaties were made in New Zealand, Fiji, India, Malaysia and North America. This is certainly the instruction given to Captain Phillip, and no amount of New Class revisionism can deny this as the instructions are available as historic records. The reason that neither Phillip nor subsequent governors made treaties was not because there were no people, but because there was no apparent leadership and cultural structure with which to conclude them. Even today we have recently had Paul Keating lamenting that he did not know whom to negotiate with. If he had to make a treaty with a representative Aboriginal leader, just which one would he choose?

The High Court was extremely presumptuous to believe that with two hundred years of hindsight, they could have done better than our first settlers.

Common Law is the essence of experience. It is not and should not be about so–called social justice. Common law is essentially a code for the good management of society. As such it should change only in an evolutionary way, not a revolutionary way, as has happened with Mabo. The majority of judges, in their emotional ardour, grabbed powers that the founding fathers of our Constitution, for very good reasons, denied them and simply turned two hundred years of established law on its head.

I have heard so many people from Keating down to newspaper editors, clergy and of course the Aboriginal industry, even people in the mining industry, say "the High Court has decided and we have to live with it." I disagree. The High Court has made itself a political court and now has to face the rough and tumble of politics like the rest of us. It cannot, as one commentator so rightly noted, commit a judicial coup d'etat and expect those of us who oppose its action to accept it quietly.

The elimination of appeal to the Privy Council, a decision of the Hawke Government with which I agreed at the time, has removed any need for intellectual rigour from our High Court and this is a circumstance that must be remedied.

It is my very strong view that the High Court has been mischievous or stupid. Either way, instead of leading us towards illumination, it has self indulgently created a gloomy cloud cover over our public affairs. To use the words of Dylan Thomas, we must "Rage, rage against the dying of the light".

How do we do this? Clearly we could get help from the government, but Keating has raised the Mabo decision to a matter of fundamental importance to all the true believers. He has made it the ultimate Social Justice issue. His speech of Redfern is held by some, but by no means all, of my colleagues to be a landmark in social justice.

It is of course nothing of the sort. It was the speech of somebody ignorant of the subject who fell back on outpourings of guilt and the most degrading national self abasement. Frankly I can see no reason to make such a speech to the lost tribes of Redfern. They are in the city because they voted with their feet and long ago left their tribal areas for what they perceived to be a better life. Historically it is this perception that caused large numbers of Aboriginal people to gravitate to our society or to the fringe of it. They, particularly the young men, made a decision that our way looked better than the very hard, unforgiving laws of their own cultures. This is not however accepted by the New Class, as it does not sit well with the development of the guilt industry.

Notwithstanding the present euphoria, I believe Keating's Redfern speech will come to be viewed as the emotive, but empty, rhetoric that it really is. Even Don Watson, the joke writer who manufactured the speech for Keating, was surprised that it was accepted in its entirety. He referred to it as an "ambit claim" – the ambit claim of a privileged individual who takes or bears

no responsibility for its consequences. Don Watson has a flight from responsibility which he should not be allowed to forget.

We cannot expect much from the Opposition leadership. After all, the present Federal coalition Aboriginal policy was cobbled together by a couple of public servants, seconded to Dr Wooldridge by the good grace of Robert Tickner.

In the ducking and weaving done by the High Court following its Mabo 2 judgment, the Chief Justice has sought to justify the court action with the following quote to the Australian Lawyer magazine, where Sir Anthony said: "In some circumstances, government and legislature prefer to leave the determination of controversial questions to the courts, rather than leave the question to be decided by the political process". Sir Anthony may well be right about the gutless nature of some legislators. What he is wrong about, what he is naive about is his belief that the Court can enter the political arena without becoming politicised itself.

The Court is simply not competent to enter what is clearly the political arena. The Court for its own short term aggrandisement should not pander to gutless politicians, and I am appalled to think we pay the Chief Justice $191,550 for being so silly.

No, if we are to be saved, we must save ourselves, and the people must demand and use the power of the referendum. The High Court must be made to bear the censure of a higher court, the court of the people.

I am more convinced that it would be no bad thing to put a few questions to the people with every general election. Although I once opposed it, I am now quite prepared to countenance Citizens' Initiated Referenda, provided the percentage of people requesting a referendum on a particular issue is big enough to prevent vexatious abuse of the system by small groups of zealots.

Section 51 of the Constitution clearly needs looking at. The High Court is taking it where I am sure the founding fathers never intended. I would personally favour a new section making it clear that no government had the power to sign any foreign treaties or UN resolutions that in any way impugned our sovereignty without the mandate of an election or a constitutional referendum.

At this point, I should confess that I went into Parliament as a confirmed centralist. Thirteen years in Canberra have convinced me that I was wrong and I am now a convinced federalist. There is no doubt that a federal system can be clumsy and it can hold up good ideas, but if those ideas are sound and workable, it will not stop them. This occasional clumsiness is, I am convinced, a small price to pay for the checks and balances inherent in our present constitutional system.

I want now to address a solution.

Since native title has been extinguished over the largest part – in fact all – of inhabited Australia, the sensible thing, in the name of equity, would have been for the Commonwealth Government to legislate to do what we always thought had been the case, and extinguish native title and agree to pay compensation. Since the High Court has acknowledged that minerals should not form part of the compensation, the cost of compensation would in fact have been very little. If there was requirement to prove title under the terms outlined by the High Court, there would in fact be very few successful claimants.

Keating has talked about regional solutions. Western Australia is a region as well as a State and things are very different in WA from the rest of Australia. This is the State with the largest area of unalienated Crown land. It is all very well for Premier Kennett of Victoria to support the Federal government. This is not an issue that will impact much in Victoria. Kennett is obviously listening to the largely foreign-owned mining company boards in Collins Street. What they want is their present operations protected so that they can continue to use them as a milch cow to fund their offshore expansion.

I believe that Richard Court is right to fight for the differences in Western Australia. I think that the State Government should legislate to extinguish native title and pay compensation. Of course, to be consistent, the Premier should also remove from farmers the power of veto over mining foolishly given to them by a previous coalition government.

I set out these views in a letter I sent to The West Australian on 14 June, 1993. They of course did not publish it even though it would have given some sort of balance to their coverage.

I am told by my more learned parliamentary colleagues that the Premier cannot act as I suggest, as he will be stopped by section 8 of the Racial Discrimination Act. I do not see the conflict myself but in any case, the States' right to administer land stems from the Constitution and this must override an Act of the Federal Parliament. Of course if section 51 is invoked and upheld by the High Court, then all is lost because it will render the Constitution meaningless. Unless this could be redressed by a referendum, the High Court would entrench itself as the new dictatorship.

What of social justice? I am, in fact, a great advocate of social justice. I simply say that this is not the mechanism for applying it.

The Aboriginal industry in Australia today receives something like $2 billion a year – $1.25 billion from the Commonwealth and about $0.75 billion from the States. There are, in round figures, something like 240,000 people of Aboriginal descent in Australia. On this basis, each man, woman and child receives about $7,500. If you accept five people as being an average for the Aboriginal family, then every two or three years that Aboriginal family should receive enough money to buy a completely new house. Quite clearly, the money is not getting to Aboriginal people and Aboriginal people are aware of this. Obviously in the acquittal of these funds lies the greatest opportunity for social justice and this is what Aboriginal people are calling for.

Let me give you an illustration: in the Kimberley, there are about 60 Aboriginal children that we know of who have chronically perforated eardrums that require surgery. Without this surgery,they are doomed to a half–life. They will not be able to hear, they will not be able to learn, school will hold no interest for them, they are doomed to be alienated and unemployable. This could be easily remedied, the surgical technique is well known. If we are unable to get surgeons to go from Perth to the Kimberley to operate, then the Commonwealth should look at doing something useful. I suspect that within our military medical resources, the necessary surgical skills are available. A military medical exercise in the Kimberley would provide valuable medical and logistic training. The military would be doing something useful and the government would deserve and get kudos for a genuine social justice objective achieved. While the AMA is without doubt the most powerful union in Australia today, they would be unlikely to object in the face of such an obviously good, compassionate and cost effective exercise. Ask yourself the question, what is stopping us?

We should ask ourselves :"What is the extent of Aboriginal support for Mabo?"

Now, this is actually quite hard to determine because Aboriginal people have never been asked. We have been too busy consulting with the Aboriginal industry. But I do have a good rapport with a lot of Noongar people in the South of Western Australia. These people know that there is no native title for them – that was extinguished long ago in their case. They say there is nothing in Mabo for them except the backlash – a backlash which they believe has already started and which understandably they do not want.

Aborigines in communities I have spoken to have another point of view. It has been put to me that this legislation will pit black against black and black against white at the same time as the Aboriginal communities believe we should all be working together. These people say to me "We

are Australians. We don't want anything other Australians don't get". This is not a view one finds reflected in the mainly city– based media.

Aboriginal people and the wider community must realise that the continuation of the guilt industry is incompatible with Aboriginal advancement. The guilt industry needs victims. If Aboriginal people are advancing in mainstream Australia, where most of them want to be, there are no victims. I can assure you the Aboriginal industry will fight tenaciously to maintain the quota of victims.

Some months ago I was talking in my office to an Aboriginal elder who has in fact been inducted into three Aboriginal law systems – a man who has battled and overcome chronic alcoholism, a man who has travelled so widely there is scarcely a nook or cranny of Central Australia that he is not familiar with. While I was talking with him, I heard raised voices in my outer office. I went out to investigate, to find two young Aborigines harassing my secretary for money for a variety of reasons. I might add this is not an unusual occurrence. On this occasion, I said there was no money for them, they had in fact not repaid previous loans, and that it was my view that they would spend the money on grog.

One of the young men then said to me, "You owe us, you have taken our land". Now since he came from the Central Reserve area, where their land has never been taken, this was totally untrue. I set about to simply throw them out of the office when the elder emerged from my inner office and said, "What is this? What is this I hear?", and lined up the young blokes and said, "Now listen, you fellas, listen to me. Two hundred years ago", he said, "this was a big empty country, just a few black fellas like you and me running around the place. Sooner or later someone was going to come 'ere – you can thank your lucky stars it was this mob and not..." and he reeled off a whole list of other possible colonists. The fact that Australia was bound to be colonised by one group or another was obvious to this man. The fact that the British as colonisers have a better record than most was also clear, no matter what the New Class may insinuate.

Europeans themselves have been subject to colonisation and invasion. Consider the devastation of the Mongol invasions of Europe, the advance of the Turks through the old Empire of Byzantium and into Europe, and the advance of the Moors into Spain. This sort of thing is a constant in human history, and our own European forebears have been at the end of it. The Mongol atrocities for example put anything that happened in Australia well and truly in the shade.

But 200 years ago, due to the development of superior technology, Europeans were the leading colonisers, so it was always most likely to be either the British, French or Dutch for this continent. If the first two had both gained footholds we might have found ourselves today in the situation of Canada, in danger of breaking up as a nation. If the Dutch had colonised part of Australia they may well have shipped indentured labourers from the East Indies here. In time the ancestors of these labourers may even have been as numerous as, or even outnumbered, those of Dutch descent. In that case, when the East Indies gained independence, Indonesia would have made a strong claim for the Dutch controlled section of Australia.

We were fortunate to have only one coloniser, providing a solid base and a common culture and language from which the country could be unified. I strongly maintain that, at the time, only the British had the power to claim this entire continent. Other colonisations would have been piecemeal and would have led to inevitable conflict and division.

I can assure you that there are many Aborigines who accept that there is no conceivable way that they could have continued on as they did 200 years ago. Given the forces at work it is nonsense even to suggest it as a possibility, and yet the utopian New Class act as though, if it had not been for the nasty British, the Aborigines would still be living their traditional lifestyles all across the country.

As it stands, the descendants of the colonisers of this country are far and away the best bet of the Aboriginal people. I have heard the professional Aboriginal Eric Willmot virtually wishing for the day that Europeans are displaced and Australia becomes Asian. Would that help the Aboriginal people? Dr Willmot and others should take note of the comments of thoughtful Asians. The vice chancellor of Hong Kong university, Professor Wang Gung Wu, has stated for example, as reported in The Canberra Times of 8 July 1992, "where most Asians are concerned, the survival of Aboriginal peoples and cultures has never had any priority." For those who open their eyes this is obvious, but our elites always have us look at Asian countries through rose coloured glasses. Our extinction is something to be welcomed almost as some sort of divine release, and Aborigines are used for their guilt value to hasten the process. The logic involved is truly that of which, to paraphrase Orwell, only an intellectual would be capable: in order to survive in the region we have to conspire in our own demise.

Becoming an Asian nation, in the fashionable jargon of the elites, would mean that Aboriginal people would slide further and further back, rather than advance. I make it quite clear that I do care strongly about Aboriginal people and I do want to help them to advance. It is because I am so sure that Mabo is not the answer that I oppose it.

I can't now recall how many times Aboriginal people have said to me, "What's this reconciliation nonsense? Reconciliation is about the past. We can forget all about that. We've got to think about the future, and we will have to work together, otherwise no-one has got a future."

Aboriginal people tell me everywhere they want to be mainstreamed, but we continue to marginalise them in a system which wants them to be eternal mendicants. But there is no doubt that the Aboriginal industry is directed to failure. It is a big industry with its own bureaucracy, and there is nothing more tenacious than bureaucrats fighting for their survival, which would be threatened if Aboriginal people were to successfully integrate in mainstream Australia.

Contrary to the myths of the guilt industry, there is little evidence in our history of massed or planned genocide of Aboriginal people, if it exists at all. Of course there were individual instances of killings, often in revenge for the killing of stock. But even in Tasmania, the passing of the Aborigines was not a planned policy. Quite apart from the individual brutalities of convicts, who were themselves often brutalised, it was largely a case of misguided paternalism.

Misguided paternalism in the shape of welfare is also the problem today. It is welfare that is killing Aboriginal people, and there are indeed people who recognise this, but believe that the solution is to increase the welfare even more. There is that twisted logic again. It's a logic I am not prepared to accept, and I do everything that I can to support the real and legitimate concerns of my large Aboriginal constituency.

Mabo will lead to a misallocation of resources with no benefit except to lawyers and the Aboriginal industry. Great hopes can be raised among some, only to be dashed, and the end results will be bitter.

The situation of Aboriginal people will not improve until they take responsibility for themselves. I am interested in hard headed measures which will assist them at the grass roots. I am not interested in enriching lawyers and promoting the status of members of a self appointed Aboriginal industry.

At this point I should consider what the Government's Aboriginal Affairs policy has been about. If it was to improve the lot of Aboriginal people, then it has been very expensive and only very marginally effective. If it was to placate urban white middle class guilt, it has been very successful, so successful that we are now at the backlash stage. The tragedy is that the Aboriginal people, the vast majority of whom do not deserve it, will be the recipients of the backlash. Those in the Aboriginal industry will simply move on, protected as many of them are by jobs funded by the Australian taxpayer.

Solutions:

I personally believe that it would be better to provide the present funds through the States or other federal government departments. ATSIC should be abolished. It has failed, for all the reasons that I told Gerry Hand it would when he set it up.

Overwhelmingly, Aboriginal people want to get rid of ATSIC. Returning it to the Department, fully answerable to a Minister, would meet with general approval. If the funds were disbursed by the States, all that would be needed would be a small overview monitoring department.

We should scrap the rubbish about guilt and address the basic issues: housing, health, education, training and employment. I think in that order, but all are interlinked, and if one element is missing, it cannot work.

We should listen much more to what Aboriginal people are saying. They are much more realistic, sensible and honest than the industry.

We must demand the same level of competence and accountability from Aboriginal bureaucrats as we demand from others.

In my electorate, I have some Aboriginal stations that are, in terms of cattle quality, land care and improvements, better managed than they ever were under the previous management. These properties are being hampered in their development because ATSIC appears unable to provide their allocated funds on the due date. Funds are often not paid until late in the year, forcing the properties to employ white contractors to get the work done and money acquitted before the end of the financial year.

This leads to depreciatory remarks in the wider community about "lazy black bastards", thereby entrenching the stereotype, feeding the prejudice and helping to guarantee the failure, thus ensuring the survival of the Aboriginal industry that requires a mendicant constituency.

To be fair, and notwithstanding my earlier comments, I believe the new State Manager of ATSIC is aware of this problem and is trying to rectify it.

We must stop treating Aboriginal people like children. They are able to and they want to enter into their own negotiations.

Somehow we must make the press more responsible, especially ABC TV. I have many experiences with ABC programs which have been little better than politically correct propaganda pieces.

In Western Australia, the ABC has point blank refused to give air time to Aboriginal people who want to complain about statements made in their name, but about which they have absolutely no input and with which they do not agree. I can give many instances of this.

People like Peter Yu of the Kimberley Land Council and Robert Riley of the Aboriginal Legal Service speak ad nauseam on television but the counter Aboriginal view never gets reported. This leads the wider society to think that all Aboriginal people are the same, and I know it is not the case. In fact, this week I have just returned from the Kimberley, where Aboriginal people are looking to change the constitutions of their communities to make sure they cannot be infiltrated or taken over by the Kimberley Land Council or other groups.

While you might think this contradicts views I have expressed earlier, this is not really the case. I am simultaneously acknowledging the way things are and the logical outcome of the continuation of this course, and the belief, maybe against all the odds, that the constructive Aboriginal voice, the voice of Aboriginal people who recognise they are Australian, that their future lies in a united Australia, will triumph. I hope for all of our sakes that I am right.

Chapter Three

W.A. Inc.: Why Didn't We Hear The Alarm Bells?

Bevan Lawrence

People for Fair and Open Government (PFOG) was established in Western Australia in the winter of 1989 following the re–election of the ALP Government in February, 1989. We lobbied for a Royal Commission of Enquiry into what had then become known as WA Inc. This was a general reference to a number of financial arrangements which the Government had made with business which many in our community viewed as improper.

The lobby group came into existence because neither the press nor the Parliament had been able to uncover or stop any of these improper transactions. It believed that there had been a significant cover–up of these improper deals, including what became known as the Rothwells Petrochemical deal. PFOG was hopeful that if the Government was exposed, further public funds would not be wasted. It failed in that objective but ultimately, in November 1990, a Royal Commission of Enquiry was called by the then Premier of Western Australia, Dr Carmen Lawrence, into the major transactions.

This Commission of Enquiry was called when the ALP Government's voter support plunged to an all time low of 22 per cent, when the West Australian Ombudsman had called for a public enquiry following dramatic revelations in a court case, and when evidence was adduced through two Legislative Council parliamentary committees, and after The West Australian newspaper had finally campaigned for such an enquiry for about three weeks. The terms of reference were roughly in line with the terms of reference which PFOG delivered to the Premier in May, 1990.

The Royal Commission began with the support of the general community. While some criticisms and complaints were made during the enquiry, PFOG was generally supportive. Part I of its Report, which included all its findings of fact, was published on 20 October, 1992. The general community was supportive of its major findings, which appeared to be fairly based on the evidence. There was, no doubt, more to be uncovered but the public nature of the enquiry had exposed the essential features of the impropriety.

Part II was published three weeks after Part I. This Report was made pursuant to the terms of reference of the Royal Commission which required the Commission "to report whether changes in the law of the State or in administrative or decision making procedures are necessary or desirable in the public interest".

At the time Part II was published, a core group of those active within PFOG were both surprised at some of the recommendations and concerned that such recommendations did not fairly flow from the facts which had been uncovered by Part I. We felt that too little attention had been paid to the role of the Executive and that the Report had not in any way attempted to curb or control the power of the Premier and the Ministers either individually or collectively.

The Commissioners reported that "the allocation of ministerial responsibility both individually and collectively is for the Parliament to exact and for the electorate to judge, not for this Commission to pronounce upon". I strenuously disagree with this statement. Surely the very task of the Commission was to report whether changes in administrative or decision making procedures are necessary or desirable in the public interest.

If the Commissioners thought that such a task was outside their terms of reference, then we in the community surely now have a duty to undertake the task of ensuring that we bring the Executive under control so that it will in the future act lawfully and in the interests of the citizens of this State.
In determining how to prevent a recurrence of the abuse of power and the impropriety uncovered by the Royal Commission, I believe it is necessary to ask:
Why was it that information did not become public at the time to expose these deals?
Did the alarm bells ring? If they did, did anyone heed them?
What is required to ensure that such impropriety does not happen again?
Today, I will examine some of these transactions. I will refer to the public reaction at the time the deals were done, and then provide my own analysis of how this now disgraced Government managed to keep much of the impropriety quiet and in the process survived two elections. I will then use that analysis to make my own suggestions.

The Acquisition of Northern Mining

The Australian Labor Party led by Brian Burke won Government in Western Australia in February, 1983 after ten years in Opposition.
One of the platforms of its policy for the election was that the Government would acquire an interest in the fledgling diamond industry in Western Australia. At the time of the election the Argyle diamond venture was to be operated by a consortium of companies (joint venturers). Northern Mining NL had a 5 per cent interest in the project and was effectively controlled by Bond Corporation. The joint venturers were required, pursuant to an agreement with the previous Government, to build a town near the minesite. Shortly after the election the joint venturers made it clear to the Government that they wished to be relieved of this obligation, and they suggested that unless they were so relieved the project could be threatened.
Laurie Connell came to hear of this, probably through his employee, the late Jack Walsh, who was also a friend of Brian Burke. At about the same time Connell also became aware that Bond Corporation was anxious to sell Northern Mining NL, as it was having trouble servicing the debt which related to its acquisition.
L R Connell and Partners, acting as advisers to the Government, assisted the Government in obtaining an agreement from the joint venturers that in lieu of building the townsite $50 million would be paid over a period of time. At the same time, with L R Connell and Partners acting as its advisers, the Government agreed to acquire Northern Mining NL for $42 million.
After conducting its enquiries the Royal Commission found that L R Connell and Partners earned a commission of $5 million from Bond Corporation for the transaction. It found that Mr Burke was well aware that a fee was to be paid by Bond Corporation to L R Connell and Partners and, assisted by one of his political advisers, Burke kept this information from Cabinet, so that Cabinet was unaware that L R Connell and Partners was taking a commission from the vendor at the same time as it was advising the government as to the price it should pay. The Royal Commission found that the price paid was from $7 million to $12 million more than its true value.
It is apparent from Royal Commission evidence that the decision to acquire the company was deliberately kept secret from senior civil servants. The transaction was handled by Burke and his political advisers attached to the Department of Premier and Cabinet.
Cabinet was advised by Burke that no fee was being paid to Connell and Bond. The Attorney General, Mr Berinson apparently raised a query with Mr Dowding and then penned a hand written note to Burke which said:
"I was frankly stunned at the end of our meeting with CONNELL and WALSH to hear that their services to us (though not to others) were without charge. If I understand the position correctly,

that means that our primary advice came from agents (salesmen?) for the vendors. If I am wrong in this, I would be pleased. Even if I'm right the decision is made and looks right – and has the express support of our own adviser in the Under Treasurer."
Berinson did not send that note and wrote on the bottom of it:
"Not sent – but all matters discussed at P/H (Parliament House) 10.10.83. Connell is the organiser of Bond's loans."
Subsequently Berinson wrote a note to Burke on 27 October, 1983 which stated:
"Observations on the Acquisition
1. I have previously put to you that we were vulnerable to the charge that we failed to get fully independent professional advice. The Opposition has been weak on that, but the criticism will emerge should anything go astray.
2. We must have independent advice in the future and at a level of experience and expertise that is self-evidently adequate."
It is unfortunate that Berinson did not take any positive steps to bring his concerns to the attention of the Cabinet.
In addition to condemning Burke's role in the transaction, the Royal Commissioners criticised the Opposition parties in the following manner:
"The Northern Mining acquisition Bill came before the Legislative Council in a form which would deny accountability in respect of the actions of the Treasurer in the executive department. It is a pity that, notwithstanding that obvious feature, the Opposition, which could have used its numbers to reject the bill or amend it to preserve accountability, failed to do so."
I have since read the Parliamentary debates in their entirety. It is apparent that the Legislative Council was of the view that it should not oppose the Bill because it was attached to a Budget requisition and because it was part of the Government's pre–election platform. This was held to be in accordance with established Westminster convention.
Although many members of the Opposition spoke in opposition to the Bill both in the Legislative Assembly and in the Legislative Council, their comments were mainly directed to the desirability of the Government being involved in business and whether or not the Government paid a fair price.
Opposition members do not appear to have realised that, once acquired, Northern Mining NL could be used for a number of other activities in accordance with its Memorandum and Articles of Association and thereby avoid all parliamentary scrutiny of the company's future activities. Cabinet made the decision to acquire Northern Mining NL on 26 September, 1983. The Bill was passed through both houses of Parliament and became law on 31 October, 1983. It is apparent from Royal Commission evidence that some in Government well knew that once the Act was passed it could use the company for other purposes. This was not apparent to the Opposition at the time.
In my view, if any fault is to be attached to the Opposition or to the parliamentary processes, it relates more to the fact that the Bill could be rushed through Parliament in such a short period of time, and to an overly zealous adherence to the Westminster conventions referred to. The elements of this improper transaction, which recurred time and time again during the Burke administration, were:
1. Career public servants were kept in the dark;
2. The matter was closely associated with the Premier and his partisan advisers who were placed in key positions in government;
3. Cabinet was not fully informed; and
4. Neither the Attorney General nor any other member of Cabinet made sufficient enquiry about the arrangement they were approving.

After the WA Development Corporation was formed it acquired the shares in Northern Mining, which changed its name to West Australian Government Holdings Ltd with the object of it being an investment arm of the State. The State then had an investment arm which was not accountable to Parliament. This was first clearly brought to the community's attention by the Burt Commission of Accountability which reported to the Dowding Government in January, 1989.

The Fremantle Gas & Coke Sale to SECWA

Fremantle Gas & Coke Co Ltd was a public company which supplied gas through an underground reticulation system to the residents of Fremantle. It had been operating since 1883. On 19 September, 1986 the then Minister for Fuel and Energy, Mr David Parker announced that the Government had made a decision that SECWA would purchase the gas utility operations, which included the reticulation system (but excluded some land and buildings worth approximately $2.5 million), from Western Continental Limited, a company controlled by colourful entrepreneur Yossie Goldberg, for $39.75 million.

There was a public outcry, because Western Continental had purchased all the shares, which included the land and buildings, for $23.92 million in August 1985 after a take–over struggle involving Mr Robert Holmes a Court's company. Western Continental appeared to have made a profit of at least $15 million after outlaying just on $24 million twelve months previously.

Complaints about the deal received wide publicity. Both The West Australian and Mr Hassell, the Leader of the Opposition, appeared to be well informed. As a result of parliamentary questions and disclosures through The West Australian, some further facts and allegations rapidly emerged.

David Parker had in May, 1986 – just 4 months before the announcement of the deal – approved an increase in the share capital of the Fremantle Gas and Coke Company from $5 million to $15 million. (Note: Fremantle Gas and Coke Company had been controlled for many years by two Acts of Parliament which had the combined effect of limiting the authorised capital of the company and limiting the profits it was allowed to obtain or distribute to its shareholders.)

It was argued in the press that Mr Parker had increased the value of the company by increasing its authorised capital. This increase undoubtedly put Western Continental in a better bargaining position. It was also alleged that some discussions had taken place between the Government or SECWA to acquire the gas utility at the time Parker had agreed to increase the authorised capital. He denied all these allegations.

Although when he made the announcement of the purchase Mr Parker claimed it was "a Government decision", in fact he had made the decision alone with the knowledge of Premier Burke, and he had directed SECWA to make the purchase at the price agreed by him. It appeared that Burke was the only other member of the Executive to know of the deal. Mr Berinson, the Attorney General and Minister for Budget Management, told the Parliament that he knew nothing of the deal, nor did he know how it was to be financed. In fact Mr Parker had arranged, presumably through the Treasurer, Mr Burke, for $40 million to be loaned from Treasury funds to SECWA.

In the weeks ahead the Leader of the Opposition, Mr Hassell led the attack on Mr Parker and the Government, and his claim included claims that the Government had been involved in Goldberg's successful take–over of the Fremantle Gas and Coke Company in the previous year, and that an officer from SECWA had sent the former directors of Fremantle Gas and Coke Company to Mr Connell, who introduced them to Mr Goldberg.

Mr Hassell sought full details of Connell's role in the deal. He told the press that in the Lower House he would move for the Minister's resignation and in the Upper House the Liberals would ask for a Royal Commission of Enquiry. The former directors of the company also called for a full enquiry. Mr Parker denied any involvement in Goldberg's take–over of the company.

The matter was pursued by the Opposition and by The West Australian. The Government's response was to attack the former directors of the Gas and Coke Company and to claim that the furore was being whipped up for party political purposes. Burke told the public that the Liberals were envious of his relationship with the new breed of "four on the floor" entrepreneurs.

Connell made it clear both to the media and to his contacts in the Liberal Party that he was unhappy with being named in the Parliament, and he referred to "imputation and innuendo" surrounding his name and the deal.

On 29 October, 1986 about 15 members of the Parliamentary Liberal Party attended on Connell at his office. It is claimed that Connell attacked Hassell at that meeting, and some of those present gained the impression that the Liberal Party was unlikely to get financial support from the business community associated with Connell while Mr Hassell remained as Leader. Five weeks later, on 26 November, 1986 Bill Hassell was dumped as the Leader of the Parliamentary Liberal Party. At the time, Hassell said there was a link between Connell's meeting with his parliamentary colleagues and his being dumped as Leader.

On Hassell's departure the Opposition dropped its calls for an enquiry into the Gas and Coke deal and the transaction was rarely referred to in public for another four years.

It does not seem reasonable to blame the media generally, The West Australian or the Upper House for the failure to persist. It is possible that some in the Liberal parliamentary team avoided the issue in an attempt to maintain some relationship with the businessmen who were being courted by the ALP Government. Others were plainly close to Connell or to former Liberal Premier Ray O'Connor, who by then had worked with Connell. (At that time the Parliamentary Liberal Party would have been well aware that the ALP had dramatically outspent them in the February, 1986 election campaign).

The Royal Commission hearings began in a blaze of publicity in March, 1991. Shortly afterwards the public of Western Australia was astounded by the revelations which flowed from the investigators' discovery of Mr Burke's slush fund, euphemistically called "the Leader's Account". One of the accounts which formed part of the fund was blandly entitled "Advertising number 1 account".

During the hearings Connell gave evidence that he was entitled to 50 per cent of the profit made by Western Continental on the Gas and Coke deal. It was quickly established that on 7 June, 1985 – about four weeks before Goldberg won control of the gas company – Connell contributed $300,000 in cash to this Leader's Account. On 25 July, 1985 – two weeks after Mr Goldberg won control of the gas company – Burke's secretary, Mrs Brush received a further $300,000 from Connell. $200,000 was paid into the No. 1 advertising account and $100,000 was kept in cash in a calico bag in Burke's safe. The next day Goldberg's Western Continental reimbursed the $300,000 to Connell.

In conclusion the Royal Commissioners found inter alia:

a) In late January or in February, 1985 Mr Burke requested Mr Connell to consider intervening to defeat a take–over offer by J N Taylor for the Fremantle Gas Co. The Government did not want that bid to succeed. It was interested in finding an alternative purchaser from whom, at some time in the relatively near future, the Government would acquire the company or the gas utility. It was arranged that Mr Parker would contact Mr Connell. There was an understanding Mr Connell would profit from the arrangement.

b) Mr Parker contacted Mr Connell and asked him to arrange a counter offer. Mr Parker told him that the Government wanted to acquire the company or the gas utility in relatively short time if the counter offer succeeded.

c) Parker arranged a meeting at his office on 7 March, 1985 when Connell undertook to arrange a counter offer through Goldberg on the basis that, if successful, the company or the gas utility would be onsold to a Government agency.
d) At the meeting, Mr Kingsmill (a senior executive of SECWA) was requested by Mr Parker to send the directors of the Fremantle Gas Co., who were expected to call on Mr Kingsmill later that morning, to Mr Connell.
e) Mr Connell arranged a counter offer for the Fremantle Gas Co through Mr Goldberg. The counter offer succeeded. In May, 1986 Mr Parker agreed to a request from the Fremantle Gas Co to increase its authorised capital from $5 million to $15 million, knowing that it would enable the single shareholder to extract substantial profits from the company and knowing that it would increase the value of the company (and the gas utility) and benefit the shareholder and those associated with it, when there was an arrangement for the acquisition of the company (or the gas utility) by the Government or by a Government instrumentality and when he knew that Mr Goldberg was interested in a sale.
f) Without adequate knowledge and experience, and without proper advice from Treasury or from SECWA, Mr Parker entered into negotiations with Mr Connell and Mr Goldberg in private for the sale of the gas utility to SECWA. He gave SECWA no prior notification of the negotiations.
g) As a result of the negotiations, Mr Parker agreed on a purchase price for the gas utility, which was significantly higher than its true value.
The price of $39.75 million was in fact agreed in August, 1986 at an evening meeting in Mr Connell's house at which only Mr. Parker, Mr. Goldberg and Mr Connell were present.
It can be seen therefore that very few people knew about this improper deal, and had Parker been obliged to get Cabinet consensus to the arrangement properly things may indeed have been different.
I believe it is essential that, at the very least, a code of principles be put in place so that the public is aware of when a government decision is a Cabinet decision and when it is the Minister's sole decision. If a Minister is to direct a statutory authority to carry out a certain task, then at the very least he should be obliged to make that direction public forthwith. This deal had the same hallmarks as the first; no public service input and secrecy involving very few personnel. This time the matter was not put to Cabinet at all.

Rothwells Rescue and the Petrochemical Pretence

There was nothing planned about the Government's rescue of Rothwells Ltd in October,1987. Its decision was made with a great degree of urgency. However, it is of importance to note that the decision was made not by Cabinet – it being argued that the matter was too urgent and that there was no time to assemble Cabinet – but by three of the five members of the budget subcommittee. Burke, Parker and Berinson were present when the decision was made. Bryce was not consulted. Dowding had been present earlier but had agreed to abide by whatever decision was actually made.
It is not the province of this paper to unravel the extraordinary events that followed. It is sufficient to say that the original public rescue was for $300 million, half of which was guaranteed by the Government. This money was spent almost immediately and within nine weeks, by the end of December 1987, a further $340 million had been provided. Of this, in addition to the $150 million advanced by the National Bank and guaranteed by the Government, a further sum of $125 million was either advanced by the Government or its instrumentalities or was paid in as a result of government deals. This included $50 million paid in by Mr Holmes a Court's company on 16 November, 1987, which was a condition of the Government buying BHP

shares from him at a cost of $285 million. The SGIC had earlier purchased city properties from Holmes a Court at a cost of $206 million.
Between 1 January, 1988 and 25 April, 1988, when the Government and Bond Corporation each acquired 19.9 per cent of Mr Holmes a Court's interest in Bell Group, a further $135 million was invested in Rothwells from government sources or by government activity. $50 million was deposited by the Government Employees Superannuation Board and $50 million was paid in by Mr Warren Anderson's company after he and Mr Kerry Packer purchased what has become known as Westralia Square from government instrumentalities.
All of these transactions were carried out in secret. Neither the public nor the Parliament had any knowledge of this massive rescue. In fact, the public was deliberately put off the scent by the announcement on 22 April, 1988 that Rothwells had emerged from the rescue in good shape and had purchased Western Collieries Ltd for over $100 million. The public was not told that 100 per cent of the purchase price had been borrowed without any long term financing arrangement in place.
Once again Burke and Parker were the two Ministers involved in the rescue. They were aided and abetted by their two political advisers, Edwards and Lloyd. In March, 1988 Dowding replaced Burke as Premier. Berinson, who obviously had less information than the others, became involved when he was asked to introduce the Bell Group share deal into Cabinet.
Royal Commission evidence shows that Ministers were deceiving each other. Advisers were deceiving Ministers and vice versa. Cabinet was being knowingly and unknowingly deceived by the Ministers and the advisers, and the public was being deceived by all. Parliament was being told little.
On 29 April, 1988 it was announced that Bond Corporation and the SGIC had each purchased 19.9 per cent of the issued shares in Bell Group Ltd. The approximate cost to the SGIC was $150 million. The public was not told until later that the SGIC had also purchased convertible notes for $140 million. These notes were trading in Europe at a value of $95 million at the time. The value on the market of the shares purchased by the SGIC at the time of purchase was $95 million. This deal was driven by the need to inject further funds into Rothwells and to enable it to repay the $50 million deposited with it by the Government Employees Superannuation Board.
The Royal Commission found "that Mr Dowding and Mr Bond had reached an understanding that they would each purchase 19.9 per cent of Holmes a Court's shares in Bell Group and that the SGIC would remain as an investor so as to give effective control of Bell Group to Bond Corporation. Bond Corporation would then procure funds to assist Rothwells".
If the deal had succeeded, Bond Corporation would have outlaid $160 million to gain access to the cashed up Bell Resources Ltd, which then had liquid assets of $1.2 billion. No doubt Bond Corporation and the Government thought the liquidity problems with Rothwells were now solved. No doubt the officers in Bond Corporation were also well aware of its own liquidity problems.
The NCSC stepped in. Bond Corporation was obliged to bid (and pay) for all of the shares in Bell Group. In the end, $100 million was deposited in Rothwells by Bell Group, although there was evidence before the Commission that the original plan was to invest $200 million.
Following this disastrous Rothwells driven transaction, more funds were required and, just as importantly, Bond Corporation, because it had been obliged to pay for the remaining 60 per cent of the shares in Bell Group, required the return of the $100 million it had deposited in Rothwells.
The next rescue hatched up was the Petrochemical pretence. It is now a notorious fact that the Government and Bond jointly acquired the right to construct the Petrochemical plant from Connell's company and from Dempster (a Western Australian businessman) at a price of $400

million. Dempster was paid $50 million and Connell $350 million, which he was obliged to place in Rothwells.
In November, 1988 Rothwells collapsed. Despite this, Mr Dowding managed to keep the full story and the likely losses secret throughout the election campaign in January/February, 1989 and he won the election. He maintained, and obviously his story was accepted by some, that the Petrochemical deal was value for money, and that this had saved the Government from losing the original $150 million guaranteed by Burke to the National Bank. This money had been paid back by Rothwells at the time the Petrochemical deal occurred.
At the time of the election Mr Dowding maintained that government losses would be between $50 million and $100 million and arose out of direct government investment in Rothwells. In fact, the Government continued to prop up Rothwells until its collapse in November, 1988. In the end, the government instrumentalities themselves became severely embarrassed and could not inject further funds.
Ultimately, the SGIC lost almost all of the funds it invested in the Bell Group shares and the Bell Group convertible notes. Bond Corporation and the Government fell out. The Government lost all of the funds it had invested in the Petrochemical Project, which funds far exceeded the original purchase price. The SGIC is still burdened with poor investments in central city property which were an integral part of the rescue. The State of Western Australia has lost well over $1 billion.
The pattern of the Rothwells rescue and the Petrochemical pretence was similar to the previous deals. Only a few Ministers were fully involved, advice was not taken from civil servants, political advisers were carrying out the wishes of government, secrecy prevailed and the Cabinet, the Parliament and the people were deceived.
There was, however, one difference. Because of the dramatic and urgent need to keep pouring funds into Rothwells, many others in the community came to know of the secret rescue. Officers in the R & I Bank, the State Government Insurance Commission, the State Government Insurance Office, the Government Employee Superannuation Board and Treasury officials must have known that the Government was secretly supporting Rothwells. Outside Rothwells, officials in Bond Corporation, a large number of leading accountants, valuers and solicitors had varying degrees of knowledge. Mr Warren Anderson and Mr Kerry Packer knew that they could not complete a deal to buy properties in St George's Terrace without depositing $50 million in Rothwells. It is extraordinary that no significant whistle blower emerged during this period.
Press
Our leading newspaper, The West Australian cannot be criticised for its role in the Gas & Coke affair. It is, however, surprising that with the knowledge gleaned from this transaction and others, it completely failed the reasonable expectations of the people of Western Australia with respect to the Rothwells Petrochemical saga. All significant revelations in the press came either through Brian Frith writing for The Australian or Martin Saxon for the now defunct Daily News. It is impossible for the casual observer not to associate some connection between the ownership of the newspaper at the time and The West's failure to get a sniff of the massive public deception. In its defence, Chief of Staff, Paul Murray, has said the public "did not hear the thousands of questions which were parried, deflected or on many occasions answered with a direct lie. They did not read the many reports which were not published when editors decided they could not be defended in law because a strong factual base could not be established no matter how evident the wrong–doing".
While I have some sympathy for Mr Murray's position on the question of defamation laws, in my view, the impropriety was so obvious that a competent journalist properly resourced could have put paid to the Government in a very short period of time. It is now extraordinary to recall that

the 1989 election campaign was focused on an attack on Bill Hassell by The West Australian for claiming without supporting evidence that Bond Corporation had provided a six figure sum to the ALP.

I support Paul Murray in his call for reform of the defamation laws. I support the use of the public figure test which allows the publisher to successfully defend an incorrect story on the basis that it was written about a public official in good faith, without malice or reckless disregard for its truth or falsity.

On this matter, the Royal Commission in Part II of its Report concluded that "the present law may well have inhibited public investigation and a media discussion of at least some aspects of the events into which we have enquired, but given the national character of modern media practices, reform of this aspect of the law of defamation if it is to be effective requires a national approach".

With respect, I strongly disagree. Defamation laws are State laws and State responsibilities. In Western Australia, our law is already more beneficial to publishers than in some other States. There is no reason why we cannot take the lead in this regard.

My first article written on WA Inc proved in retrospect to be very tame indeed. It did, however, require 15 drafts before my honorary defamation solicitors would let me publish it. We believed we knew the truth, but we could not prove it and accordingly pulled our punches. On one occasion, I was obliged for my own financial protection to apologise publicly to Mr Holmes a Court for making a statement which turned out not only to be true but to be a gross understatement of the true position. It should not be forgotten that Mr Holmes a Court was probably the greatest beneficiary of the Government's improper business dealings. In all, Mr Holmes a Court or companies controlled by him received just on $780 million from selling assets to government instrumentalities.

Role of Cabinet and Cabinet Responsibility

As I mentioned in my introduction, the Royal Commission Report Part II ducked this issue. As I have shown in the transactions mentioned, Cabinet had a peripheral role in much of what occurred. When it did become involved it was not adequately informed. The lack of knowledge of Cabinet and its lack of participation is a matter which should be of great concern.

Whether the Royal Commission evidence was a correct assessment or not we will probably never know, but the notion that there is a Board of Directors known as the Cabinet taking control of the Executive of the State is a more comforting thought than the reality which has been uncovered. Surely we, the public, have a right to know:

a) When Cabinet has given due consideration to a matter and when it has not;

b) When a Minister has made a decision alone;

c) Which matters require a decision by the whole Cabinet and which matters can be delegated to a single Minister; and

d) In particular, the right of the Premier to make decisions on behalf of the Government without Cabinet approval should be clearly defined, and he should be obliged to tell the community when he is making decisions on behalf of the Government and when it is the decision of Cabinet.

When he was in Opposition, the present Minister for Health, Mr Peter Foss, introduced into the Upper House a Bill which purported to make public officials responsible for civil wrong and negligence in the same manner that applies to company directors. I believe this is a matter that should also be considered by the Commission on Government proposed by the Royal Commissioners.

The Royal Commissioners have, of course, dealt with a large number of other recommendations, many of which are to be referred to the proposed Commission on Government. It must not, however, be forgotten that the alarm bells did not ring effectively or, if they did ring, they were

neither heeded nor were acted upon. The primary reason for the success of the secrecy was that very few in the Executive were actively involved. Had the whole Cabinet been required to be involved, it seems impossible for the impropriety to have continued. The impropriety was not exposed in the public arena, and the defamation laws certainly played a significant part in this failure.

An examination of how the Executive should make its decisions and how its power should be shared, and a relaxation of the defamation laws, are essential matters which should be dealt with by the proposed Commission on Government. Their absence from Part II of the Royal Commission Report in my view seriously flaws that Report.

In my readings, I have uncovered no evidence which suggests that members of the Legislative Council were coy about doing their duty to the State because they felt they had been elected inappropriately. I do not accept the Royal Commissioners' findings in this regard. Reform of the Upper House may be a matter of great political interest but it should not be allowed to cloud the vital necessity that we reform and control the Executive.

In fact, in April 1989, when the Government attempted to rush the Petrochemical Authority Bill through Parliament, the Liberals opposed it and, with the last minute help of the Nationals led by Mr Eric Charlton, the Bill was rejected.

At the time, The West Australian attacked the Nationals and Charlton was made to look a fool. In fact, his innate common sense, without hard evidence, had led him to the conclusion that something was amiss. It certainly was. If passed, the Act would have had the effect of making lawful, guarantees to the Petrochemical deal which had already been given. Up until that time, the Government had denied giving the guarantees. The Parliament certainly did not understand that the guarantee provisions of the Bill would have enabled the Government to have perfected the otherwise defective guarantees, the legality of which was being disputed by bankers because they had not been approved by Parliament.

Whistle Blowing

At least with respect to the Rothwells issue, many career public servants came to know something of the Government's improper dealings, and had they not been bound by secrecy laws, and had there been someone in authority to complain to, I am sure many would have taken the appropriate step. They were left in a situation where, if they were to do their duty to the people of Western Australia and do what they considered to be right, they were obliged to break the law. One public servant who is known to me arrived at work in the middle of the cover–up to find the relevant Act open on his desk with the secrecy provisions highlighted. Such provisions are often used to protect those least worthy of protection.

In my view, the appropriate course of action is to pass legislation whereby public servants can go to an official like the Auditor General or the Ombudsman to make appropriate complaints. That Officer can then determine the appropriate course of action. Included in his options should be the ability to report the matter directly to Parliament. He or she alone should determine whether or not to make the complaint public.

Role of the Attorney General

The irony of the Bell Group share transaction was clearly shown when the National Companies Securities Commission, which was effectively controlled by the various State Attorneys–General, investigated the transaction involving the SGIC and Bond Corporation in the Bell Group share purchase. It was investigating an allegation that Bond and the SGIC had acted in concert. The transaction had in fact been introduced into the Cabinet room by one of those Attorneys–General. When Mr Berinson introduced this transaction, he appeared to erroneously believe that Kevin Edwards was holding a legal opinion given to the SGIC suggesting the transaction was lawful. In fact, the legal opinion merely suggested that the provisions of the

Companies Code did not apply to the SGIC. The Royal Commission concluded that had Mr Berinson been aware of the limited nature of the opinion, he and at least one other Cabinet member would have opposed the transaction.

This may be correct, but I am of the view that had Mr Berinson fully understood that he had a higher duty to ensure that at all times the Government and its instrumentalities acted legally, then he may have felt a duty to peruse the opinion or to seek further advice.

I believe it is essential that there be at least one member of the Executive or person attached to the Executive who has a responsibility to ensure that the Government acts lawfully and properly. In the United Kingdom, the Attorney General has historically been perceived as being more independent and less political than in Australia. The Attorney General has rarely been a member of Cabinet. In Australia and in other colonies, the position has been different, and the role has been politicised to such an extent that his or her obligation to the political party, the Cabinet and the Executive, and the duty to act as Counsel to the State and the Parliament, have become blurred and confused.

I believe it essential that we examine this role with a view to ensuring that the public is protected by knowing that at least one member of or person attached to the Executive is aware that he or she has a duty which far transcends any duty to the Party. In an article entitled "The Attorney General, Politics and the Public Interest"* the author said, "A more pertinent parallel might be that of the secretary of a large corporation, a lawyer, whose attendance at meetings of the Board of Directors is taken for granted and whose functions could well be described ..the better able he is to ensure that if there is a lawful and a proper way of achieving the corporation's objective, that way will be found". I would put it higher and require this official to ensure that in its deliberations and decision making the Government does not act unlawfully or with any impropriety.

The same author in an earlier article said "of no less significance than the Attorney General's traditional position as the State's chief agent in enforcing the criminal law is his responsibility as guardian of the public interest generally". In my view, during the Dowding/Burke administrations the Cabinet, including the Attorney General, failed to protect the public interest. I do not visit the totality of that failure on the Attorney General, but believe that the reasons for this and the rectification of the failure should be explored by the proposed Commission on Government. We must develop a system that delivers a watchdog that has the capacity to withstand political pressures savouring of party advantage.

Conclusion

I am concerned that so far few reforms have been implemented which would effectively prevent the abuse of executive power seen in the '80s from recurring. I believe that our adapted Westminster system visits enormous power upon the Premier and, in the federal sphere, upon the Prime Minister. I believe that the people of Australia should look carefully at curtailing not only the power of the Executive in each State, but also the power of the federal Executive and the Prime Minister. This power continues to grow largely unchecked.

Reference:

*JW Edwards, LLD (Cantab), 1984 : London, Sweet & Maxwell.

Chapter Four

The Three Monkeys Syndrome and Possible Remedies

Professor Peter Boyce

An inventory of Royal Commissions and Boards of Inquiry into alleged political corruption will reveal that some 44 scandals have been investigated in Australia since 1960, most of them involving State instrumentalities, and the most spectacular of these having occurred in the past five years.

It has become a tired cliche to refer to Western Australia's "loss of innocence" in the mid 1980s, and I will not rehearse the reasons for this State's fall from grace, but before attempting an assessment of the Royal Commission into the Commercial Activities of Government and other Matters, I would like to offer a few tentative thoughts on the reasons why official corruption has been more prevalent at State level than in the Commonwealth arena.

Firstly, the Commonwealth is more concerned with broad policy issues which don't lend themselves to bribes, kick–backs or decisions affected by conflict of interest than the States, and the key decision makers are physically more remote from many of the day-to-day decisions where corruption can occur. Secondly, the Commonwealth has been much more conscientious in developing a system of parliamentary scrutiny than any of the States, and has set in place administrative review processes which tend to insulate the political actors. Perhaps it is also significant that corruption is more likely to surface in States or regions where rapid development and industrialization are occurring than in States experiencing stable economic conditions.

I see my principal task in this paper as being a review of the adequacy of the Royal Commission Report, and its recommendations for reform, as safeguards against corruption and serious impropriety in our political system. But something needs to be said also of the opportunities available to the community to identify corruption and signal the alarm. (Otherwise, the reference to `the three monkeys syndrome' in my title might seem largely irrelevant).

The Western Australian community contained many wise monkeys in high places, who covered eyes, ears and mouth during the mid 1980s, but by way of partial defence of them (and many of us), it must be acknowledged that hard facts are difficult to obtain in the world of secret and complex business transactions, that the media were themselves not engaged in serious investigative reporting, that harsh libel laws do not favour civic minded courage in this treacherous field, and that because there was no tradition of corruption in government in W.A. there was perhaps a low level of public expectation of serious wrongdoing.

That there were a few fearless sceptics and crusaders like Bevan Lawrence and Peter Kyle was most fortunate, and had their names not been associated in public reporting with a political party then in Opposition, their appeals for a commission of inquiry might have been heeded earlier.

Because I witnessed the degradation of processes of responsible government in Queensland prior to the establishment of the Fitzgerald Commission by Premier Mike Ahern, I am tempted to compare the conditions and circumstances under which alarm bells were sounded in Queensland during the late '70s and in W.A. during the late '80s.

In Queensland the danger signals were far more evident to a discerning citizen than in W.A., because abuses of the political process itself were so numerous and so publicly and defiantly exhibited. Abandonment of the standard procedures of Parliament, politicization of the

bureaucracy, and systematic withholding of information from Parliament were just a few examples of such abuses. I referred to these in a series of newspaper articles and radio/television commentaries in the late 1970s as a corruption of the processes of responsible government. Premier Joh inferred from my statements that I had branded him as personally corrupt. I had not taken that bold step, but I was stressing that continued debasement of the ground rules of responsible government provided safe territory for conventional forms of personal corruption. Unfortunately, it was not until allegations of specific personal corruption began to surface in 1986–87, and then due largely to the persistence of two investigative journalists, that a mounting chorus of public indignation prompted a commission of inquiry. And had not massage parlours, poker machines and policemen been tangled up in serious bribery allegations, the clamour might not have been so loud. In Western Australia, as Bevan Lawrence has indicated, the outward and visible signs were very different.

An `impossible' assignment

In being expected to produce a thorough but realistic blueprint for political and administrative reform, the Royal Commission into Commercial Activities of Government and other Matters was set an impossible task by a hounded and increasingly nervous government, a government understandably eager to be seen to be placing no fetters or limits on the Commissioners' investigations. The task was impossible because of (i) the terms of reference presented to them; (ii) the limitation of time for serious consideration of necessary reforms; and (iii) the difficulty presented to legal practitioners in handling certain matters of political process which do not easily lend themselves to legal discourse.

The Commissioners' terms of reference required them not merely to inquire whether corruption, illegal conduct or improper conduct had occurred, and whether any matter should be referred to an appropriate authority with a view to the institution of criminal proceedings, but also whether "changes in the law of the State, or in administrative or decision making procedures," were "necessary or desirable in the public interest."

It would be difficult to imagine more open ended terms of reference than this. Although it might be possible to identify defective procedures of accountability in a political system, the scope for remedial practice is almost unlimited. Certainly there was no unanimity within the group of Commission consultants as to how far into the political system one needed to probe to do full justice to the government's brief, and we faced a strong temptation, not always resisted, to canvass any reform that held promise for the betterment of the machinery or processes of government in W.A.

The second major difficulty facing the Commissioners was the extraordinarily tight time frame within which they had to undertake their examination of the political system between late completion of the First Report and the deadline for submission of the Second Report. Because the investigations of more than a dozen episodes of government business dealings required more time than had been originally allocated, the Commissioners sought two extensions of deadline. By the date of presentation of the First Report (August 1992), barely two months remained for the Commissioners' focussed consideration of the issues of political and administrative reform. Admittedly, a first draft of the Second Report had been in preparation for several months, being principally the handiwork of resident legal counsel, Michael Barker, and a legal consultant from the Australian National University, Professor Paul Finn, but involvement of the Commissioners themselves at that stage was of necessity perfunctory and spasmodic.

The Commissioners faced an awkward dilemma, because they were well aware of the mounting costs of the Commission and the increasing impatience of government which was heading towards a critical election. They knew that to recommend a transfer of responsibility for further investigations to a yet–to–be– established Commission on Government would generate public

cynicism and a corresponding decline of community interest in reforms of any kind. They therefore decided to review the draft placed before them and proceeded to work through it at breakneck speed. They made considerable refinements to the document, but it was by now too late to re–arrange its structure and basic thrust.

The Commissioners' difficulties were compounded by the fact that two very different sorts of expertise were required for the two Reports. The first inquiry belonged exclusively to legal counsel and members of the judiciary; the second required an admixture of constitutional legal expertise and an understanding of political processes.

As indicated elsewhere in this paper, neither the legal consultants nor the Commissioners seemed entirely comfortable in confronting issues of political process, especially those relating to ambiguous or contested conventions of ministerial responsibility. The sphere of statutes, regulations, codes and tribunals, where authority is specific and enforceable, seemed more to their liking.

Official and public reactions to the Second Report

The Commission's First Report, published in six volumes, found that the system of government in W.A. had been placed at serious risk by a series of improprieties committed or sanctioned by members of the Burke and Dowding Governments, and in their Second Report Commissioners opened their discussion with the opinion that, taken together, the catalogue of wrongdoing discloses "fundamental weaknesses in the present capacity of our institutions of government, including the Parliament, to exact the degree of openness, accountability and integrity necessary to ensure that the Executive fulfils its basic responsibility to serve the public interest." This is obviously considered by many parliamentarians on both sides of the political fence as too harsh a judgment.

The Commission's Second Report was bound to alienate the then Opposition and to disappoint a large number of informed observers by its priorities and omissions. Ironically, the political parties which pressed hard for the Royal Commission while in Opposition viewed many of the published recommendations with scepticism and have proceeded so far to implement only two of them, whereas the government which was tarred with the brush of WA Inc. scandal accepted almost all the recommendations within days of the Second Report's presentation. Had the Labor Government been returned at the February '93 election, perhaps its enthusiasm for reform may have been dimmed somewhat.

The coalition parties extracted considerable mileage from the First Report in the summer election campaign, but they apparently regarded certain of the recommendations of the Second Report, notably those relating to electoral reform and restructuring of the Legislative Council as a house of review, as either naive or irrelevant to the prevention of corruption.

I regret very much that electoral reform received such emphasis in the Second Report, partly because electoral malapportionment was not an obvious or direct cause of the improprieties identified in the First Report, and partly because it could have been predicted that the coalition parties, especially the Nationals, would reject any recommendation for abandonment of weighted rural voting. My fear was that any emphasis on electoral reform would arouse distrust of the entire Report among the coalition parties, a fear that seems to have been fully justified.

The Second Report contained forty recommendations. Of these, three have been or are in the process of being implemented. The two major recommendations on which the Court Government has taken legislative action are bills for the establishment of a Commissioner for Public Sector Standards, coupled with abolition of the office of Public Service Commissioner, and for establishment of a Commission on Government. Both are still awaiting their final reading in Parliament.

The intended responsibilities of the Commissioner for Public Sector Standards follow broadly those recommended by the Royal Commission, but the Commission on Government will be more narrowly focussed on issues relevant to the prevention of corrupt, illegal or improper conduct in the public sector than the Second Report had proposed. Another departure is the deletion of a requirement that the Commission chair be a person well versed in constitutional and administrative law, a change which I fully endorse.

The original bill listed fifteen matters for the Commission's attention. The revised bill listed twenty–four, the additions being: Cabinet secrecy, the Financial Administration and Audit Act, an administrative appeals tribunal, the functions of the Auditor General, scrutiny of state–owned enterprises, public servants serving on boards, the Official Corruption Commission, guidelines for caretaker governments, and the adequacy of the processes by which the constitutional laws of the State may be changed. It seems to me to make sense to confine the list of specified matters to those which relate to the causes or prevention of corrupt, illegal or improper conduct by public officials.

Strengthening Parliament

At the forefront of the Report's proposals for reform was an enhancement of Parliament's role. This concern about a general tendency across Westminster–derived political systems to allow political executives to dominate Parliament was shared by all consultants and the Commissioners themselves. There was no dissent from the view that a stronger Parliament, demanding direct accountability from the Burke and Dowding Governments, could have averted the worst consequences of WA Inc. transactions.

Because the trend towards Executive dominance seems so inexorable, it might have seemed a little naive for the Commissioners to argue for specific reforms of the political process with any expectation that they would or could stem the tide, but they were surely right to lay considerable emphasis on the problem. I think, too, that most of their specific recommendations relating to Parliament were reasonable enough in themselves.

What the Report could not have been expected to acknowledge was the general unwillingness of major political parties to bring about a strengthening of Parliament if it has to be at the Executive's expense. Since Oppositions live in hope of becoming the next government, their leaders do not exhibit much enthusiasm for a fettering of the Executive.

But the problem of reviving or strengthening Parliament at the State level in Australia involves more than the challenge of converting the thinking of Opposition leaders. Consider, for example, the efficacy of the committee system. The Commission Report lays considerable emphasis on the need for a well developed committee system, even in a relatively small legislature, but a strong committee system requires a strong measure of bipartisanship and independently minded chairpersons to ensure their credibility.

These desiderata are greatly assisted by the convention of electing Opposition members as chairs of key parliamentary committees, a recommendation so far resisted by the Western Australian Parliament and not supported by government. Committee chairs drawn from the ruling party will not be taken seriously by the Opposition or the general community unless they have demonstrated a capacity to defy or embarrass government, but the courage to behave this way does not come easily to a committee chair who is earning his or her spurs for filling the next Cabinet vacancy. Only in larger Parliaments, and then usually in powerful upper houses, will independent committee chairs emerge. This unusual breed of political actors will have decided to rest their career hopes on the high profile and prestige of their committee office – rather than any confident expectation of ministerial office. There is little evidence of such career choices having been made in the Western Australian Parliament.

Issues by–passed by the Commission

The Second Report contains many sensible recommendations pertaining to the structure of government and its nexus with Parliament, but the political process itself was not canvassed thoroughly. In particular, the Commission was reluctant to examine the status of ministerial responsibility. The Commission also remained unpersuaded that any re-examination of the Western Australian Constitution was warranted. Although I understand and respect the Commissioners' hesitation to traverse this difficult territory, I am still of the view that a government or community committed to minimize the incidence of corruption in public life would have been assisted by more extensive discussion of the key conventions of cabinet government and some consideration of the adequacy of the State Constitution. On the other hand, certain issues which occupy considerable space in the Report, for example freedom of information, the need for a State administrative appeals tribunal and other matters pertaining to individual rights, did not seem to me to relate directly to the causes of W.A. Inc. scandals.

Ministerial responsibility

The draftsmen of the Commission Report were obviously more comfortable in discussing the need for `watchdog' agencies, new structures for parliamentary committees and new regulations to govern the public service than in discussing sensitive and slippery questions concerning the political process itself, particularly those concerning ministerial responsibility.

It took some effort to persuade the lawyers preparing a first draft of the Report that anything more than a perfunctory reference to ministerial responsibility should be included in the text. In the event the Commissioners allowed three pages of discussion on `Cabinet and cabinet procedures', but I would have welcomed a much lengthier discussion, since abuse of long established conventions on ministerial responsibility lies at the heart of any explanation of `WA Inc.'

Admittedly, the concept of collective responsibility did not lend itself to easy treatment in the Report. Although there is widespread agreement that the collective responsibility of Cabinet requires Cabinet unity, there is no infallible rubric on which issues Ministers must bring to Cabinet, or what penalty a government should suffer if a Minister commits government to a dangerous course of action without formal Cabinet approval. Although the Commission demonstrated that Premiers Burke and Dowding held unacceptable views of the role of Cabinet, it did not wish to pronounce judgment on whether serving Ministers in the Lawrence Government who had survived from the Burke and Dowding Cabinets should be expected to resign in the wake of Commission findings. Speculation in the print media focussed particularly on whether the Attorney General, Joe Berinson, should have escaped the Commissioners' condemnation.

The Constitution

The Royal Commission's Second Report makes no reference to the State Constitution. Several members of the public who offered written submissions to the Commission called for significant amendments to it, and two academic critics, Patrick O'Brien and Martyn Webb, proposed the drafting of a new Constitution via a popular convention, a Constitution which would abandon the structure and process of responsible government in favour of a political system modelled on those of the American States, favouring a separation of powers and intricate checks and balances. While not favouring such a drastic step myself, especially if it is not pursued by all States collectively, I do think the Commission Report should have addressed the adequacy or otherwise of this State's Constitution. I say that not so much because I wished to see a drastic change of direction, but rather because I wished to see a much more complete, tidy and informative document than we must currently contend with.

I appreciate that The Samuel Griffith Society is very wary of proposals to re–write our national Constitution, and perhaps by implication it would be sceptical of proposals to re–write the State Constitutions. But your Society is also eager to promote an understanding of the Constitution among the citizenry and to celebrate it. I warmly identify with those objectives, but think we should focus also on the need to understand the State Constitution.

I realize, too, that there are dangers in allowing one's Constitution to say too much, but a first reading of the Western Australian Constitution by even a highly intelligent layman would not shed much light on the structure or principles of government in this State. I submit that one helpful deterrent to a repeat performance of WA Inc., or another serious drift into political corruption, would be an intelligible and informative Constitution.

Values and education

No set of institutional reforms can guarantee that improprieties or official misconduct will not recur within the political system. In the last resort, the health and integrity of a body politick depends on the moral character of its political actors and the vigilance of their constituencies. In other words — personal values and political education. The Commission Report offers brief acknowledgment of these requirements, but could, and probably should, have had considerably more to say on both matters.

There is ample scope for debate as to how civic ethics can be revived, and one can certainly respect the Commissioners' wariness about offering any prescription. In an earlier age, one was permitted to cite a general framework of Judaic–Christian personal and social ethics as the source of discipline, but that is no longer universally acceptable.

The Commissioners would have been on safer and surer ground in pressing for a stronger diet of political education in the general community, as a vehicle for sensitizing the electorate to their rights and opportunities to call governments to account and, above all, to inform them of the vulnerability of their particular version of a liberal democratic political system.

A system which depends as much as ours on observance of conventions, on a Constitution which tells one practically nothing about the political process, and on a subtle but sophisticated set of relationships between Cabinet and Parliament, needs to be understood by the electorate if public accountability is to be taken seriously.

A 1987 survey revealed that just over half of the Australian population were aware of the existence of our national Constitution, let alone its contents. The percentage aware of a State Constitution would be even smaller, I suspect. But no less distressing than an ignorance of the Constitution is the widespread ignorance of the axioms or guiding principles of responsible government.

The Commission Report recommends induction courses for newly elected members of Parliament, but the electors themselves need a basic level of political education too. And, contrary to apparently widespread assumptions, advanced secondary courses in government and politics do not have to be essays in dogmatics and ideological indoctrination. A politics syllabus, preferably allied to legal studies, can be rigorous, informative and stimulating. Above all, both electors and the elected need to be reminded again and again that our chosen form of liberal democracy, the `Westminster model' if you like, is highly vulnerable to abuse and distortion — because of its very heavy reliance on conventions, on unwritten rules, which means the good faith and integrity of political practitioners.

The possession of a formal education by our parliamentary representatives offers no guarantee of a willingness to abide by the rules of the game. After all, the Burke ministry was probably the best educated ever to hold office in Western Australia! But a better educated electorate, at least in political terms, will ensure more efficient vigilance.

Conclusion

The ongoing impact or influence of the Western Australian Royal Commission Reports should not be measured solely by the number of prosecutions which issue from findings in the First Report or the number of recommendations for institutional reform adopted by the Court government. (I am reasonably confident that a fair number of recommendations will eventually be accepted, especially those relating to the involvement of government in commercial activities and the powers of the Auditor General.)

The judicial inquiry was in itself a major purgative exercise for the State, and although the community's collective moral outrage has abated, the Reports will stand as major reference points for political parties and opinion leaders, especially the media, in public debate about the adequacy of our political institutions or the propriety of particular behaviours.

Fortunately, there is a clear commitment by the ruling coalition parties to establish a Commission on Government, and from it may flow not merely sound proposals for refinements to our mechanisms of government accountability, but also useful public discussion papers outlining the options for change. The latter could be valuable educative tools for Western Australians, just as EARC discussion papers have been useful to Queenslanders in the post–Fitzgerald Commission years.

I must nevertheless close on a cautionary note. It is unlikely that many Western Australian parliamentarians, regardless of party affiliation, will welcome significant changes to the current political system. Labor parliamentarians, to be sure, will gladly accept an electoral formula of one vote: one value for both Houses of Parliament, but few if any will join a crusade to extend or strengthen parliamentary restraints on the Executive arm of government.

Secondly, although it can be demonstrated that the circumstances which gave rise to the Royal Commission were highly unusual, it would be unwise to argue, as some senior Liberals have, that because the improprieties and costly errors of judgment committed by senior members of the Burke and Dowding Governments were confined to a single `barrel of bad apples', whose behaviour was unique and unlikely to be repeated, there should therefore be no tampering with the political machinery. While political actors will continue to be of mixed quality and character, our elected representatives tend to exhibit disturbingly uniform bad behaviour traits.

These two observations simply highlight the need for eternal public vigilance, and the fact that Parliament itself should not be the only or even principal arena for public discussion of the health and welfare of our body politick.

Again and again we are reassured by political leaders from across the political spectrum that the `Westminster system' is the model framework of liberal democratic government, and that they themselves subscribe fully to its conventions and rules, but we seldom hear any outline from them of what they understand to be the basic principles and ground rules of that system. And for many non–parliamentary critics, "the phrase is a cover for normative views of the way in which they believe the system ought to work, normative views which far extend any sensible interpretation of the term".

I therefore agree with the strong view expressed by the Royal Australian Institute of Public Administration in its written submission: "In short, the Westminster model is not the solution to the problems of government in W.A., it is actually part of the problem."

That is not to suggest, however, that we need a wholesale re–design of the Constitution. That "would waste the accumulated experience which enables existing institutions to work reasonably well". But there does need to be a concentrated rethink about such matters as the role of the Upper House, and there certainly needs to be a clear understanding and exposition of the place of ministerial responsibility in our system of government.

This would help develop within the State a strong culture of accountability, of which integrity and openness are the key components. Within such a culture the so-called `three monkeys syndrome' will find no home.

Chapter Five

The Civil War We Never Had

Professor Geoffrey Bolton

Modern Australia was destined for federation. This has been disputed on the one hand by the ever– hopeful band of Western Australian secessionists and on the other by modern commentators, mainly in Sydney and Melbourne, who complain that a population of seventeen million is over–governed in a polity which includes a bicameral Federal Parliament and six State legislatures; seven if the Northern Territory is counted, eight with the Australian Capital Territory. Undeniably reforming politicians such as Gough Whitlam have chafed at the difficulties of achieving political and social change under the consultative processes inevitable in a federal system. Federalism is thus sometimes equated with conservatism, and the current debate over an Australian republic owes something to a belief that a `horse–and–buggy' Constitution designed to secure co–operation between six members of the late–Victorian British Empire is an inadequate vehicle for the nationalist aspirations of a century later.

All the same, geography dictated that Australia should be a federation. Unlike those other transcontinental examples of European expansion, the United States and the Russian Empire, Australia does not present the picture of a rolling frontier moving ever outwards towards the distant Pacific. The Australian interior was too arid. Instead, Australia began with an archipelago of isolated settlements along a sprawling coast. Sydney in 1788, Hobart and Launceston in 1803–04, Brisbane, Perth, Melbourne and Adelaide between 1824 and 1836, even the New Zealand of 1840 can be seen each as the nucleus of a separate impulse of settlement from which colonization would spread out.

These foundation city–states, each with its own hinterland, depended for their communications to a large extent by sea until late in the l9th Century. Each developed its own strong sense of local identity, so that it was thought almost inevitable that, when self–government came in the 1850s, the foundation ports each became the mini–metropolis for a separate colony. The boundaries of these colonies were drawn ineptly by clerks in the Colonial Office without sufficient regard for economic and social linkages. Thus Brisbane lost a good deal of its hinterland to the north of New South Wales, and the Northern Territory, although having much in common with the northern parts of Queensland and Western Australia, was allocated for nearly half a century to South Australia. Other facts of life such as the Nullarbor Plain and Bass Strait were given greater recognition. However shaped, once the new colonies were given established boundaries, institutional development followed speedily, so that change was never acceptable.

The British authorities in the 1850s were well aware of the disadvantages of fragmentation, and urged formal co-operation at least over such issues as a common tariff policy and a standard railway gauge. They were unheeded. Each colony went its own way at the cost of half a century of ludicrous customs barriers in the outback and more than a century of dislocation in a continental railway system built on three different gauges. By the 1880s the impact of these drawbacks was becoming evident, and federation gradually surfaced on the agenda of practical politics.

Other currents were swelling the tide of federation. Capital and labour were beginning to organise on a nationwide basis. Banks such as the National and the Bank of New South Wales,

merchant firms such as Burns Philp set up branches across Australia; and in response the shearers, miners, and other trade unions organised themselves nationally. Increasingly it made sense for the colonies to federate as a common market.

The British had never wavered from the view that a federation gave greater security to investors and deserved a better credit rating than solitary colonies. Defence was increasingly important. Not only were Australian colonists eager to prove themselves willing volunteers in Britain's colonial wars, but a growing sense of anxiety haunted Australian imaginations as China and Japan came to the fore. Federation would make for greater efficiency in defence and also allow the majority of white Australians to override any regional government too tolerant of cheap non–European labour. There would be no more `scandals' such as the importation of Chinese workers to build the Northern Territory railway, or the indenture of Melanesians to labour in the Queensland canefields.

Less pragmatic ideals also strengthened the federal movement. By the 1880s the adult Australian population included a majority of native–born, and as males of this generation attained political prominence they spoke the rhetoric of a new nationalism; a nationalism whose symbols were provided for many by the work of the Heidelberg painters in Melbourne and the Bulletin writers in Sydney. Perhaps inspired by the centenary of American independence in 1876, publicists spoke of Australia as a nation potentially of equal growth in the 20th century, capable of supporting a population of 100 million and giving its own version of the Monroe Doctrine in the South Pacific.

This rhetoric did not always carry conviction in Western Australia. It was instructive that in 1890, when the Sydney Bulletin informed its readers that Henry Lawson was to visit Western Australia, one Perth journal responded with the comment: `Who's Henry Lawson?' Having achieved self-government only in 1890, and having almost immediately encountered a wave of goldrush prosperity which contrasted delightfully with sixty years of penury under colonial government, Western Australians were understandably coy about surrendering their new freedom even to an Australian federation.

Above all, there was as ever the tyranny of distance. In the first session of the Western Australian Legislative Assembly the prominent politician Stephen Henry Parker put it thus:

Nature had, so far as New Zealand was concerned, created 1200 obstacles in the way of 1200 miles of stormy sea. And that is our position. Our only connection with the other colonies is by the intervening stormy sea, and the distance from Albany to Adelaide is the same, some 1150 miles ... We shall be situated at such a distance from the seat of Government that I do not think we can expect that consideration for our wants and requests which we would be entitled to.

It is relevant to remember that at that time New Zealand was a member of the Federal Convention, but the point needed making. If we take a map and imagine that all the arid interior – the country with an annual rainfall of less than 250 millimetres – was sea, leaving the South–West of Western Australia and the Kimberleys as two large islands, the similarities between Western Australia and New Zealand would seem even stronger.

Yet as a result of the referendum of 1900 Western Australia joined the Commonwealth. Historians have usually explained this by pointing to the large influx of Victorians and South Australians to the goldfields, and the pressure exerted by the goldfields' threat to secede in their turn in order to join a federated Australia. But even outside the goldfields there was a majority, narrow but still a majority, in favour of Federation. This was in no small part due to the prestige of Sir John Forrest, whose national vision and personal ambition led him to think transcontinentally despite the misgivings of many of his own followers. He bargained for concessions for Western Australia, and was allowed a phased period of tariff reduction and the promise of a transcontinental railway.

As it happened, the first thirty years of Federation revealed that there were disadvantages for Western Australia. Local manufacturing declined because of Eastern States competition; we remember that the depressed industrialists of Melbourne had been among the most fervent barrackers for an Australian common market. Some of Western Australia's economic problems were self–inflicted. It has been convincingly argued that by neglecting the rehabilitation of the mining industry, and focussing on wheat– growing and dairying, the State governments of the day probably hindered Western Australia's economic advancement. It is also noteworthy that in most of the referenda to extend federal powers, Western Australia was among the minority of States which usually voted "Yes" in favour of strengthening the Commonwealth. New South Wales, which had most to lose by federation, was by far the most cantankerous of the States at least as late as the premiership of J.T.Lang.

Within Western Australia, secession was largely the crusade of one newspaper, the populist Sunday Times. Even the allegedly unifying experience of the 1914–18 war was not enough to deter its proprietor, McCallum Smith, and in 1919 the Sunday Times re–opened its campaign, largely as a response to the high tariff policies of the Hughes Commonwealth government. Tariffs were always a grievance to a primary producing State. During the 1920s however secession made little headway, and it was not until the coming of the Depression in the early 1930s that the cause surged into prominence in the public mind.

It is instructive for us in the l990s to note how quickly the idea took hold, since it is often argued that the relatively apathetic mood of recent years is a guarantee that secession will never again become a live issue. But in the 1930s, despite the opposition of the Labor Party and the half–heartedness of the National Party premier, Sir James Mitchell, public support shifted until, at a referendum in April 1933, 68 per cent of the voters said "Yes" to secession.

Part of this result was due to the propaganda of the Dominion League and its very able publicist, H.K. (later Sir Keith) Watson, but to a large extent it was an emotional response to the trauma of the Depression. I have argued – and although the argument has not been universally accepted, I stick to it – that the Depression, instead of leading to an increase in class antagonisms as happened in more industrialised societies, created tensions in the Western Australian community which were externalised against the Eastern States, symbolised by the extravagant new capital city of Canberra and the dangerous radicalism of Lang in Sydney.

The secessionist credo as stated by Watson stressed the virtues of consensus. Its foundations were the integrity of the British Empire, loyalty to throne, country, and kindred, and a sense of one's first duties to one's own children. Australia, Watson argued, was over–governed with seven Governors, seven Parliaments, and seven income taxes; but the solution was not unification, but reducing the number to six by removing Western Australia. It would prosper as a separate dominion of the British Empire, to the untold benefit of the neighbouring Australian States. Underlying this curious logic was the assumption that it was the duty of the good citizen to promote economic growth, to secure the welfare of his [sic] children, and to strive for a society free of the wrangling which had characterised the relations of the Commonwealth Government and the States.

The supporters of secession included many, such as Watson himself, who came from families of Eastern States origin, as well as a number of former champions of the federal movement, such as Sir Walter James, who had grown disenchanted with experience. Many families were divided on the issue; thus Alexandra Hasluck relates that she voted in favour and her husband (the future Sir Paul) against, and they both concluded that they might as well have stayed at home. Western Australia, too, had as always a larger proportion of British–born inhabitants than any other part of Australia, and Britain provided an alternative focus for larger loyalties. But the goldfields stuck to their tradition of wanting to stay in the Commonwealth, and so did the Kimberleys.

Besides, on the same day as the referendum, the voters returned a Labor government opposed to the measure, and its leader, Philip Collier, procrastinated skilfully about putting secession into effect. Eventually a delegation was sent to London with the case for secession in a jarrah casket, and a decision was sought from the House of Commons. The British wisely refused to get involved, saying that secession was now entirely a matter for negotiation between the State and Federal Parliaments.

With astute timing, this negative response was delivered in the very week of King George V's Silver Jubilee celebrations, at a time when loyalists were more than usually unwilling to question British wisdom. There was of course no hope that Canberra would consent to secession, and with returning prosperity support for the movement dwindled. With Japan's entry into the Second World War the remaining attractions of secession vanished overnight, lingering only in the widespread belief that, in the event of invasion, Western Australia like Queensland would have been abandoned on the wrong side of the Brisbane Line.

Such is the conventional wisdom, but it is possible to imagine an alternative scenario. Suppose that, instead of the pliable and conciliatory Lyons, there had been a Prime Minister in Canberra – and they have been known – insensitive to the feelings of the outer States, and abrasive and hectoring in his public statements. Suppose that Watson and the Dominion League had been less respectful of British authority. It would have been ridiculously easy for a small Western Australian force to seize the line of communication with the east and for a Western Australian government – and Labor nearly lost in 1936 – to proclaim a Unilateral Declaration of Independence. In such an event, the conventional wisdom usually presupposes that the rest of Australia would have let the West go quietly; but until it actually happened, the conventional wisdom in North America never really believed in the possibility of an American Civil War. The divisive issues unleashed by a bid for secession could not easily have been contained. At the very least, they would have been a debilitating source of weakness in Australia at the moment of crisis in 1942.

During the decades of postwar prosperity the issue largely slumbered. Following the introduction of uniform income taxation during the Second World War, most authorities taught that the influence of the Commonwealth was gaining at the expense of the States. Even the Sydney Bulletin, then at its most conservative, regarded this development as a good thing. It was not until the mineral boom of the 1960s began to tilt the balance of economic and demographic growth away from south–eastern Australia to Queensland, Western Australia, and the Northern Territory that the pretensions of the States began to revive. Geoffrey Blainey has pointed out that, if current population trends continue, within a hundred years there will be as many people living in Western Australia, the Northern Territory and Queensland as in the south–eastern States. This may not lead to a demand for the removal of the federal capital to Alice Springs, but it will have a marked effect on the balance of power within the Australian Commonwealth, and perhaps on its ethos.

The experience of the last fifty years suggests that, in matters of social welfare and social justice, Western Australia and Queensland have usually lagged behind the rest of Australia. If, as is probable, the States are to exercise an increasingly strong influence on the Australian Commonwealth as a whole, it behoves us to create a political culture which will allow the maintenance of regional diversity without at the same time handing over the country to the redneck values, which probably do not form a majority view in either Western Australia or Queensland, but which from time to time dominate political discourse there.

Now it may be argued that Australia is increasingly coming under homogenising influences which will iron out our comparatively minor regional diversities. The Australian Broadcasting Corporation and the independent regional networks provide largely nationwide programming,

and there is mounting evidence that the media, rather than the region or the family, shape political and cultural attitudes. Improved telephonic facilities, including the fax, have facilitated speedy communication across the continent. Above all, it could be argued that internal migration during the last two or three decades has broken down the original demographic differences between the States. But imbalances remain. Until the late 1970s there was never a Western Australian on the bench of the High Court, the body charged with interpreting the Federal compact. To this day there has never been a South Australian or a Tasmanian.

Since 1945 every Prime Minister of Australia has come from New South Wales or Victoria; in earlier years a Curtin from Fremantle, a Lyons from Tasmania, an Andrew Fisher or Artie Fadden from Queensland might hope to win that office. It is not really surprising that from time to time a sense of grievance surfaces in an outer State such as Western Australia which leads some citizens to ponder the merits of going it alone.

Under the stimulus of what were seen as the centralising tendencies of the Whitlam Government the secession movement revived in Western Australia in 1974, only to subside after Whitlam's dismissal in November, 1975. Many of its most prominent advocates were British migrants, perhaps influenced by their experience of an offshore island faced with the prospect of closer ties with the European Community; but its most prominent spokesman and financier was the fourth–generation Western Australian Lang Hancock, whose impatience was fuelled by the threat of Rex Connor's intervention in the mineral export industry. There were incongruous features in Hancock's campaign, since he was also a strenuous advocate of a transcontinental railway linking the Pilbara with Queensland; a strong symbol of Western Australian integration with the rest of the continent, and one which might support the argument that Hancock wished merely to exchange domination by Canberra for domination by Bjelke–Petersen's Queensland.

Note must be taken of the veteran secessionist Martyn Webb's contention that Hancock's support was the kiss of death for the secessionist movement in the mid–1970s. During the more conciliatory regimes of the Fraser and Hawke Governments the issue lay largely dormant. It has revived since Paul Keating became Prime Minister in December 1991, partly due to a perception that he knows little about the outer States and does not take them seriously. It is nevertheless extremely difficult to get inhabitants of Sydney or Melbourne to accept the level of emotional support which secession is capable of generating.

To counter the appeal of secession, and to improve the working of federalism, I can think of four practical measures:

1. Educate the young. The young are Australians, not secessionists. They are not on the whole conservative or radical, but generally sceptical; in the majority republican, but willing to retain the flag in its present form. But many are deplorably underinformed about the processes of government. Current research in Western Australia suggests that, although politics has been in the secondary school curriculum for more than a decade, most young Western Australians claim to owe their information about politics to television. The educational programmes designed to develop concepts of citizenship have so far proved ineffective. Perhaps this is because Australians are reluctant to explore the responsibilities and rights of citizenship. That is why they rejected the North American concept of a Bill of Rights without adequate debate. At any rate, much more needs to be done on the educational front.

2. Explore methods for delegating Canberra's powers regionally. During the last twenty years some attempts have been made in this direction. The Whitlam Government's experiment in bunching local authorities into regional zones for the allocation of federal funding had some promising features, but it was brought in without the co-operation of the States, and hence aroused hostility. It also suffered from a lack of identification with established regional loyalties. It was hard to grow passionate in defence of Zone 12. More recently, Commonwealth regional

offices have been set up, but some have recently closed for budgetary reasons. Thought has been given to the delegation of federal powers to State instrumentalities. This seems the way to go. Much low and middle-level Commonwealth decision–making could be delegated to local offices accessible to the public. For many of us, Canberra is a long way away.

3. Pay more attention to comparable societies overseas. Since 1989 the federal Senate has published two reports on the concept of Australian citizenship. Canada, with even more intractable problems than our own, has undergone a similar exercise, but there seems to have been little communication between the two. The Americans, the Swiss, and the Germans are also not without experience of federal political systems. Australians are too much given to tackling problems without an international comparative dimension. The federal delegates at the conventions of 189l and 1897 did not make that mistake; and neither should we.

4. Legislate that nobody should become Prime Minister without living for at least two years in a State other than New South Wales and Victoria.

Endnotes:

Chapter Six

Secession and Federalism

Dr Campbell Sharman

Secession has long been a word with powerful magic: it conjures up the dismemberment of countries and the creation of new and unpredictable regimes. But, since the break up of the Soviet Union, secession has become both more familiar and less fearsome. It is true that television news brings us graphic pictures of the strife precipitated by the creation of new states from the destruction of old ones, but we also have the occasional reminder of secessions which have received general approbation: Estonia, Latvia and Lithuania. And then there are cases of more ambiguous virtue: Georgia, Ukraine, and the long running case of Quebec. Secession can no longer be assumed to be a bad thing. It has become a more complicated notion as it is seen that it can be associated with the establishment of regimes with a strong commitment to freedom and liberal democracy. After all, wasn't the United States a case of secession from the British Empire?

Whatever the growth in familiarity with the idea of secession, it is not seen to have any relevance to Australia. There may have been some crazy Western Australians who talked about it in the 1930s, but they didn't really mean it. Any current talk of secession is just a joke, a cry for publicity, or some kind of trick to avoid taxation or the bailiffs.

But it is the contention of this paper that secession should be taken seriously in Australia, not as a prescription for immediate action, but as a way of thinking about the serious problems that beset the operation of our federation. It is not so much a case of thinking about the unthinkable, but thinking about the dissatisfactions that might justify secession of a component of our federal system, and the actions that should be taken to remedy current problems. In this way, thinking about secession highlights the points of conflict between local majorities and national majorities, a conflict which a federal system is designed to accommodate but which our federation is increasingly failing to do. If local majorities feel they have lost the ability to shape the governmental decisions that affect them, secession is a logical course of action.

Secession

Secession is the withdrawal of territory, by the community that occupies that territory, from the jurisdiction of a larger entity. As the excellent book by Allen Buchanan (1991) indicates, a simple definition of secession masks many problems, both practical and theoretical, but at its heart secession is a claim for self government. For this reason, Buchanan argues that there is a moral right to secession, albeit a conditional one., Some of the conditions include the exhaustion of less extreme remedies, fair dealing with those who have property rights in the seceding territory but who do not live there and, of greatest importance, that the regime established in the newly autonomous territory is a liberal democratic one. Indeed, Buchanan argues that the liberal individualism that underpins our notion of democracy must include the group right to define the political community in which individual rights are to be exercised.

This latter point is an important one, because much of the coverage of secession in the press implies that secession is about linguistic, religious, or cultural claims to self–determination, and that the ethnically non–challenged need have no dealings with secession. This is not the case: the

territorial claim to self government by a political community springs from claims that individuals have to shape their future irrespective of their cultural baggage.

But, in the Australian case, what grounds could be used as the basis for secession on the part of an Australian State? As Western Australia has more of a history of secession movements than any other State in our federation, let us assume that this question is applied to Western Australia. Two answers can be given: secession precipitated by the effects of discriminatory redistribution on the residents of Western Australia and, secondly, secession prompted by the unilateral breach by the central government of the constitutional arrangements that established the federation, to the detriment of the rights of self government of the residents of the State.

Discriminatory Redistribution

The term "discriminatory redistribution" is one taken from Allen Buchanan (1991), and describes the situation where a disproportionate share of the costs of the policies of a government fall on the residents of a particular territorial component of the country. Buchanan argues that the lack of redistributive justice is frequently a component of secessionist claims, either from wealthy areas with claims that they are being impoverished, or from poor regions with claims for greater equality in the distribution of national wealth.

Western Australia has frequently made both sets of claims, sometimes simultaneously. The Case for the People of Western Australia (Western Australia 1934), presented to the British Government in 1934 to support the secession of the State from the federation, made the discriminatory effects of national policy on the residents of Western Australia a central component of its case. Three claims in particular were perennial complaints after the 1920s.

The first of these was the national policy on tariffs. Western Australia, as a State which has always generated a disproportionate share of its wealth from exports, suffers a substantial penalty from a national tariff policy that favours a protected manufacturing industry that is disproportionately concentrated in the south–eastern corner of Australia. Some of the edge has gone from this claim since the national government has been in favour of reducing tariffs, but the point remains, and has been restated by our present Premier, Richard Court, as a claim for a greater say by the Western Australian Government in the framing of national economic policies.

The second claim was that transport policies discriminated against Western Australia. Originally, it was Commonwealth policies on coastal shipping that caused dismay. The Commonwealth requirement for Australian crews with high wages and restrictive working arrangements not only greatly increased costs for the many commodities imported into the State from the rest of Australia, but led to the lingering death of the industry. In later years, it was the two airline policy that milked the residents of Perth for the benefit of other Australian air travellers. The building of the transcontinental rail link, the lifting of restrictions on road freight, and the abolition of the two airline policy have weakened both claims, and it would be hard to mount a claim for substantial discrimination against Western Australia on the grounds of transport policy at present.

In contrast, the third claim is still a lively one. The effects of an ever expanding national arbitration system have reduced the ability of workers and employers in Western Australia to enter into agreements which reflect local conditions and the state of the local economy. This was felt to be a major problem in increasing costs to the State from the 1920s, a problem of regional inequity and rigidity that has got worse as the ambit of the arbitration system and national awards has broadened. Some of the substantial costs to regional employment of these policies have recently been outlined by the Industry Commission (1993), and the competing plans for labour market reform from State and national governments indicate that there is broad agreement that the present system has many flaws, one of them being an insensitivity to the idiosyncrasies of State economies.

Put together, these three claims for discriminatory redistribution point to grounds for complaint, but are far short of grounds for secession. Moreover, Western Australia has benefited considerably from favourable transfers of funds channeled through the central government, and still sees itself as a State with special claims for national subsidies. Untangling the net costs and benefits of membership of the federation for the residents of Western Australia would be a hard task indeed, and would be highly unlikely to show that they were substantially subsidizing the rest of Australia.,

In a federation where average State per capita income varies as little as it does in Australia, the claims for discriminatory redistribution are not likely to be persuasive. Economics, in other words, is not a convincing ground for secession in Australia at the moment, however powerful a claim it may have been in the 1930s. We must turn to stronger meat, claims based on the politics of self–government.

Breach of Constitutional Arrangements for Self–Government

The essence of a federation is that a number of territorial communities agree to form a larger union while preserving constitutionally guaranteed rights of self government over those matters not referred to the new national government. Such an arrangement seeks to preserve the responsiveness of the regional community or State Government to State interests and State majorities, while accommodating the preferences of national majorities for matters of nationwide concern.

Such an accommodation raises issues of practical and theoretical complexity, which is why a federal system provides a variety of institutional structures for the representation of diverse interests and the resolution of conflict. But the touchstone of a federal system is that it recognizes and respects the ability of State communities to govern themselves in the areas assigned to them by the constitutional settlement.

Unfortunately, this principle is steadily being eroded in our federation to the prejudice of the rights of self government of Australian citizens. Notwithstanding the very limited powers granted to the central government in the Constitution in 1901, there is hardly any aspect of government activity with which Canberra is not currently involved in one way or another. This, we are told, is simply the result of Australia being one nation, of many issues being of national concern, of the benefits of national uniformity, of the need to discharge our international obligations, and of the superior virtue and wisdom of the government in Canberra.

These specious claims, even if true, do not alter the fact that, the more the central government is involved in matters of State jurisdiction, the less the residents of the State can shape government policy to suit their particular goals, needs and resources. For every involvement of Canberra in areas of State policy making, there is a net loss of influence for the political community of the State. This process has been going on for so long that it is close to denying the citizens of each State control over key areas of State activity.

From education and health, to welfare and industrial relations, the issue is never simply what is the best policy to suit current local conditions, but what can be done by the State Government given the limitations of a host of inter– governmental agreements and potential financial penalties deriving from Canberra. Much of the governmental process has moved from a concern with real political issues and the search for real political solutions, to the metapolitics of bureaucratic deals between departments in State capitals and the corresponding departments in Canberra. This amounts to a substantial denial of self government with all the costs of lack of responsiveness, inefficiency and frustration that this system entails.

The Question of Consent

Whether this situation can amount to grounds for secession requires two preliminary questions to be answered. The first is whether there has been popular consent to this massive expansion of central government involvement in State issues, and the second is whether there are other means of remedying the problem short of secession.

If consent is taken as being agreement to the expansion of central government influence through the procedure of formal constitutional amendment, then the answer is a resounding No. Of the forty–two changes to the Constitution that have been submitted to the people at referendums since 1901, only eight have secured the necessary majorities, and only three of these amendments could be seen as increasing the ambit of Commonwealth jurisdiction. In no way can the present scope of Commonwealth involvement be seen as stemming from popular consent expressed through formal constitutional amendment.

It could be said, however, that Australians have elected the governments that have presided over this expansion of Commonwealth power, and thus have consented to it. The trouble with this argument is that all governments have an appetite to extend their influence, State and Commonwealth, yet when their ambitions have conflicted, the Commonwealth has, more often than not, had its way. In other words, the increase in Commonwealth involvement is less a reflection of popular consent for what the Commonwealth government was doing, than a failure of the mechanism designed to find an accommodation between the rival ambitions of State and Commonwealth governments. To argue that any policy followed by a national government automatically indicates the consent of the governed is a prescription not only for the end of federalism but of constitutional government as well.

The whole idea of a federal system is to limit the ambit of national majorities to those questions that have been agreed upon to be national. It is not the particular Commonwealth policies that need to be agreed to in the fields of health and education, for example, but the changes to the rules of the game that make possible the pursuit of such policies by the national government. These questions have never been asked, let alone answered. And part of the reason why they have not been asked is precisely because the answer would be No.

Exhaustion of Lesser Remedies

Let us assume that there has been no consent to the radical reduction of the autonomy of State communities: what of the second precondition for secession? This is the condition that there is no other, less radical, way that this situation could be remedied, and in particular, that there is no method of removing the problem that lies within the discretion of the State Government.

This leads to an issue that has been avoided thus far: how did we get into this mess? The response must be that there were two faults in the design of the Commonwealth Constitution that have proved to be of great significance: the first was the constitution of the High Court, the second was the process for the initiation of constitutional amendment.

Much of the explanation for the present extent of Commonwealth influence can be traced to the constitutional interpretations of the High Court. These have led to the increase in Commonwealth power directly, and indirectly. Decisions on the external affairs power of the Constitution, for example, have given the Commonwealth the unilateral ability to amend the scope of its jurisdiction in areas of settled State administration without the need for formal constitutional change. At one remove, decisions of the Court since the early years of the federation have given generous interpretations of the Commonwealth's constitutional powers over financial and taxation matters, and constrained those of the States. The interpretation of section 90 of the Constitution, which has denied the States the right to levy a retail sales tax, is but one example, as is the lack of restraint on the interpretation of section 96, the grants power of the

Commonwealth. This has helped to give the Commonwealth greatly superior access to revenue, and the resources to buy its way into influencing policies outside its jurisdiction. It is this financial dominance that has been the most important single factor in the extension of Commonwealth involvement in State political issues.

The greatest impact of the High Court, however, has been even more indirect. Since the Engineers' Case in 1920, the Court has had no federal jurisprudence, no notion of a federal system that requires constraints on national power to protect the self governing capacities of the States. While the Court is now able to derive implied individual political rights from a Constitution that is silent on the issue, it has been unwilling to protect the rights of State political communities in spite of clear intent in the Constitution. This failure of the Court to develop a set of principles that protect a federal division of powers has denied Australians a balanced interpretation of the Constitition. It has also deprived them of an informed debate over the proper scope of Commonwealth powers.

How can this problem with the High Court be remedied? A recent comparative article by a Canadian scholar (Bzdera 1993) has shown that there is an inexorable logic that drives centrally appointed constitutional courts to interpret the constitution in favour of the central government. In spite of some gestures to the sensitivities of the States in this matter, the Commonwealth government maintains its monopoly control over the appointment of justices to the High Court. What is needed is a system where a committee of State Attorneys–General appoints every alternate judge to the Court. In the long term this might have a beneficial effect on the operation of the federal system. It would certainly enhance the popular acceptance of the High Court as a legitimate umpire in constitutional adjudications.

To make such a suggestion not only points to a defect in the design of the Constitution in 1901 as it affects the composition of the High Court, but it also highlights a problem in altering the Constitution to remedy the defect. Section 128 of the Constitution gives the Commonwealth Government of the day a veto over what constitutional amendments are submitted to the people. In other words, only constitutional amendments that suit the partisan goals of the Commonwealth Government ever get to be voted on at constitutional referendums. This explains both why so few constitutional amendments have passed, and why the States, individually and collectively, have no ability to initiate constitutional change to the Commonwealth Constitution. In sum, until there is a constitutional amendment that sets up a procedure that permits a resolution passed by a majority of State Parliaments to initiate the process of constitutional change, the remedy to the problem of the High Court and its interpretations of the Constitution is beyond the power of the States.

Secessionist Movements

So, we have a claim for secession and have exhausted conventional remedies: what happens next? It is here that claims for secession divide into those that can only be met by secession from the larger entity, and those that are part of a process of strategic bargaining for change in central government policies, a process in which secession itself is a final, and perhaps never invoked, step. Of course, it is part of the strategy of secessionist claims to blur this distinction so that opponents to secession are never sure how seriously separation is contemplated.

But the overwhelming evidence from those periods when secession has been an issue in Western Australia is that it was part of a process of strategic bargaining. While the key actors in the process may have been dyed in the wool secessionists (note Besant 1990), it is clear that the voters regarded claims of secession as a cry of protest and frustration at their lack of power to influence government policies that they felt were ignoring their interests or doing them harm.

This was the conclusion of Harry Hiller (1987,1989),, a Canadian sociologist who studied secessionist movements in the Canadian province of Alberta during the 1980s, and the State of

Western Australia in the 1930s and 1970s. He stressed that such movements were an expression of the powerlessness felt by the residents of peripheral, but resource rich, parts of the federation who were unable to influence what were regarded as the economically predatory policies of a central government that was captive to the interests of the large population centres in the East. He pointed to the paradox that those who supported secession saw themselves as good Canadians and Australians, who had been driven to support secession by the unwillingness of central governments to make policies in the interests of all citizens, and not just to cater for the concerns of the numerical majority who lived in two large provinces or States. For these people, support for secession was one of the few ways to redirect the attention of the central government to their grievances.

From this perspective, secessionist movements in Australia represent a lack of trust in the existing processes of government and, in particular, a profound lack of confidence in the ability of a distant central government to respond to their particular needs. The irony is that, the more the central government becomes involved in areas of State jurisdiction, the greater the potential for conflict between the priorities of the State political community and those of the Commonwealth. The multiplication of forums in which the interests of the local majority and the national majority can collide will intensify the sense of difference between State concerns and those of Canberra.

There is recent evidence that this process is at work in Queensland and Western Australia, where the distinction between the interests of the State, and the interests of a Canberra–centred national majority based in New South Wales and Victoria, is acutely felt. As part of the 1993 Australian Election Survey run by a team of researchers from several Australian universities, a study focusing on the attitudes of individuals to government has found that Queenslanders and Western Australians are much more likely to trust their State governments than the national government (Denemark and Sharman, 1994). In complementary fashion, the residents of New South Wales and Victoria trust the national government more than their State governments.

Secession and Federalism

The tension between these two perspectives — a local majority but national minority stressing its distinctive needs, and a national majority stressing the overriding claims of national majorities — is one that the federal system was designed to accommodate. But it can only do this by separating the spheres in which national majorities and local majorities have paramountcy. This maintenance of separate spheres does not mean that co–operation between State and Commonwealth governments is precluded, but that differences in priorities between agencies reflecting local and national views are settled by negotiation and compromise. If the differences persist, there is no automatic presumption that the central government will have its way through financial dominance or favourable judicial interpretation of the Constitution. Just as there are areas where the national majority must prevail, there are many others where local majorities must have the final say.

And if there is doubt as to the appropriate category for a particular matter, two methods of resolving persistent differences are provided: first, an appeal to a constitutional court that is imbued, both in its composition and its jurisprudence, with the federal principle of divided spheres of governmental authority; and secondly, a method of constitutional amendment that, while giving the national majority a final veto, enables local majorities to initiate constitutional changes and be a part of their endorsement.

To describe such a system is to remind us how our system has fallen short. The blurring of responsibilities and the constant harping on the virtues of uniformity and national solutions to every problem, no matter how trivial, has created a system of government that is shapeless, and remote. Like the index of the current phone directory, the attempt to force every government

activity into a single alphabetical listing destroys the sense of differentiation between local, State and national responsibilities and fosters the belief that we should not distinguish between State concerns and national ones.

As well as being a recipe for inefficiency and unresponsiveness in government, such a system leads to the alienation of those communities who know they are not at the centre of things. Such communities resent the easy assumption that, because it suits a distant majority, it must apply to them: with justification, they feel that they are losing their ability to shape their own destinies in matters that are of predominant concern to them alone.

This is the benefit of thinking about secession. It is not a course of action that is ever likely to be carried out by an Australian State, but thinking about the justifications for secession forces us to realize where our system of government is defective and needs repairing. Chief among these are the mechanisms that differentiate between the responsibilities of State political communities and national majorities. Without this clear distinction, citizens cannot exercise their political rights effectively.

A properly working federal system is the best shield against secession, since it provides a powerful defence against the basic moral claim to secede – the claim to effective self government. The challenge for Australians is to make our federation fulfil its promise, and to restore the sense of State autonomy within a fair and predictable federal constitutional structure. Secession can then return to its familiar home: the fleeting images of the television news.

Endnotes:

Chapter Seven

Mr Keating's Mirage on the Hill: How the Republic, Like the Cheshire Cat, Came and Went

The Hon. John Howard, MP

I welcome this opportunity to address The Samuel Griffith Society. I congratulate the body for the great contribution it has already made to a more balanced and informed debate about Australia's Constitution.

Along with some other groups, such as Australians for Constitutional Monarchy, as well as many individuals, this Society has comprised the main line of defence against an initially populist onslaught against the integrity of one of Australia's great success–stories – our Constitution.

When John Stone first told me of the projected formation of the Society, he opined that I might not share all of its objectives.

Perhaps, like some others, he suspected that I was a bit of a centralist and that I would therefore want some radical changes to the Constitution.

That admonition has been known to pass the lips of some of my Western Australian colleagues.

Perhaps it is because I am a graduate of the Sydney University Law School. Maybe it is due to my having once been Federal Treasurer or because, as Minister for Business and Consumer Affairs in the late 1970s, I launched the first completely national, but co-operative, scheme for the regulation of companies and the securities industry.

Whatever the reason, it is of no real account.

Let me declare with, and perhaps because of, the Indian Ocean pounding in my ears, that I am, of course, not a centralist.

I am, however, a passionate Australian nationalist. Of that there should be no mistake.

A centralist believes that the accumulation of power at the centre is a desirable goal in its own right.

A nationalist is one who sees serving the national interest as the ultimate goal.

Such approaches can frequently be in conflict. It is often the case that it is against the national interest to centralise decision making.

As Western Australians, more than other Australians, will know, it is frequently the case that the national interest is best served through the dispersal of power and the decentralisation of decision making.

That is not to say that on other occasions the reverse will not be the case.

I am happy to say that my heavy involvement in the debate about the place of the constitutional monarchy in Australia's system of government has led me to look again at our Constitution and to reflect even more deeply on the Australian identity.

In the process, I have developed a whole new respect for the durability of the Australian Constitution and for the genius and national spirit of those who put it together.

It has flaws, but by any reasonable test it should be a matter of celebration that this document has helped take us almost through our first century as a nation and has been the framework within which an humane, liberal and enlightened people have flourished.

Americans, it is said, revere their Constitution. Australians are said, by contrast, to know and care little about theirs.

If that be the case, then it is the fault of our education system and the almost institutionalised retreat from pride in our history, orchestrated by the New Class establishment and cultural iconoclasts who have held such sway in Australia in recent years.
If the question were asked, which of the two Constitutions – the American or the Australian – was a declaration of the people, I am sure most would say it was the American.
The opposite is the case. The Australian Constitution was approved by the people at a referendum before its adoption. The American one never was.
The Australian Constitution may have drawn its legal validity from being an enactment of the then imperial Parliament. Its moral and political force came from the will of the people.
This is a political speech. Whether or not Australia becomes a republic is a prime political issue.
Paul Keating is the first Australian Prime Minister to openly and consistently advocate turning Australia into a republic. He is Australia's best known republican.
Therefore, his views on the subject and the nature of his participation in the debate are crucial. Suggestions that the republican debate be de-politicised are both naive and illogical.
This is all the more so as the Prime Minister has sought, since this debate began, to politicise Australian patriotism.
An express or implied theme of most of his comments is that it is more Australian to be a republican than it is to support the present Constitution.
He has also brought to the debate his penchant for division and polarisation. His arguments for change are those of a wounder and a wrecker, not a healer and a builder.
There is also much more to his republican agenda than the central issue of whether or not Australia retains the constitutional monarchy.
The hidden agenda of greater constitutional change is properly apprehended by many in this audience.
Beyond that, 'though, the Prime Minister is engaged in a major exercise of re-writing Australian history, and of changing the way in which we see ourselves and how we reflect on where we have been and what we have achieved.
He knows the power of historical allusions. He seeks frequently the unashamed use of his version of history to promote a modern day political argument.
Paul Keating is not only about changing our Constitution. He is also intent on marginalising the liberal/conservative contribution to Australian history and the Australian achievement. He has embraced the essentially negative view of our history, and seeks in the context of Australia's necessary involvement in the burgeoning economies of the Asian/Pacific region to impose a wholly unnecessary choice between our past and our future.
That he should see the issue as a choice marks his failure as a national leader.
As I shall explore later, there is no inherent conflict between Australia's historic associations and the contemporary imperative of close involvement with the nations of our region.
I emphasise this aspect of the Prime Minister's involvement in the debate. There are still far too many who fail to grasp that there is more in this debate than the identity of our head of state.
A notable feature of the story so far has been the way in which the expression "join the debate" has been deliberately re-interpreted by republicans.
I had always thought that a debate occurred when people with differing or opposing views joined issue with each other. It had always seemed to me impossible to have a debate without both sides of the argument.
In that sense I, and many others, have been up to our armpits in the republican debate ever since it began.
I now know how wrong I was. Republican spokesmen and supporters, including some New South Wales Liberals such as Peter Collins, continue to call for people like me to join the debate.

They have brought me to realise that joining a debate, contrary to my earlier belief, actually means caving in and agreeing with the other side, and simply being content to discuss with one's would-be adversaries the method of implementing their agenda.
The Prime Minister's republican campaign thus far has had four distinct phases.
Tracing them tells us a lot about the nature of the debate and provides reflections on Mr Keating's political personality.
His push for an Australian republic was launched in an orgy of "Pom-bashing", with the Prime Minister's somewhat infamous and (almost predictably) historically wrong accusation that the British had actually abandoned what he (erroneously) called Malaysia in World War II, and therefore by implication betrayed Australia.
Opponents, particularly within the Liberal Party, were depicted as out–dated, pro–British sentimentalists who longed for some bygone era.
No concession was made to the possibility that there might exist some Australians who actually believed, on the grounds of almost one hundred years of immense political and social unity, stability and tolerance, that our current constitutional arrangements had a lot going for them.
Also, the fact that from the early 1950s to the late 1970s the constant Labor criticism of the Liberals was that they were too pro–American, not too pro–British, apparently had not penetrated the consciousness of our Prime Minister.
Did he not recall that the great catharsis of those years – the Vietnam War – involved the alleged subservience of Liberal governments to the United States?
Had he forgotten that the last occasion on which an Australian Prime Minister aligned this country with Britain for what could be seen, arguably, as grounds of sentiment was the Suez crisis of 1956 – thirty seven years ago?
The fact was that, despite his British externalities, Menzies was unflinchingly pro–Australian in the decisions he took on defence and foreign policy issues.
In volume one of his superb biography of Menzies, the self–described Labor voter, Allan Martin, debunks the myth of Menzies grovelling to the British during the early years of World War II.
Restored to the Prime Ministership in 1949, Menzies never allowed his affection for the British connection to colour his judgment about Australia's strategic interests.
He forged the ANZUS treaty, despite some British heartburning. In other respects, he took us firmly into the American defence and security orbit.
In the face of enormous British pressure to buy their military hardware, most major defence purchases in the Menzies period went to the Americans.
It was Menzies' deputy, John McEwen, who laid the foundation for Australia's economic links with Asia with the Japanese/Australian trade agreement in 1957.
While keeping our British links, Australia's longest-serving Prime Minister pursued the policies of realpolitik in the world in which Australia found herself in the 1950s and 1960s.
The apotheosis of the Prime Minister's anti–British push was achieved when he scathingly rejected a proffered Australian flag from the then President of the RSL. "Give it to the Poms", was his insulting retort to Brigadier Garland.
It was not only insulting to the Brigadier, it was an insult to the Australian community.
Then came the Asian phase. To prove what good citizens of the region we had become, Australians were required to dump both the Monarchy and the flag.
Last year I watched, with incredulity, an interview with the Treasurer in which he seriously asserted that Australia's economic performance in Asia would be lifted if the Union Jack were removed from our flag.
He neglected to tell us how it was that Hongkong had achieved a GDP twenty five percent of that of the whole of China with the same blot on its ensign!

No argument is more insulting to Australia's dignity and sense of independence than the one which says that we must change our emblems or institutions to please the nations of the Asian/Pacific region or, indeed, any other region.
It is also uncomprehending of the extent to which many Asian countries respect those who, in turn, respect their own sense of history and culture.
Australia will thrive or fail, economically, in the Asian/Pacific region according to the price and quality of our goods and services, their delivery times and after sales service – not the domicile of our head of state.
In cultural, historical and political terms, Australia is a European nation. It is firmly part of the western world, sharing its democratic ideals and liberal values. We also help comprise a loose group of English–speaking peoples.
Nothing can, or will, alter that. To pretend otherwise is to deny reality, and to be ashamed of something of which we ought not to feel ashamed.
There is full bipartisan political support in Australia for this country totally involving itself as an economic and political participant in the region, on the basis of mutual respect for the values and institutions of each other.
That involvement must recognise that many of the countries of our region do not, and perhaps never will, share all of our democratic beliefs or our instinct for personal liberty.
Our involvement in Asia must not be at the cost of our deep links with Britain, the rest of Europe and the United States.
Nothing is more unnecessary, artificial or indeed destructive than the sense of choice now being forced upon Australians by the Prime Minister.
We can be full citizens of our region without jettisoning our ties with others. No choice is necessary.
For generations, those Australians who have valued the positive elements of our British heritage have been accused of a cringing attitude towards the past.
To the extent that those self same critics would have us uproot a system of government which has given Australia one hundred years of stability, unity and tolerance, in the naive belief that it will win us friends in the Asian/Pacific region, then they themselves are guilty of an infinitely greater cringe.
Even Malcolm Turnbull, the Chairman of the Government's Republican Advisory Committee, has been embarrassed by this line of argument. He forcefully dissociated himself from it during the Bob Hawke– compered "Four Corners" programme on the republican debate.
After that phase came the "white–out" phase. All that was needed, so the argument ran, was a copy of the Constitution, an adequate supply of white-out and the replacement of all references to the Queen with references to the president.
Malcolm Turnbull's committee was appointed with the express purpose of validating the white-out, or so–called minimalist approach.
This hand–picked and grossly lop–sided committee was expressly prohibited from canvassing the intrinsic worth of whatever arguments there might be for and against an Australian republic.
In my view, some of the initial euphoria in favour of a republic began to dim when the Prime Minister refused to appoint people such as Geoffrey Blainey, nominated by the Victorian Government, to that committee.
Australians saw that as unfair, and indicative of a Prime Minister who was not interested in serious, logical debate.
It may well prove to be the case that the decision of the Government to appoint such a partisan group, and the willingness of the members of that group to participate in such a biased exercise, has done long– term damage to the republican cause.

Leading republicans, such as Thomas Kenneally, Donald Horne and Malcolm Turnbull, are clearly mortified that the Prime Minister's association with the republican push may have given it a fatally partisan taint.
They have only themselves to blame. If they had not danced to the Prime Minister's tune when the tide of public opinion appeared to be running for a republic, and lent their support to his partisan committee, they would not now face such a dilemma.
It's a bit rich to call for a non–political debate when you have initially connived at its politicisation.
However, as many suspected, the devil was in the detail. Once the so-called minimalist approach began to be examined it became abundantly clear that there was no such animal.
The most spectacular retreat came from Professor George Winterton, a member of the Turnbull committee, who bluntly declared that there was no minimalist position and that really it was all a lot more complicated than originally believed.
Then, of course, there has been the delicious irony of the reserve powers.
The Turnbull Report has made it clear that if Paul Keating ultimately puts a republican referendum to the Australian people, then he will almost certainly ask them to vote for a president having the same power to dismiss a government which cannot obtain supply as that exercised by Sir John Kerr when he dismissed the Whitlam Government in November, 1975.
As I am sure this audience appreciates, there have always been three options regarding that particular reserve power.
The Senate's current power concerning money bills can be left precisely as it is. It can be removed. Finally, there could be a provision inserted in the Constitution requiring an automatic dissolution of both houses if there is a deadlock over the passage of supply.
There is no likelihood that the Australian people would, in the foreseeable future, vote to reduce the power of the Senate over supply. It would be against all tradition and history for the Labor Party to support an extension of the Senate's power through adoption of the automatic dissolution option. That leaves us with the status quo.
If the Prime Minister does follow the path I have predicted he will not have maintained the Whitlam rage of 1975. The great irony will be that the very Senate power which produced the very event which was the source (however unreasonably) of the modern push within the Labor Party for a republic will have been maintained intact in the Keating vision.
In recent weeks the fourth Prime Ministerial phase of the campaign has emerged. It can best be called the "be nice to the Queen" phase.
Wittingly or otherwise, Paul Keating has decided that the current monarch is quite a respected figure in this country. As Gough Whitlam has observed, she also knows a thing or two about handling Prime Ministers.
Commencing with his Balmoral visit, the Prime Minister has decided that he might breathe fresh life into his cause by creating the impression of a friendly relationship between himself and the Queen.
But of course he has gone further. He has implied that the Queen, with a wink and a nod, has given her support to his republican aspirations. That no such thing has occurred is no barrier to his inferring the opposite.
It is typical of his style that he should seek support for an Australian republic by first suggesting that if Sir Robert Menzies were alive today he would be a republican, and then implying that the Queen herself understands and sympathises with his position.
They are the kind of opponents he likes. Their names give respectability to his assertions, but neither can reply. The first is prevented for the most obvious of reasons, and the Queen cannot

respond by reason of constitutional propriety. He knows that. That is why he has said and implied what he did regarding her attitude. She can't correct him.
However, as many, to their pleasure, observed, the late Prime Minister's widow made plain her views of the Prime Minister's grubby attempt to enlist the Menzies name.
These then have been the four major phases. There have been several ill–fated minor phases which have quickly come and gone.
He foolishly raised his Catholicism while in Ireland, which produced a collective groan of embarrassment from many Australian Catholics, republican and anti–republican alike.
In doing so, he stirred the ashes of a fire which once raged furiously in Australia but has thankfully been long extinguished.
The Prime Minister tried the Sydney Olympic euphoria for just twenty four hours. Such was the hostility at his attempt to make partisan political capital out of the successful Sydney bid that he dropped off that approach very quickly.
That he should have attempted it in the first place betrayed a lack of sensitivity on his part to the overwhelming desire of Australians to keep partisan politics completely out of great sporting events.
The poetic justice was that the Prime Minister's clumsy attempt to link the successful bid with his flag and republican designs only served to underline the fact that Sydney and Australia had been accorded the great honour of hosting the Olympic Games in the year 2000 because of what we are as a nation and a people – not because of what some people would like us to become.
That the Prime Minister has been through so many phases in his campaign illustrates a fundamental aspect of the whole republican debate.
That is the lack of a solid core of persuasive, positive arguments as to why we should change, fundamentally, a Constitution which has helped deliver such stability, unity and tolerance for almost one hundred years.
At no stage have we heard the authentic and convincing "How Australia will be better" speech from the republicans. We have not been told how our liberties will be expanded, the quality of our public life enhanced or the respect we self–evidently enjoy in the world increased.
It is neither reactionary nor old–fashioned to adopt the Burkean view that institutions should not be discarded unless they have clearly failed.
Good statecraft requires selective conservatism or discerning radicalism – either description will do.
No institution is immutable. A lively, open society should always be ready to question the continued relevance of longstanding institutions. Those which are no longer working should be altered or replaced. Those which continue to serve the national interest should be preserved and defended.
The republican push has angered many Australians for the very reason that there is no evidence of the present arrangements for a non–political head of state under our Constitution failing the national interest.
They see little point in changing something which works well, when so many institutions and arrangements in Australia are not only inadequate but working positively against the national interest.
Although republicans work overtime to paint their opponents as locked in the past and out of step with contemporary thinking, the true institutional troglodytes are often to be found cheering the Kenneally/Keating view of life.
There is something absolutely perverse and absurd to hear supporters of the Prime Minister speak in hushed reverential tones about the glories of a centralised industrial relations system which has so clearly failed Australia's national interests.

The origins of that system lie in the years before World War I. It has been out–paced and out–moded by a dramatically transformed world economic climate within which Australia must operate.
Yet such is the institutional grip of union power within the labour movement, that Mr Keating and his followers cannot shed their allegiance to an institution that no longer works for Australia.
In a final irony, that very union power was a dubious inheritance from Britain, whose positive bequests the Prime Minister and his ilk are so keen to denigrate.
Isn't it extraordinary that some of the British attitudes and institutions republicans would like us to retain are the ones that do us harm, yet they wish to shed those which appear to work.
Inter–governmental arrangements are another case in point. There would be few to deny that Commonwealth/State financial relations represent the area most in need of reform within our national governance.
Three years ago, the former Prime Minister, Bob Hawke, with generous bipartisan help from the former New South Wales Premier, Nick Greiner, attempted the task of reform in the Commonwealth/State financial area.
Through a malicious act of self-serving sabotage, the then Member for Blaxland, the now Prime Minister, poisoned the Labor Caucus against the Hawke initiative. He stymied a genuine attempt to reform an area of our constitutional arrangements which clearly was not working.
With breathtaking hypocrisy, he then embarked, after becoming Prime Minister, on a campaign to change an area of our constitutional arrangements which clearly was working and continues to work.
Although the republican momentum has slowed, it would be foolish to think for a moment that the debate has been won.
I suspect it has entered a long, lethargic stage. That is worse news for republicans than for those opposed to change.
Australians no longer see the change to a republic as a simple thing without risk. There is a greater recognition of the complexity of change.
Also, there is one set of polls which truly haunts the Prime Minister and his followers. They are the polls which show that if there is to be a republic, the overwhelming majority of Australians want to elect the president directly.
Such an approach is anathema to the republican vanguard. They, and many others, know that such an arrangement would alter for all time the nature of our system of government.
It would entrench rival centres of political power. As someone who has been a senior participant in Australian politics for almost twenty years, let me say without any fear of contradiction that an Australian president, having a popular mandate, would feel infinitely more powerful in dealing with an incumbent Prime Minister than would any Governor–General, irrespective of the formal powers which might be given to that president.
As we move to the next phase of the debate, there are two lines of argument which the defenders of the present Constitution should further emphasise and develop.
The first of these is the simple and positive argument that the present arrangements for a head of state deliver, better than any alternative available under a republic, a politically neutral head of state.
Australians want a politically neutral umpire to sit at the apex of our system of government. That is one reason why so many of them say the president should be directly elected if a republic were to come about.
Their belief is that a popularly–elected president would be politically more neutral than one chosen by another method. This belief is almost certainly not well–founded, but that is not the point I make.

History tells us that four former senior politicians, two Labor and two Liberal, have served as Governors–General. They were successively McKell, Casey, Hasluck and Hayden.
A degree of controversy surrounded the appointment of each, more so in the case of McKell and Hayden than with Casey and Hasluck.
Without exception, all were subsumed by the neutrality and apolitical character of the office. This came about through the unique character of the position they occupied.
Each of them owed their appointment to the government of the day. However, once having been appointed, the apolitical conventions and practices attaching to the office, and distilled over hundreds of years of experience, insulated them from implied political obligations to the government which appointed them.
So it was that McKell did his constitutional duty in granting Menzies a double dissolution in 1951, to the great chagrin of many Labor people who wrongly believed that "Bill would do the right thing". Of course, he did, but it was not the right thing they wanted.
Likewise, the current Governor–General, despite my own personal misgivings about his original appointment, which were based on his pro-republican attitudes, has behaved with both dignity and complete party political neutrality.
The other argument which should be more strenuously developed is to draw attention to the way in which an almost ritualistic use of the external affairs power by the present government is, bit by bit, handing over Australian sovereignty to foreign committees and institutions.
We should all be indebted to some excellent studies of this done by my colleague, Senator Rod Kemp, of Victoria.
He has graphically illustrated an astounding and quite irrefutable proposition.
That is that the alleged loss of sovereignty in sharing our head of state with a number of other nations is quite minuscule compared to the massive erosion of national sovereignty which has occurred in recent years through adherence by this country to so many international conventions and treaties.
In 1986, the Australia Act abolished residual appeals to the Privy Council. None other than Gough Whitlam said that, "It is entirely anomalous and archaic for Australian citizens to litigate their differences in another country before judges appointed by the government of that other country".
Yet, as Senator Kemp has pointed out, five years later the Hawke Government ratified the so-called optional protocol of the International Covenant on Civil and Political Rights, which enabled Australians to take complaints to the UN Human Rights Committee.
In February, 1993 the Keating Government further opened the doors to allow Australians to litigate their differences before a UN Committee.
There can be no argument with proper redress procedures for human rights infringements. But surely it is within our own wit, competence, dignity and self-respect as a nation to provide for the resolution of those matters once and for all within the borders of our own country.
Such examples of sovereignty thrown away make a mockery of calls for Australia to become a republic in the name of achieving national independence.

Appendix I

Addresses Launching Upholding the Australian Constitution, Volume 1

1. The Rt. Hon. Sir Harry Gibbs

I wish to say something about the proposed review of the Constitution which, it seems, is intended to proceed until the year 2000. The review is to commence, we are told, with a public process of education – a suggestion which is no doubt well meant, although some might find it patronising and others might wonder exactly what are the constitutional theories which it is intended that the members of the public should be taught.

The sort of amendments to the Constitution that are likely to be approved at a referendum will depend very much on the attitude and belief of the electors. If the public can be convinced that a unitary form of government would be preferable to a federation, or that the Commonwealth Parliament is prevented from enacting beneficent legislation because its powers are too limited, they will be likely to favour the increase in the powers of the Commonwealth that will undoubtedly be proposed.

If the public can be persuaded that the wise policies of the executive government are likely to be frustrated by an uncooperative Senate, or even by the possible exercise of the reserve powers of the Governor–General, they might agree to the removal of some of the checks and balances that remain in the Constitution.

On the other hand, if the public does not believe that Canberra has a monopoly of wisdom and efficiency, or that it is good for the nation to have two sets of bureaucrats dealing with the same questions, or that the States should be reduced almost to impotence, they might support amendments that would confine, rather than expand, Commonwealth powers.

Since in the end no constitutional amendment can be made without the approval of the electors, it is important that any process of education should give them an accurate and balanced view of constitutional theory and practice, and not a slanted one.

Federalism is of the essence of the Australian Constitution. That seems to me self evident, but such is the diversity of opinion on constitutional questions nowadays that I suppose there are some who would disagree.

It is a necessary characteristic of a federation that the functions of government are divided between governments at two levels, and it would seem natural to conclude that the division should be made by allocating to the States all those functions which they are able to carry out effectively, and by giving to the central government only those functions which the States are unable to perform for themselves. Indeed any other basis of division would seem purely arbitrary.

Clearly, it was the intention of the framers of the Australian Constitution that the functions of government should be allocated between the States and the Commonwealth in that way. That intention has however been defeated. So wide a meaning has been given to some of the provisions of the Constitution that the Commonwealth has become, if not quite omnipotent, certainly omnipresent – it can intrude into literally every field of government.

Two developments, in particular, have made possible this expansion of Commonwealth power. The first is that some of the powers specified in Section 51 of the Constitution have been given a meaning far wider than the framers of the Constitution ever contemplated.

As everyone here is no doubt aware, the provision that does most to make Commonwealth power ubiquitous is that which enables the Parliament to make laws with respect to "external affairs". It is hardly an exaggeration to say that it would not make any practical difference if the word "anything" were substituted for "external affairs" in that provision.

One particularly dangerous side effect of the broad interpretation of this power should be noticed. Section 109 of the Constitution, which renders invalid any law of a State which is inconsistent with a law of the Commonwealth, usually works well enough. If a State law becomes invalid, there is usually a Commonwealth law on the same subject – there is no vacuum. But under the external affairs power the Commonwealth has enacted laws which prevent the States from legislating on those subjects although there is no Commonwealth legislation relating to those subjects. That was the effect of the first Mabo decision by which a State law, with respect to lands within the State, was held invalid. A new limitation on State power was added to those expressed in Chapter V of the Constitution.

Another instance of an expansive construction of a constitutional power which has had side effects which were presumably unintended is provided by the history of Section 51(xxxv), which gives power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. I shall not take time to trace in detail the development of the artificial doctrine of paper disputes, and of the principle that a union has a capacity greater than that of the employees it represents. It is enough to say that the important role – indeed the essential role – which the Courts gave to the unions in the working of the system of conciliation and arbitration was directly responsible for the great increase in trade union power that occurred in Australia during this century, and gave Australian trade unions a strength greater than that which they have almost anywhere else in the world. The situation of unions in Australia is exceptional, but many people regard it as natural because they are accustomed to it.

A second cause of the expansion of Commonwealth power has been the extensive use of Section 96 of the Constitution, which enables the Parliament to make grants of financial assistance to any State on such terms and conditions as the Parliament thinks fit. The Commonwealth now collects about 50 per cent more revenue than it requires for its own purposes. Out of the excess it makes grants to the States, which themselves raise only about half of the revenue they need.

The States are hampered in establishing a workable tax base by the fact that they are prevented by the Constitution from imposing duties of excise – an expression which has been construed widely, and in some cases unpredictably. The States thus depend on the grants which the Commonwealth provides, often on conditions which require the States to apply the money for purposes which the Commonwealth has no power to effect directly.

True it is that there is probably no subject in respect of which the Commonwealth could not legislate if it went through the right motions to invoke the external affairs power, but where it presently has no other power it can get its way by financial coercion.

These distortions to the working of our federal Constitution do not inevitably follow from the fact that the provisions which confer power on the Commonwealth have been given an expansive interpretation. The Commonwealth is of course not obliged to exercise its powers expansively. It might conceivably take to heart Shakespeare's dictum that it is excellent to have a giant's strength but tyrannous to use it like a giant. However, the Commonwealth is unlikely to embrace any such policy of self restraint. History shows that power, once tasted, is addictive. Those who have it resent limits and restraints on its exercise. It is certain that in any review of the Constitution the Commonwealth will seek further powers.

It is almost certain, also, that the Commonwealth will seek to include in the Constitution a guarantee of what will be described as basic rights. The question will then arise what rights should be guaranteed.

It is certain that, if a bill of rights comes to be framed, all those pressure groups, to whose influence our politicians so readily succumb, will urge that their own interests be made the subject of constitutional guarantees. Indeed, some of those groups have already announced that this is their intention.

Unfortunately it is a characteristic of many special interest groups, in Australia and elsewhere, that they tend to exaggerate a case which is not without some merit, and make claims which are distinguished neither by fairness nor moderation. Politicians give in to such claims, as some recent legislation in Australia shows. Thus in a bill of rights we might expect to find guarantees of gender equality (whatever that may mean), and of the special rights of indigenous inhabitants, trade unions and so–called ethnic groups, and even of the protection of the environment.

The effect that would be given to constitutional provisions of that kind is entirely beyond conjecture but what is clear is that they could seriously inhibit the powers of elected legislatures to carry out policies for which they had a mandate and which the majority of the community supported.

Even if no provisions of that kind were included in a bill of rights, and protection was afforded to such apparently desirable objects as life, liberty and property, the Courts would be drawn into political controversies which in a democracy should be settled by the elected representatives of the people. The experience of the United States shows how in the result both the democratic process and the integrity of the courts may suffer. As President Lincoln said, in 1861: "If the policy of the Government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in original litigation.....the people will have ceased to be their own rulers". The decisions of the Courts, under an entrenched bill of rights, would prevail over legislation even if that had been supported by an overwhelming majority of Parliament and of the electorate.

The actions of a later American President showed how the Courts themselves may be affected if they take it on themselves to decide political questions. In the 1930s President Roosevelt found that the Supreme Court consistently overruled his New Deal legislation and similar laws of the States. He believed that he had a strong public support for his legislation and blamed the conservatism of the elderly justices; six of the nine were over 70. In 1937 Roosevelt proposed to Congress that the law should be changed to permit him to appoint an additional justice for every one aged 70 who did not resign, so that the size of the Court might be increased to 15. Within a very short time the Court staged something of a constitutional revolution, and began to uphold legislation of the kind that it had previously invalidated – it was said at the time that a switch in time had saved nine.

No lawyer can approve of Roosevelt's proposal, but no wise lawyer can fail to see the moral taught by those events. Subsequently, American Presidents have not found it necessary to go so far, but Presidents and Senates alike have shown that they often look more to social and political attitudes than to legal ability when making judicial appointments.

If Australian Courts had the power to decide purely political questions, as they could under a bill of rights, no one can doubt that they would become similarly politicised, or that their capacity to perform their essential role, of impartially protecting rights and freedoms under the law, would be put at risk. At present the rights and freedoms of our citizens are protected without a bill of rights at least as successfully as they are in the United States or in any other country which has a bill of rights.

I have mentioned only a few of the issues that would arise when constitutional amendment comes to be discussed. There are no doubt some minor changes, of no great importance, which might with advantage be made to our Constitution, and upon which everyone might agree. When it comes to reforms that would really matter, there will be much greater difficulty in reaching agreement.

Those attempts to amend the Constitution that have failed in the past have often been seen as politically motivated. If any effort has been made to involve the public in the process of formulating proposed amendments, rather than entrusting the task to persons picked by the Government, it has not been successful. If it is intended now to make a genuine attempt to involve representatives of all sections of the public in a serious discussion of possible constitutional reforms, without any preconceived commitment to change of a particular kind, that will be welcome. However, as I have endeavoured to suggest, conflicting views are held on matters of fundamental principle and those views are wide apart.

When federation was achieved there was general jubilation in Australia. The future was viewed with hope and confidence. Today living conditions are generally very much more comfortable than they were in 1901, but optimism has evaporated. The public attitude is one of disillusion, pessimism and even despair.

Whether the distortions that have occurred to what was a workable federal system have played a part in this deterioration is a matter for debate. Certainly the drift to centralisation has resulted in a multiplication of bureaucratic interference and of cost that we can ill afford. If the Commonwealth needs further powers, they should not be such as to provide further avenues of intrusion into State affairs, or to result in overlapping and unnecessary administrative expense.

Any review of the Constitution should not lose sight of the fact that the best reform might be to make the Constitution work as it was originally intended to do, providing for a true federation and a true democracy.

Appendix 1

Addresses Launching Upholding the Australian Constitution, Volume 1

2. Mr Justice Roderick Meagher

When this Society commenced, Mr Stone wrote to me saying that the chattering classes were devoted to the general notion that the Australian Constitution was hopelessly outmoded and needed to be brought from the horse–and–buggy stage and propelled into the 21st Century. The Society should, he suggested, be formed as an antidote to the chattering classes, so that sane and scholarly discussion of constitutional issues could proceed.

This clearly is true. We all seem to be at the mercy of the chattering classes. In Australia they seem to be particularly virulent. The current Republican debate over the past decade has drawn them all out.

There was Patrick White who could be coaxed out of his mansion, an old curmudgeon with a teacosy on his head, and persuaded to denounce, in a fusillade of rather verbless sentences, the social system which had always cocooned him in immense wealth.

There was his mate Manning Clark who would hint darkly that unless the monarchy were abolished "blood will stain the wattle".

There was Thomas Kenneally, ever ready to announce his Worship of Whitlam, his devotion to the left, and his detestation of everything else. He thinks too little and talks too much.

And of course there is Donald Horne. He has an honorary degree from one University, and is a Professor of another, but never took a pass degree at the only university he attended. Notwithstanding, the leitmotif of his writings is that Australia does not appreciate intellectuals, a group in which he does not shrink from numbering himself. No doubt he would take to the Queen if she started to read Engels. It was during his aegis as Chairman of the Australia Council that we witnessed some surprising grants: there was a grant of $334,890 to the ABC to permit 21 persons of non–Anglo–Celtic backgrounds to broadcast, so that the public should have the opportunity of listening to "accented" voices on air. There was also the grant of a capital sum to enable eight Aboriginal women to walk from the South Australian/West Australian border to Koolyanobbing once a season to search out and remove the evil skeleton weed. O scion of Newton! O heir to Einstein!

They have their overseas counterparts. In New York, for example, there is Susan Sontag, ever ready to champion any progressive feminist cause, and Noam Chomsky, who is always ready to denounce as fascist anything which the USA or the UK government does. Then in the United Kingdom there is the unspeakable Pilger.

Belloc once said of the heretics: "The wind will blow them all away". Would one could say the same about the chattering classes. But alas, one cannot. Till the end of recorded time they will babble and scribble and chatter, because they can do nothing else. However, they are a danger as well as a pest, and there are real prospects they may impair the very Constitution we are all concerned to preserve.

One way of appreciating what I mean can be gleaned from a close reading of the leading judgment in the Mabo Case, the judgment of Brennan J. His Honour said there were two ways of approaching the question of whether the natives in question owned the land in question. One way was to apply the existing legal authorities. One would be pardoned for thinking that a lawyer

would find such a course attractive, particularly if it was his duty to apply the law. But his Honour spurned such a course and thought it more palatable to invent a new law. Why? Because, he said, it was required by two imperatives: "the expectations of the international community" and "the contemporary values of the Australian people".

This is all a mite curious. As for "the international community", who are they? How does one discover their "expectations"? Their views were not handed down by Moses and the prophets, nor does his Honour seem to be referring to the prominent international lawyers. And, even if one could locate such a body and discover its views, why should its views take precedence over those of the "existing authorities" which in fact lay down the law? In this struggle between the "existing authorities" and the "expectations of the international community", one has the uneasy feeling that all which is meant by the latter term is the overseas members of the chattering classes, Miss Sontag, Mr Chomsky, the unspeakable Pilger and the like.

And in determining the "contemporary values of the Australian people", where does one go? Not to the past Justices of the High Court, not to the judges of the lower courts, not to the States of Australia, not to the people in referendum, but, again, one feels, to one's very own chattering classes, who have thus ceased to be a mere nuisance and have become translated into a source of law.

The situation may be worse still. One must contemplate s.51(xxix), the "external affairs" power. This was the subject of an excellent paper by Dr Colin Howard at the July conference, who said of the power:

"Still less should it assume a character that invites any government to extend the scope of Commonwealth legislative power almost at will".

Dr Howard's star at the moment is not in the ascendant with the chattering classes. I see in one newspaper article that he is labelled the puppet of the mining industry, although he has not yet acquired the status of being a clerical–fascist hyena.

Our convener, John Stone, has also recently written of the pivotal importance of the external affairs power. His views, which do not differ greatly from Dr Howard's, have recently been described as "offensive" by the Aboriginal Law Bulletin. Both challenge the new orthodoxy that the Commonwealth arbitrarily can expand the boundaries of its power by the simple expedient of entering into a treaty on a new subject. But, with respect, both gentlemen have under–emphasised the danger. It is, unhappily, clear from the Tasmanian Dams Case that under the "external affairs" rubric the Commonwealth may not only extend its powers if there is a treaty on a new matter, it may also do so in the absence of a treaty if the new matter involves a question of "international concern". How, one asks, can a matter become a question of "international concern"? Presumably, by a lot of foreigners talking about it. This raises the horrendous prospect of a new campaign – the preservation of kangaroos, the banning of breast–feeding, the destruction of sheep on the grounds of pollution, whatever – started by one of our own chatterers, who incites his New York counterparts, Miss Sontag and Mr Chomsky, who jointly influence their UK colleague the unspeakable Pilger – and lo! one has a question of "international concern", empowering the Commonwealth to legislate on the question. In this way, the chattering classes will not only be a source of law but a touchstone of expanding Commonwealth jurisdiction.

None of this has anything to do with what our founding fathers intended, but that apparently does not matter. None of it has much to do with interpreting the written document which is our Constitution, but that apparently does not matter either. Armed with this anarchy, and fortified by the right to disregard all decided cases which Sir Gerard Brennan perceived in Mabo, the High Court gives the appearance, perhaps, of swinging violently between extreme positions – now (as in Mabo) abolishing rights we always had; now (as in Australian Capital Television Pty

Limited v Commonwealth of Australia) protecting rights we never had; punishing the people for rejecting a bill of rights by inflicting up to seven new bills of rights on us like it or not; with the prospect of being guided in their endeavours by the siren song of the chattering classes.

And now I come to launch the book, which is made up of copies of papers and addresses made and given at the Society's inaugural conference on 24-26 July in Melbourne. It was a resounding success, and many of the papers delivered there were of major academic importance and of great practical relevance.

It started with an address by Sir Harry Gibbs on rewriting the Constitution, which was delivered by an amanuensis. It told one simple truth after another. Indeed, simple truth is Sir Harry's utmost skill. We have had some more simple truths from him this evening. He pointed out that the Constitution's basic idea was that the Australian continent was to be occupied by only one nation, an idea which is inconsistent with the notion of a treaty with the Aboriginal people. It is a pity he could not blow–dry his few remaining hairs and make this announcement in a sobbing voice before the television cameras. It is one of Sir Harry's great achievements to utter simple truths in a way that makes them seem blindingly obvious, although they were not so before he uttered them. He also deplored the idea that we should welcome change either for change's sake or because the year 2000 was approaching or because the horse–and–buggy had disappeared or because other more fortunate nations like Pakistan change their constitutions from week to week. This was an idea which was further pursued by SEK Hulme in a paper which John Stone has rightly described as "delectable".

Indeed, there is a positive virtue in refusing to change. As Montaigne said:

"There is in public affairs, no state so bad, provided it has age and stability on its side, that it is not preferable to change and disturbance."

This attitude is not confined to French philosophy. It is shared by the Australian people. That is why they always vote "no" at referenda. If Parliament wants constitutional change it will have to elect a new people.

That is one reason why one hopes the High Court will refrain from radical change in interpreting the Constitution, because the people cannot signify their approval or disapproval to changes caused by curial decision.

The inaugural address was given by Peter Connolly on the important question of Constitutional right. In it he made some perceptive observations on Cole v Whitfield (1988) 165 CLR 360. That case, amongst other things, is authority for the proposition that s.92 of the Constitution did not confer on the citizen any personal individual right of freedom in interstate trade, although it is hard to see why Sir Owen Dixon was wrong in expounding the view that the section was meaningless unless it gave such individual protection.

It is worth reflecting upon the droll result: in Cole v Whitfield the idea of an individual right to enforce s.92 disappeared from the Constitution into which it was written, whereas in Mabo a newly invented right which is not even in the Constitution was held to confer individual rights.

There were excellent contributions on the current Monarchy/Republic debate from Mr Frank Devine, Sir David Smith, Mr John Paul and Mr Bruce Knox. Their various papers stressed many important aspects of the debate: that being a Constitutional monarchy does not give Australia any real problems, that the proponents of Republicanism have not fully thought out their positions – are we to have a figure–head President, or an executive one? Is a President of any kind to have reserve powers or not? How will one deal with the question of having a royalist State within a Republican Commonwealth? These are, however, somewhat negative arguments. There are more positive reasons for the continuation of the monarchical status quo. One might do well to contemplate Walter Bagehot's statement:

"The best reason why Monarchy is a strong government is that it is an intelligible government. The mass of mankind understands it."

One of the pinnacles of intellectual reasoning on the monarchy question I wish to quote to you. It comes from Sister Veronica Brady, quoted in Professor Donald Horne's new book "The Coming Republic", probably being launched at this moment. It reads as follows:

"I'm Irish on both sides, fourth generation Australian, so that's a good reason to be a republican – if you're Irish like that you can't see any need for the British establishment. You ask why canonise the people who shipped out so many of our ancestors? But leaving that aside, for Australia the monarchy is costly, it encourages snobbery and is the epitome of suburban values. The Queen herself might be an admirable woman, but the media turn fairy tales kinky with their treatment of the dizzy dames her sons have married."

One cannot comment. One will not, of course, mention feminist logic. But it is an interesting example of puerility – or, perhaps, that is a sexist word; perhaps one should say "puella–ility".

Professor Cooray delivered an important paper on the High Court. All lawyers know that Sir Owen Dixon said that it was the business of the High Court to be legalistic in its approach to its cases. We have all accepted that. But now the current Chief Justice has suggested "that legal reasoning should not be pursued so far", and that decisions must take into account "fundamental values". As Professor Cooray pointed out, this new approach involves some problems:

(a) How does one determine what values are "fundamental"?

(b) How does the new approach cope with the fact that at any one moment different people have different "fundamental values"? (c) How will the approach cope with the fact that tomorrow's "fundamental values" will be different from today's? (d) Is it valid to entrench "fundamental values" which are nowhere mentioned in the Constitution? We must all ponder these things.

But probably the highlight of the Conference was the paper of that arch–wit of Melbourne legal circles Mr SEK Hulme, a paper teasingly entitled "Constitutions and The Constitution". I wish I could have said the things he said: never mind, in the future I shall. One utterance perhaps should be repeated because it symbolises what most of the delegates to the Conference felt:

"Where there is no need to change the Constitution, there is a need not to change the Constitution."

I have great pleasure in launching the book.

Appendix I

Addresses Launching Upholding the Australian Constitution, Volume 1

3. The Rt. Hon. Sir Paul Hasluck

It is a privilege to be able to join fellow members of The Samuel Griffith Society today for the launching of this book. The volume contains the text of the proceedings of the inaugural conference in Melbourne last July. The chapters come from a wide and diverse range of contributors, drawing on many levels of experience in public affairs and the study of public questions.

The inaugural conference, this publication and the notable gathering in Perth tonight make a clear declaration of the chief purpose of the Society, namely to ensure that the debate on the Constitution of the Australian Commonwealth should be an intelligent debate, and that any changes that may have to be made to our Constitution should only be made after the widest range of thought and opinion has been canvassed.

I myself have a conservative approach to revision of the Constitution, for I believe that the basic purpose of having a Constitution and for giving a Constitution one shape or another is simply the better government of Australia. A Constitution is not just a piece of draftsmanship, but an agreement about working together for a common purpose and practical arrangements for the government of Australia. A good foundation needs stability.

It may seem very arrogant for me to say on an occasion such as this, and in the presence of a gathering as learned as this, that I personally feel that I have two great advantages whenever I enter on a general discussion of the Australian Constitution. Firstly, I have not been trained to the profession of the law. Secondly, I have always been much more deeply interested in Australian government than in the practice of Australian politics. I hope that you will see those words simply as a valid claim that I join in discussion about the Constitution with fewer inhibitions than does the text-book lawyer or the party politician.

The outcome of the first advantage I claim for myself is that I think of the Australian Constitution as more than the written text drawn up in 1901 and I see discussion of the Constitution as wider than argument about the interpretation of that text.

The second advantage is that I do not read the Constitution as a political manifesto or a statement of political objectives. Rather I regard the Australian Constitution, in the widest sense of the term, as the accepted and established description – and I use the word "description" knowingly as a word that will not satisfy any good lawyer – of a system and structure of government, of the institutions by which government is conducted, of the relationship between those institutions, and the distribution of powers and functions between them. It is a description of the accepted arrangements by which public affairs can best be transacted – a man–made set of arrangements for handling better, day–by–day, those matters that arise in the government of a nation–state.

Now, of course this certainly does not mean that I ignore or even disregard in the slightest degree the fact that the text of a written Constitution of the Commonwealth of Australia exists, nor fail in reverence for the text. I see that text primarily as the outcome of an agreement between six self–governing colonies to federate in order to form the Commonwealth of Australia in 1901, and to achieve the ideal of one people living together in one continent. Perhaps the briefest way to summarise this view is that I rely on the text for settling questions of function and powers, but

look beyond it for the discussion of purposes and principles (or the immediate tasks) of Australian government.

At the time they agreed to federate, the Australian States were singularly blessed by the fact that there was no dispute or doubt about our territorial boundaries or our origins, and consequently our territorial integrity and sovereignty were unquestioned. The ethnic, social and linguistic similarities (almost the homogeneity) of the population gave us ground for the slogan of one people for one continent. Before the point of time when the colonies agreed to federate, there was a history of the development by each of them of the structure of government, the growth of political institutions, and the usages of political adjustment and compromise. Earlier than that there was an inheritance from centuries of change in the British Isles.

I count it to have been my good fortune to have come up through the Australian education system during a period when the teaching of history in school and university led me progressively through the study of the way our modern political institutions were developed and the law and custom of the Constitution took shape. Consequently the Australian Constitution of 1901, shining and virginal in the halo of infancy, was for me the culmination of a constitutional history, both in the Mother Country and in each of the colonies. The ideas, experiences and practices derived from that history were just as much part of our Constitution as the text.

Again speaking rather arrogantly – or what is worse rather snobbishly – I regret that, so often in public discussion about constitutional reform in Australia, so many eager political practitioners take the floor assertively only to reveal that they do not know any constitutional history, have scant understanding of modern political institutions, and see the machinery of government in the same way as they see a motor vehicle to which they have been given sole possession of the ignition key. For the same reasons, whenever reform is in the air, we always see an untidy and eager swarm of amateurs who crowd the opening sessions of any Constitutional Convention, each with his pockets bulging with the complete draft of a wholly new Australian Constitution, to be tabled as soon as he has been able to throw the old one into the waste paper basket.

I shall turn now from expression of my prejudices to another theme. This theme is that the Constitution of 1901 has shown a remarkable quality of being able to encompass and to prove workable in a succession of great changes in the course of the past century. If the history of that century yields a lesson it is not that our nation needs a more elaborate constitutional text so much as it needs political wisdom, clearer understanding of where our interests as a people and a nation lie, and above all more of that singular talent for working together (with some forbearance for each other's shortcomings as well as a zeal for serving the common good) that is the characteristic of good government in a parliamentary democracy.

Perhaps you will allow me to give a personal touch to a quick cursory survey of the century of change through which I have lived. It is just seventy–five years ago – almost to the day – that I was in the last year of primary school, waiting to sit for the annual scholarship examination. It was November, 1917 and we were celebrating the opening of what was called the Trans–Continental Railway. We were told that part of the "promise" that had been made to Sir John Forrest at the time of Federation had now been honoured. The east and the west were linked by rail. Each child was given a souvenir of the memorable event.

Already in 1917 the waging of the war, and especially the story of the Gallipoli landing, had given schoolboys of those days a new and livelier sense of an Australian patriotism larger than our local pride in our own sand patch. At Gallipoli Australia had gained a proud identity.

Then, in the early post–war years, when I was at secondary school, the aeroplane flew into our daily life. The first airline in Australia was opened on the western coast. Qantas followed in Queensland. The first great intercontinental flights, both in the northern hemisphere and from Europe towards Australia and then across the Pacific, made the front pages. The importance of

civil aviation, both commercially and socially inside Australia, appeared almost as naturally as the dawn. Where do we build the airfields? Who runs them? Who regulates the industry? Then wireless telegraphy came into vogue and we had what were then "wireless" stations to tell us the news.

During the same period the early post–war development was marked by the promotion of migration, extensive overseas borrowing and land settlement schemes. We young men were emerging from secondary school into a land of opportunity in the early nineteen–twenties. Railways were thrusting into an undeveloped interior.

During the same period some of us were introduced to international affairs by occasional enthusiasts in University circles. We became aware of the international status of Australia as a member of the League of Nations, a mandatory power in the Territory of New Guinea and the phosphate islands in the Pacific, and as signatory at Versailles. In a vaguer way, our country, following mainly a Canadian lead after the Chanak crisis, had gradually moved into something known as Dominion status – a sort of certificate which Australia treasured but seldom used in asserting our place in the world at that time and our future links with the Mother Country and the surviving parts of the Old Empire. Our Prime Ministers still went regularly to Imperial Conferences.

During this period in the thirties Australians thought seriously of many emerging problems at home. There was the Giblin–Copland–Brigden–Dyason inquiry into the effect on our economy of the Australian Tariff; the Peden Royal Commission into the Constitution; the setting up of the State Grants Commission to iron out the inequalities between the States. Australian governments moved into interstate discussion and sometimes agreement. The financial agreements and new arrangements for tax collecting were arranged. Transport was seen as an Australia–wide problem. Overseas borrowing was coordinated. Industrial relations became more than a matter that could be handled separately and also required interstate consultations.

Then came the economic depression with its political, social and economic effects both in the life of the community and in the management of public affairs. We realised painfully that we were not fully masters of our own fate. We were subject to what happened elsewhere – in the mood of the times many Australians would have said we were victims of what happened elsewhere – and we had to make painful adjustments. Trade transfer policy, Empire preferences, overseas debt, massive unemployment at home – all these put a different aspect on government. The young Commonwealth of Australia, still only in the early thirties of its age, was being obliged to face the realities of being a self–governing dominion and no longer a favoured colony in a great Empire.

War came in 1939. The theme I am developing simplifies at this point. For the waging of a total war, the defence powers of the Australian Constitution meant that a single purpose could be served by a single authority. Functions and powers matched each other. Government centralised, and the fact that a task needed to be done virtually meant that under the defence power the due authority had the power to do it.

In the course of the war a change of government brought the Labor Party into office. It would be a fair historical judgment to say that, at this period in the history of the Labor Party, centralised government was itself seen as a desirable goal. For many of its members, the key word in debate about the future Constitution was "unification". Furthermore, from a variety of sources and influences, an influential element in the Labor Party had become doctrinaire socialist. They not only saw centralised power as a desirable form of government, but also saw their temporary possession of office and centralised power as the method to make changes towards a planned socialist state.

You will recall that, apart from the natural wartime transformation which I have recounted, Dr Evatt was active, first to promote the 14 powers referendum to increase Federal powers, but also to promote the concept that the external affairs power of the Commonwealth meant that when Australia entered into international agreements, the commitments it made as a nation endowed the Federal Government with power to give effect to them.

The referendum lost, but the purpose of a stronger central government and the socialist objective remained until the reversal at the general election of December, 1949. Some of you may recall that some of the wartime controls remained until the eve of that election, and that issues such as the nationalisation of banking and medicine (just to mention two examples) were prominent in the campaigning.

Under the demands of total war, uniform tax had been accepted as a necessary measure, and Federal domination in finance had been established.

During the war, necessarily more and more talent was drawn into the service of the centralised government. Some of the best men in the public service of the States, in private industry, in academic studies, and in various forms of management and technical expertness were serving the nation in new capacities. For the most part, each had a precise job to do and no need to hesitate about having power to do it. Towards the end of hostilities, the work of government became focussed more and more on the allocation of manpower, the distribution of a due share in resources to one activity in preference to another, the choice of one venture or the meeting of one prospective need in preference to another.

Both as part of the necessities of wartime and as part of the occupational interest of those engaged in administration, we moved steadily into a routine where someone with undoubted authority and possessed of undoubted power decided what should be done. It was great fun to be able to move people around. Alongside them, enthusiasts for a new order were moving confidently towards a planned society. Post–war reconstruction was both the name of a government department and a political objective. This was a fascinating period in Australian history. As one who was in the midst of it and who has written inadequately about it in the Official War History, I hope more critical studies of it will be made.

Then, at the election of December 1949, there was a change. Doctrinaire socialism had a setback, prospects for nationalisation were rejected, the ideas about a planned economy and a planned society had to be adjusted. Wartime centralised government gave way to the usages of peacetime.

At this point I shall repeat what I have written in other places. One of the great services which Menzies did for Australia in the years following the 1949 election was the restoration of the orthodoxy of Australian government, both in respect of the place and the functioning of the public service and the relationship between the Ministers and the public service. I rate this as one of his greatest achievements. He brought good order back into the processes of government, restored the public service to its traditional honoured place in the executive as a career service, and paid constant scrupulous respect to Parliament. We who had been reading Dicey as students in the nineteen–thirties were recalled to his principles in the nineteen– fifties.

Thus we entered on the second half of the century of the Australian Commonwealth in fairly good constitutional shape, and certainly with the foundations still firm.

Now here we are forty years later, looking beyond 1992 towards the next century. Drawing on an old man's memory of the passing decades, I suggest that the changes in the second half of the century have been more varied, deeper and less readily comprehensible than those in the first half. Personally, I can scarcely recognise in Australia today many of those characteristics which I thought were native to Australia in 1950.

In the field of domestic politics I suggest that in the nineteen–fifties Australia returned to the traditional lines of Australian development both as regards objectives and methods. There was still a major task to be done in transformation from wartime to peacetime; re–location of population, training and occupation for those who were demobilised from one form or another of wartime activity, restoration of trade and industry to a peacetime pattern with opportunity for private enterprise, the review and cancelling of unnecessary controls, regulations and restrictions. There was a great back–log of need for housing, services and utilities, and deficiencies in such areas as the post-office, telephone service, public transport and power for industry.

At the same time, and linked with these demands, was a planned promotion of immigration, including acceptance of an obligation in respect of wartime refugees and displaced persons, mainly from Europe. That period of planned immigration also saw the promotion of some major public works and a careful annual budgeting of the intake of migrants. Special measures were taken to assist the assimilation of the newcomers to the Australian way of life. Good neighbour councils, classes for the teaching of English, and organisation of welfare were encouraged to help New Australians find an easier way to acceptance and opportunity.

This is not the place for an evaluation of that period of immigration but, looking at Australia thirty or forty years later, I suggest that in all walks of Australian life today – in trade, industry, science, academic life, technology – and social advancement, one sees many outstanding citizens who as New Australians in the nineteen–fifties found that this was once again a land of opportunity.

Other features of the earlier post–war period were the building throughout Australia of educational facilities, health services and a wide range of activities and benefits embraced by the term social welfare. The scope of public aid widened considerably. As I have already suggested, this was done mostly along traditional lines. Access to higher education was more open. Notably, in both education and health (as also in fields such as transport), the improvement meant Federal–State cooperation.

During the same two decades of the fifties and sixties we faced new problems in the economy. I suggest our approach to them in the Menzies era might be described as orthodox both in policy and in administration. Soon after the political changes in 1949, there was a draining away of the various "think tanks" which had been making paper plans in various back rooms of government. Happily for many of the persons concerned, the post-war expansion of tertiary education gave them opportunity to work usefully at a new desk, or should I say from a more elevated academic pulpit.

The Treasury resumed its strong and central role both in economic analysis and the shaping of the Budget. Three points in the current orthodoxy were: watch the level of employment and keep unemployment below 2 per cent of the workforce; watch the overseas balances and the terms of trade; and, thirdly, check inflation. The phrase which Menzies repeated again and again to his Cabinet was: "We are walking the knife–edge of inflation". So public expenditure was rigorously examined in detail each year after a decision whether the economic outlook allowed a balanced budget or the financing of a deficit. In the legends of the period many little wizards were credited with being those who ruled in the darker recesses of government, but my own testimony is that this was a period of strong Treasury influence, with Menzies himself the upholder of the three objectives I have listed and respect for Treasury advice.

Later we had to face problems set by changes in world markets and in the opportunities for Australian trade. It is not immediately relevant to my theme to discuss other aspects of our economic problems, and particularly the new post–war situation in respect of overseas trade, investment, access to markets and the relationship of these world-wide factors (mostly beyond our national control) to any policy or development of our physical resources or the use of our

technological and managerial capacity. Nor will I discuss strange aberrations of recent years which seem to an old fogey like myself to have landed Australia in an unholy mess. The only rather sour comment I make is that I cannot understand how it was that private greed and personal profit seemed for a period to take front place in shaping national economic policy, and why so many excursions were made by governments in areas that might well have been left alone. Perhaps it was the fortuitous circumstances that a mineral boom, exploiting idle resources which we had done nothing to create, left some statesmen blinking in the glare.

In this quick cursory review of a century I have drawn on my memories, for I am writing this address in the temporary isolation of a place where the only document I have on file is the daily chart recording my pulse beats. My only purpose has been to support the propositions that Australia has undergone great changes during the century; that Australia today is a nation–state vastly different from the collection of colonies that federated in 1901; that the issues we faced and the policies which we had to shape throughout the century were perpetually changing; and above all else, that the future will be much more brutally challenging to us than the past. Through all this, it is not the Constitution that hampered us in the handling of public affairs or prevented governments from working together. To sum up, the lesson is not that we can only prosper if we write a new text or make major amendments to the old one, but rather that we need higher political skill and forbearance in using our Constitution.

Late in the nineteen sixties an amendment to the Constitution was made of the power to make laws in respect of Aborigines. I would doubt myself whether this was a well– considered judgment of the Australian people on the constitutional question alone. Rather it was an expression of opinion that we should do more to help the Aborigines and to redress the wrongs they had suffered. I would also suggest that the eventual historical judgment on whether it was either a necessary or a wise decision will be made on what has happened to the Aborigines since that redistribution of powers. Now, in the early nineties, are the prospects for the future of Aborigines and for the Australian nation better than they were in the early seventies? The amendment to the Constitution certainly does not appear to me to mean or (in the new language of the interpreters of the Constitution) to imply that there shall be two systems of law in Australia, or two different classes of Australians.

As I have indicated at the beginning of my rapid summary of the changes taking place in Australia during the century, my theme is simply that the Constitution gave a sound basic structure, system of government and the political institutions for handling the changes. It proved sufficiently adaptable to meet the changing needs of an emerging and evolving nation. Our Constitution is not an outworn obstacle to political wisdom or administrative skill. Perhaps the shortest way to summarise my view is that I can see no strength in arguments that we need a new Constitution, or a new system of government, even if there are very strong arguments for the need for some adjustments to meet changes in Australian needs.

In conclusion, may I be permitted to make remarks about the contemporary scene and the future. On the future I shall be brief, for I have no claim to be a prophet. It should be clear, however, that we are moving into an era where world affairs will be vastly different from that period since the French Revolution during which the nation–state emerged and old Empires crumbled. How long will the nation–state continue as a significant unit in decision making, both as regards what happens inside the borders of each nation and in its dealings with other nation–states? Already many of the nations which assert both their nationalism and their independence are not in fact masters of all they do, but are subordinate, either as mendicants or clients to other powers. Already some of the more significant nations are grouping protectively. Are we likely to be moving into a new era of economic imperialism, in which many fatal decisions on whether a

nation–state survives or prospers, or in brief terms what it can do as a nation, are not left in its own hands?

I pose that question starkly, for it may present the ultimate test of the wisdom of what we are doing in Australia in the few remaining years of our first century as a nation–state. The journalists sometimes put it even more crudely by asking of the future: Who owns Australia? How do we service our growing overseas debt? Who controls further investment in development? Where does opportunity lie in a continent that we once called the land of opportunity?

For the time being, however, we are still a nation–state trying to be our independent self in a world of nation–states. Survival, independence, and integrity, and our own identity as Australia are still, I assume, national aims. If so we need to cherish more than a hope that it will be so. A nation–state needs cohesion, a single clear focus of loyalty, and a rallying point of patriotism that supersedes sectional advantage. As a community of people living together, we have room for a wide diversity of interests, customs, creeds and styles of living, but as a society, organised as a nation–state, cohesion, a single loyalty and a body of law applying equally to all citizens, and respect for one government under the rule of law seem to be essential. In my gloomier moments I fear that in Australia today these essential qualities are being eroded – sometimes by design, mostly by carelessness and often by thoughtless blather about whatever happens to be the latest buzz–word.

I turn from these doubts to matters more directly related to our Constitution.

The matter that chiefly causes me concern is the pretension of the executive to be the source of power rather than the custodian of power. This is shown frequently in the relationship between the executive and the legislature and also in the daily usages of political life. Having obtained a majority of votes at an election, a party thinks of itself as gaining office, having a mandate to govern, and having won a victory at the polls. They think of themselves as being "in control". I would not go quite as far as the eminent British statesman, Hailsham, did recently when he referred to the office of Prime Minister as an "elective dictatorship", but we have had some indications in recent Australian history that Prime Ministers (and State Premiers more so) think of themselves in that way. They act as though their role was to control Parliament rather than being answerable to it.

Alongside this tendency there has been a weakening and in some cases total disregard of the unwritten conventions of our Constitution. A convention is a code of proper behaviour, something like the good manners of politics. For example, a Minister resigned if he was found to have misled Parliament; in the process of the introduction and passage of all stages of a Bill, and transmission from one Chamber to another, sufficient time was allowed for debate; question time was an opportunity to obtain information, and not to have another Donnybrook brawl. Convention requires recognition and respect of the place in a bicameral system of each Chamber. An old convention was that the Executive made its Ministerial statements and announcements to Parliament. Some recent incidents suggest that the Executive finds the National Press Club in Canberra a better forum and, moreover, I cannot recall any recent instances where the Press Club has been called as many dirty names as the Senate gets from the Prime Minister. Respect for the conventions as well as the text of the Constitution is a basic requirement of parliamentary democracy.

Another matter of concern is the damage done to the career public service, and the deterioration of the role of the public service in the whole business of governing. The lower and middle ranks of the public service provide the routine day–by–day transaction of public business in a similar way to the management and staff of any great multi–faceted organisation, and it is good for Australia that they do it efficiently, promptly and in an even–handed way. The top levels of the

public service come close to the apex of decision- making and giving effect to decisions. They have a professionalism in their own fields, from training, depth of experience, technical skill and total commitment, similar to the professionalism on which we depend in a surgeon, scientist, engineer. These qualities require a career service that is a–political, independent and not beholden to parties or persons for favour.

I see signs in recent years that the public service in Australia, both Federal and State, is not understood and used as well as it should be by those who are temporarily in office as Ministers, and that the value of their services in advice, decision making and administration in the daily processes of government is being lost. Part of the trouble is that new Ministers are a bit frightened of public servants because they are better than the Minister himself. They talk of them as bureaucrats. The only reason to fear bureaucracy is when Ministers are not competent, diligent and intelligent enough to evaluate truly the information and advice they receive and to act responsibly and decisively as Ministers.

Alongside the deterioration of the part of the public service in government we have seen the growth in recent years in the personal offices of successive Prime Ministers of something resembling a presidential bureau, with consultants, advisers, special advisers, personal assistants, speech writers, the occasional tycoon and much else, all beholden to the Prime Minister himself. One of these days, if ever Parliament revives a memory of Stuart days and challenges the divine right of Prime Ministers, it will find its Laud, Stafford and Buckingham with other candidates for attack in the presidential bureau.

Lastly my other concern is with what is happening in the electorate. I shall not elaborate on this point, but only suggest that the ultimate way to getting better members of Parliament, a stronger Parliament and more highly competent Ministers is through the electorate. How does one ensure that a majority at the polls means that voters have made a carefully–considered, deliberative and well–informed choice between great national issues, between candidates and between party policies? One enters on a topic more complicated than any discussion of the Constitution.

As I have indicated in my main theme, our biggest worries in the government of Australia are not whether the text of the Constitution is perfect, but whether we have enough wisdom – or even enough plain common sense – to govern our nation wisely.

Appendix II

Addresses Launching Upholding The Australian Constitution, Volume 2

1. Sir Walter Campbell

Thank you, Sir Harry, for your words of introduction. I have often told the story of one occasion when I was Governor of Queensland, when the chairman of the particular gathering introduced me with the words:
"Some of you have heard the Governor before, some of you haven't! Those of you who haven't, will be looking forward eagerly to hearing him".
Such an introduction was not as kind as yours, Sir Harry.
I am really very pleased to have been invited to launch Volume 2 of Upholding the Australian Constitution. This book contains the proceedings of the second major conference of The Samuel Griffith Society. The Society was formed as an incorporated association early last year by a group of concerned people, and its objective, broadly speaking, is to defend the existing Australian Constitution.
The Society held its inaugural conference in Melbourne in July 1992, and the papers and addresses delivered at that conference were recorded in a volume Upholding the Australian Constitution which I have read, and as a result of reading that first volume, I am much better informed, if not wiser. As I have already said, this present book has a similar title and is Volume 2, containing two major addresses and ten papers delivered at the second annual conference of the Society held on the weekend of July 30th this year.
In his foreword to the book, Mr John Stone articulates, and I am sure that there is no disagreement among informed persons about what he says, that three areas of the Constitution have taken on enormously increased importance, namely, the republican issue, the implications of the Mabo judgment and thirdly, the way in which the High Court has treated and interpreted the "External Affairs" power [S51 (xxix)].
Incidentally, the foreword to this book poses one simple question:
"Do we, or do we not, wish to see more power being exercised in Canberra?"
I will refer to the individual papers in more detail shortly, but let me say that I have been surprised on many occasions at the way in which more and more power is going to the central government in Canberra. I have no wish to be, and will not be, party political, and I fear that this move to central power has also been going on to an extent during the occupancy of the Treasury benches by non–Labor governments. However, I have no doubt that the policy–makers in the Labor Party are not what can be described as "federalists". Such people, and in that connection I think of former Prime Ministers Whitlam and Hawke, and the present Prime Minister among many others, from their reported statements have made it clear that they believe Australia could be better and more wisely governed from the centre. Further, they may not admit this openly, but they do not want States, and I am left with the clear impression that they favour a unitary system of government, and that they dislike the existence of the Senate.
But let me also say that the increase in central power has been brought about largely by the decisions of the High Court. It has become clear that the drift to centralism of earlier years has now become quite a flood.

I remember that in January 1979 I presented a paper at a judge's conference on the relationship between the Federal Court and the Supreme Courts of the States. Much of that paper is now out of date and I do not wish to rekindle any of the problems and difficulties that may then have existed. The Federal Court is now an accepted and reputable institution in this country, but the emergence of that new court was one of the many institutions stemming from the granting of increased legislative power to the central government. I then expressed the opinion that there was no need to create the Federal Court of Australia and that all matters of federal jurisdiction should have been vested in the State Courts. I said that there is a special expertise in resolving disputes between citizens which should be left to the courts of the States, the "local" courts, and not to the specialist courts. It was my view, and still is, that a specialist court will become divorced from the community, and that its judges will be deprived of the benefits to be gained from trial court experience and from constant contact with the general, conventional and regular judicial system. In short, I expressed the view that a centralised administration is more likely to be out of touch with, and not to be sensitive to, local needs.

I believe that the majority of the Australian people have a desire for separateness, that they want a federation which looks after the separate interests of the State.

For some years in the '70s I was the Academic Salaries Tribunal, and I then became familiar with ways in which the Federal Government had intruded into the Australian system of education. A lot of legislation was passed by the Commonwealth in that field. Much of it I found worrying.

Now, as you all know, the Canberra government has entered the field of education relying on Section 96 of the Constitution, which enables the Federal Parliament to grant financial assistance to any State "on such terms and conditions as the Parliament thinks fit". At the present time, not only have we a Federal Department of Education but we have Federal Departments of Transport and Health and, as Sir Harry Gibbs says in his address which is one of the papers in this Volume, potentially the Commonwealth can invade any field of governmental activity, and it has invaded many, producing a cumbrous and expensive duplication of bureaucracy.

Is not now the time for the Australian people to think about making an attempt to impose limits on "such terms and conditions" which the Canberra Government might impose on the money grants to the States? How that can be done, and how true federalism may be regained, raises problems, but they must be confronted, and indeed they are confronted in the papers in this work.

But I am here to launch this handsome volume of the Society's second major conference, which conference I have been reliably told was an even better one than its inaugural predecessor in July last year. It contains excellent papers from some 12 contributors, from people who have been prominent in Australian affairs and who have made valuable contributions to this country.

The opening address was given by Mr Jeff Kennett, Premier of Victoria, and was entitled "The Crown and the States". Mr Kennett argued very ably the case for the retention of our constitutional monarchy and pointed out that it has served – and continues to serve – Australia well.

May I say for myself on this topic that republicanism, I think, is being used by certain people as a pretext or as a blind or a screen to conceal a deeper purpose or purposes.

Lest it be thought that The Samuel Griffith Society does not canvass both sides of these sorts of questions, another paper was given by John Hirst, a convenor of the Australian Republican Movement, and a member of the Turnbull Committee, who put the opposing case very well. But Mr Hirst fails to persuade me to his point of view.

It was very informative to read the paper presented by Dr Frank Knopfelmacher, a Jewish migrant from Czechoslovakia, who opined that British culture is our heritage. He advocated the non–discriminatory taking, subject to economic considerations, of migrants from places such as China, Indo–China and Hong Kong, and he argued that they would absorb our British culture

and institutions, his theme being that British culture is our heritage and that, for many reasons, it is a good one.

Aboriginal issues, particularly aboriginal values in the Australian cultural environment, were frankly discussed by well–known journalist, Jack Waterford, who has been an adviser on aboriginal affairs to governments and has visited hundreds of aboriginal communities. I urge you all to read this paper because it is such a complex and sensitive issue which cannot be dealt with in a few sentences. The issue was taken up in a paper by Bill Hassell, a former WA Minister and Leader of the Opposition in that State, who warns us that the Mabo judgment would lead to a treaty with aborigines, that it could destroy the legal foundations of federalism and could lead to an independent, sovereign indigenous people's government.

Two papers I found particularly fascinating and thought provoking, one by former Queensland Supreme Court Judge Peter Connolly and the other by S E K Hulme Q.C., a leading barrister and company director in Victoria.

Peter Connolly, in his paper entitled Should Courts Determine Social Policy?, deals with the role and function of the High Court and he answers that question in the negative, because he says that it is not the function of the courts to determine social policy and, he says, they do it so badly. Mr Hulme's paper, The High Court in Mabo is a well–reasoned legal criticism of that judgment – and I might say that the Mabo judgment is also strongly and perceptively criticised by Peter Connolly.

The implications of the Mabo case are topical, and I can see how difficult it has been for anyone to come to grips with them, in view of the politicking which has been done and the coverage by the media with its oft misleading headlines and confrontational attitude. These two very learned and eminently readable papers contain so much thoughtful commentary that it would be idle and probably misleading were I to say much by way of addenda to them.

But, what did that Mabo case decide? In the words of the Chief Justice:

"Six members of the Court agreed that the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases,the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title under the law of Queensland."

I fail to see, in these papers prepared by Connolly and Hulme, that they contain anything other than reasonably–based critical argument. Peter Connolly puts the case forcibly but rationally against the introduction of a Bill of Rights which would bring the judges into the political process.

His conclusion is that the Mabo decision is an ex post facto reversal of established law, and Mr Hulme clearly opines that the judge who wrote the principal judgment in Mabo proceeded to overrule decided cases in the total absence of argument from interested persons, and in the total absence of evidence as to aborigines generally.

I must say that the arguments put forward by Connolly and Hulme are supported by authority to which they carefully refer.

Peter Connolly further says that what was said in Mabo about native title residing in the indigenous inhabitants of the mainland of Australia is obiter dicta. In other words, the remarks are simply observations on a legal question not arising in such a manner as to require decision, and therefore not binding as a precedent because the case was not about the mainland indigenes, but was concerned with the Murray Islanders who were not nomads, but who were settled on their islands and had been for generations. The Murray Islanders are not of aboriginal descent but

are Melanesians, and are not nomads but are cultivators and, to use Connolly's words: "millennia ahead of the Palaeolithics in terms of social organisation".

It seems to me too that it can be argued that the decision can be said to be one given per incuriam, a legal phrase which means that it is a decision given through want of care, because of the absence of representation and argument by all interested parties, and also because of the lack of evidence as to the facts of the Australian mainland occupants. Therefore, on those grounds it could be said to be not a legally binding decision, and could be overruled or departed from in subsequent cases. Of course, in any event, the High Court is not bound by its own decisions, and it appears that the decision could be reversed by legislation or by constitutional amendments – but such courses, I must say, appear to me unlikely.

I will not deal with those rather emotive words in the joint judgment of Deane and Gaudron JJ, which referred to the fact that the dispossession of the aboriginal people of most of their traditional lands constituted "the darkest aspect of the history of this nation", and another passage wherein it is said that the treatment of aboriginal people over the 19th century leaves "a national legacy of unutterable shame".

Suffice it to say that the comments by Mr Hulme on this so-called "legacy of unutterable shame" are well worth reading. He says that he does not know enough to draw up a balance sheet of moral turpitude or otherwise across people largely unknown. He also says that he is willing to bear responsibility as a citizen to help bring about whatever is proper in this age to repair ills now existing, but that he has no intention of accepting personal responsibility for the acts of others, or marching through the world trying to repair past ills to people now dead.

This part of the judgment, and the comments by Mr Hulme, are matters for you yourselves to think about.

Speaking for myself, I must say that I have always had a great admiration for the early European settlers of this country – our pioneers, who acquired their land titles under what they considered lawful and proper authority. In their new environment, they struggled against the wilderness as they opened vast new areas of settlement, battling against droughts, fires and floods, great distances, the high cost of transport, the lack of communications, and the fluctuations in the price of wool and other produce.

The High Court of Australia fulfils two roles : one is that it is the upholder and the interpreter of the Constitution, and second, that it is the ultimate appellate court within Australia.

As a barrister, judge and a citizen, I have always had a great respect for the High Court. I sincerely trust that the people of Australia will always hold it in the highest regard. The integrity and independence of our judicial system depends greatly on the high regard in which the Court and its members are held. Of course, all judgments of the High Court are open to fair, reasonable and proper criticism.

One of Mr Hulme's conclusions is that the High Court has wounded itself in recent years, and that it has done so again in Mabo.

I can remember the decision being given in the Tasmanian Dams Case, because it was given in the Brisbane Supreme Court building where at the time I was an occupant of Judge's Chambers. I was then most surprised with the result, which was an intervention in the affairs of Tasmania and was hailed in the media as a victory for the Greens. I do not criticise the decision from a legal point of view because, of course, it was justified by the use of the External Affairs power.

I have been going on for too long, but let me say just a few words about the other valuable contributions.

Other papers were given by Dr Colin Howard, a Professor of Law at Melbourne University for a quarter of a century, and now a barrister who is an expert in constitutional law; by Mr John Paul, a political scientist at the University of New South Wales; by a former Senator and a Federal

Attorney General in the Fraser Government, Peter Durack, QC; by Professor Wolfgang Kasper, who holds a Chair in Economics at the University of N.S.W.; and by the President of The Samuel Griffith Society, Sir Harry Gibbs, who, as you all know, is a former Chief Justice of the High Court and needs no introduction.

Colin Howard's paper deals with the External Affairs power and he emphasises, in his own words, the extent to which the High Court in recent years has converted a legislative power to deal with foreign relations and diplomatic representation overseas into a major source of power to control purely domestic issues.

As an expert in constitutional law, he is well qualified to deal with this topic which he asserts weakens our federal structure.

Peter Durack also deals with Section 51(xxix), the External Affairs power, and he asks what is to be done about it as a result of the High Court's current interpretation of it.

Mr Paul analyses in detail the 1944 Referendum. It was one by which the Government sought a transfer of certain powers to the Commonwealth by reference from the States, which it claimed were needed for the immediate post–war tasks of the reinstatement and advancement of servicemen and others displaced from their peace–time occupations, and for the reconstruction of industry. The Referendum was convincingly defeated, and Mr Paul argues that therein lies a cautionary tale for Mr Keating – a warning of the broadening of Commonwealth powers flowing from the Mabo case, and also a warning on his grand design for a referendum to create an Australian republic.

Professor Kasper's paper Making Federalism Flourish reminds us that we must think about injecting new life into State and local government, and he propounds the principles of what he calls "competitive federalism". He puts forward economic arguments for a more decentralised government, and is persuasive in his advocacy that reforms aimed at turning back the trend to centralisation will inspire new life into Australia's ageing democracy.

I refer finally to the address by Sir Harry. His paper, The Threat to Federalism considers the genesis of our federal system and explains in clear words its structure. He points out that the result of the undefined and unlimited scope which the High Court has given to the External Affairs power threatens the very basis of federalism. He also discusses the limited powers of the States to impose taxation, and says that the Court's interpretation of the excise section, Section 90, is an impediment to the rational division of financial powers between the Commonwealth and the States. He also refers to Section 96 and puts forward arguments in favour of the maintenance of the federal system, such as that the competition and diversity which can be provided in a federation can stimulate efficiency, and that politicians and public servants in the States are more likely to keep in touch with local feeling, and to understand local problems, than are those who work in the unpolluted air of Canberra.

He points out that the Constitution does not give the Commonwealth any power with regard to the provision of roads, education, housing or legal aid, but grants are made to the States to be applied for those purposes in accordance with detailed conditions laid down by the Commonwealth.

He also asserts that every increase in Commonwealth powers should not necessarily be opposed, but says that we should support the clear definition of Commonwealth powers so that they do not intrude into State affairs with the duplication of cost and bureaucratic activity.

So there we are.

I hope that I have not wearied you by attempting to comment on every contribution to this very valuable and erudite book. The papers are all of a very high standard and I suggest that they should be read by all politicians, both State and federal, by all senior bureaucrats, by those

persons in the media who seek to reflect upon or to influence the development of public opinion, and by people who are concerned or interested in the well–being of Australia.

In these pages there is much food for thought for any person who wishes to be informed on such basic matters as republicanism, constitutional monarchy, a Bill of Rights, centralism and federalism, and the role of the High Court.

For it is trite to say to such an audience as this that our system of government is a democratic one, and that in a democracy the burden of ruling falls upon every citizen. What is more, we are a federation, a federal union of several former largely self–governing colonies which became States, and if the six Australian colonies had not agreed to federation, they might be separate countries sharing a continent, as is the case now in Europe. I believe that the great majority of Australians take much pride and comfort from a truly federal constitutional structure.

It is now with a great deal of pleasure and genuine enthusiasm that I launch this book, Volume 2 of Upholding the Australian Constitution. It, and The Samuel Griffith Society, deserve every success and I am confident that they will achieve it.

Appendix II

Addresses Launching Upholding The Australian Constitution, Volume 2

2. The Hon. Ian Medcalf, QC

The proceedings of the Second Conference of The Samuel Griffith Society held in Melbourne in July last have now been published in book form as Volume 2 under the title Upholding the Australian Constitution.

It is my pleasant duty to launch the second volume in this State.

The book contains a dozen or so important addresses or papers delivered at the Second Conference on matters of principal importance to The Samuel Griffith Society such as the external affairs power, the position of the Crown, the High Court on Mabo, Federalism, Aborigines, and Republicanism.

Speeches delivered at the conference by Mr S E K Hulme and the Honourable Peter Connolly have already been printed separately and have been widely circulated in the community.

I do not propose to quote at length from any of the addresses or papers which members may read for themselves. Suffice it to say that all of the papers are intensely interesting, stimulating and thought- provoking.

I do propose however to make a few comments on some of the issues which arise out of the papers and which seem to me to be important for the future.

At the outset may I say that all the lessons I have learned about government not getting too far ahead of its people have been upset by the High Court's Mabo judgment. Since appeals to the Privy Council were abolished or disappeared by one device or another, the High Court is the unfettered arbiter on the matters which come before it in Australia. There were precious few matters left for the Privy Council when the Australia Acts were passed, finally abolishing these appeals, in 1986.

Of course the High Court can be overruled by the Commonwealth Parliament but that is unlikely to occur unless political pressures are sufficient to motivate the Parliament.

Sir Robert Menzies said that constitutional law was "half philosophy, half law". This applies to a number of other topics when there is no-one to gainsay the arbiter.

I was of course, along with a number of other people, surprised at the Mabo decision, having lectured and practised in the area of land law for many years.

As an interested reader of medieval history, I could not help making a mental comparison between the power of the High Court and the power of Holy Church before its decay in the Middle Ages.

Holy Church was the sole interpreter of canonical law and also had the custody of the moral law, which included most of the laws affecting ordinary citizens (even more than those administered by the King's Court) and could decide issues as they chose according to the beliefs of the times.

So powerful was Holy Church that after King Henry the Second had Thomas Beckett murdered in Canterbury Cathedral, he had to make atonement by walking barefoot and wearing sackcloth to Beckett's tomb, there to prostrate himself in front of a great multitude, and be scourged by the monks.

There may be something to be said for this form of punishment. If one were to adopt it in this country then, by analogy with ecclesiastical law, it could be prescribed for a new crime of constitutional heresy.
The objective of The Samuel Griffith Society has been succinctly stated by John Stone in his Foreword to the Second Volume, namely "The growing need not only to contain the further expansion of power in Canberra, but also to restore a balance between States and Commonwealth much more akin to that which the Australian people established in the 1890s."
Last weekend I attended a ceremony at the Princess Royal Fortress in Albany.
In 1893 four six inch guns were installed at the Albany Forts to defend the western half of Australia against the Russians. The eastern half I gather was to be defended by similar weapons installed at Sydney Heads.
The installation of these guns took place at much the same time as the Constitutional Conventions on the other side of the Continent leading to the formation of the Commonwealth.
It was of course significant that the colonists of east and west had come together to establish these forts out of their mutual need for protection.
I could not help wondering whether the people who were living at that time had the same feeling of apathy towards government that one detects today.
I have noticed that most members of the public today expect to have little or no say in government at all. They expect political grandstanding and confidence tricks, even corruption. Perhaps there were similar expectations in the 1890s but I do not think so. Whilst even then the average citizen may have had no time for politicians, I think he was not so apathetic, and was more inclined to feel that he might have some influence on the future of the country.
Public apathy is perhaps one of the most serious problems we face in Australia today. This gives governments the impression that they may do as they please without being brought to account. The bitter lesson is that you do not only lose one freedom or institution. As soon as you lose one, you are likely to lose another.
Hence the importance of organisations such as this Society and others seeking to redress the imbalance of these times.
In his address The Threat to Federalism, Sir Harry Gibbs makes the comment that while Australia remains a federation, its constitutional mechanism should be made to work effectively.
It is of course constitutionally correct when making suggestions for constitutional change to point to the referendum power as the means whereby such change can be effected. But as has been pointed out by numerous commentators, the likelihood of succeeding in a referendum where there is anything contentious or any substantial divergence of views is minimal. Indeed, there is no hope of success in an atmosphere of hidebound opinions, or where protagonists hold views of extreme dogma or philosophy.
This became apparent to me very early in my career as a Minister in the Western Australian Government. It was quite clear that if one wanted to succeed in making worthwhile changes, one had to devise a workable solution.
There were a number of issues in which we had success by adopting a practical formula. Peter Durack in his paper on the external affairs power in Chapter 10 has given two examples of these: the Off-shore Settlement and the formation of the National Companies and Securities Commission.
The effect of the High Court judgment in the Seas and Submerged Lands Case in 1975 was that the Commonwealth Parliament was held to have sovereignty over the territorial sea from high water mark outwards. But by putting the interests of the governed over those of government, a way was found through the problems created by this judgment in respect of all the areas affected

by it; petroleum and mineral exploration and exploitation, fisheries, environmental matters and even the criminal law.

Agreement in relation to a uniform companies law throughout Australia was achieved following a meeting in Melbourne and a subsequent meeting with the Commonwealth Minister in Sydney. There was some strong opposition, but following a three day conference behind closed doors at Maroochydore in Queensland, essential compromises were reached even by those holding extreme views, and a way through was found for uniform law.

Perhaps an even more significant matter was what had come to be known as the "residual links" exercise. This was the project whereby the remaining constitutional links between the States and the United Kingdom which had been specifically preserved in the Statute of Westminster in 1931 were under consideration.

Discussions on this matter had been going on for years, and although there was general agreement that some of the links were overdue for extinction, particularly the application of the Colonial Laws Validity Act of 1865, there were still areas of severe contention. One of the main objections was from the Commonwealth refusing to accept the fact that the United Kingdom Parliament might still have jurisdiction to enact legislation affecting Australia. Indeed there was a meeting in Adelaide when it appeared that the matter would be dropped indefinitely. However, we persisted, and by dint of finding arguments which were logical and appealing through being politically incontrovertible, agreement was finally reached between all the States and the Commonwealth.

However, at a special meeting of the Premiers and the Prime Minister (Mr Fraser), the matter foundered in 1982 simply because the Prime Minister believed the Queen would never agree to allow direct access by the State Premiers, and the States were not prepared to adopt the Prime Minister's suggestion that access should be via the Governor General. It was left to Mr Hawke to complete the exercise some two or three years later, and the result was the passage of the Australia Acts (in identical terms) by the United Kingdom, the Commonwealth and all State Parliaments.

The depth of the significance of this legislation has I believe yet to be plumbed.

All the above initiatives occurred as a result of co-operation and they all involved governments of different political colours.

I mention these matters as it is not generally understood how the wheels of federal government can work, and can be made to mesh, even where there are profound differences of political opinion and philosophy. Perhaps there are some lessons in it for government today.

There may also be some pointers for The Samuel Griffith Society.

This Society has now held two major conferences. I have not personally had the pleasure of attending either but I have read most of the papers. The subjects chosen have been appropriate and dealt with in scholarly fashion.

But I revert to the comments of Sir Harry Gibbs that as a federation our constitutional mechanism should be made to work effectively.

Perhaps The Samuel Griffith Society could, in addition to the learned papers, devote some time to some of the pragmatic possibilities which have been canvassed by some of the speakers.

Could we point the way with practical workable solutions? Should we be sitting around the table periodically ourselves to put forward solutions after evaluating the pitfalls? Is it worth holding an experimental session "in committee"?

Two subjects which would lend themselves to this sort of consideration are:

Firstly, the serious feature of our current practice which allows treaties to be adopted by executive action – unlike some other federations, including the United States.

The International Covenant on Civil and Political Rights was adopted by an Executive comprising Mr Whitlam and Mr Barnard in 1972. I doubt that many people were aware of it.
Why should such treaties, which have the potential for far-reaching effects on our domestic laws, not be afforded the courtesy of ratification by Parliament or the Senate?
One major benefit would be publicity, as at present treaties may be adopted almost in secret unless the media has some specific reason to be on the lookout.
Secondly, should not the appointment of High Court judges require some form of ratification?
It was only in 1977, following the Constitutional Convention, that some provision was made for consultation by the Commonwealth Government with the States on the appointment of High Court judges. The motion originally put forward by Victoria at this Convention was withdrawn because it contained the phrase "recognising the need for the restoration of the federal balance". When this phrase was removed by request of the Federal Opposition, a motion providing for consultation on appointments was agreed almost, but not quite, unanimously.
But this was really only a beginning, and consideration should I believe be given to whether there should be ratification of appointments by the Senate or the Parliament or the States or a majority of States or in some other fashion.
Certainly I believe this Society could make a very worthwhile contribution of a practical kind by offering workable solutions to our political parties, and the public. Ever the optimist.
I congratulate the Society on producing another excellent volume and, in launching this work in Western Australia, I commend it to all our members and others who may read it.

Appendix III

Contributors

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1 Addresses

The Hon. Richard COURT, MLA was educated at Hale School, Perth and the University of Western Australia. After graduation (B.Comm) he spent a year in the USA as a management trainee with the Ford Motor Co. in 1969; was the proprietor of two small businesses in Perth from 1970 through 1982; and then became, in 1982, the Liberal Party Member for Nedlands in the W.A. Legislative Assembly. He held a number of shadow portfolios in Opposition (Small Business; Resources Development; Mines, Fuel and Energy; the North West and the Goldfields) during the period 1986–93, and was Deputy Leader of the Liberal Party during 1987–90. In 1992 he became Leader of the Opposition, and following the State election of February, 1993 he became Premier (and Treasurer) of Western Australia.

The Hon. John HOWARD, MHR was educated at Canterbury Boys' High School and at Sydney University, where he took a Law degree in 1961. After some years as a solicitor he entered Parliament in 1974 as federal Member for Bennelong. After a period in the first Fraser Government as Minister for Business and Consumer Affairs and then as Minister for Special Trade Negotiations, after the 1977 election he became Treasurer and served in that portfolio until the defeat of the Fraser Government in March, 1983. He was elected Deputy Leader of the Liberal Party in April, 1982 and became Leader of the Opposition in September, 1985, serving in that position until May, 1989. During 1990–93 he held the shadow Industrial Relations portfolio and is also, today, Manager of Opposition Business in the House of Representatives.

2 Conference Contributors

Professor Geoffrey BOLTON, AO was educated at Wesley College, Perth and the Universities of Western Australia and Oxford, where he was awarded his D.Phil. After various research and teaching posts at Oxford, the Australian National University and Monash University, he became Professor of Modern History at the University of Western Australia (1966–73). Subsequently, he held Chairs of History at, successively, Murdoch University (1973–89), the University of London (as foundation Head of the Australian Studies Centre) (1982–85), the University of Queensland (1989–93) and, now, the Edith Cowan University in Perth. During 1989–90 he was President of the Australian Historical Association. He has published a number of books on Australian and British history and is general editor of the Oxford History of Australia.

Professor Peter BOYCE was educated at Wesley College, Perth, the University of Western Australia, and Duke University in the United States. His early academic career traversed the Australian National University, St Antony's College, Oxford, and the University of Tasmania. Subsequently he held Chairs of political science at the Universities of Queensland and Western Australia, and became Vice–Chancellor of Murdoch University in 1985. Professor Boyce has published books and articles in the fields of international diplomacy and political institutions.

Graeme CAMPBELL, MHR was born in Oxfordshire, coming to Australia as a child and being educated at Urrbrae Agricultural High School in South Australia. For nearly 12 years he pursued a variety of occupations (contract driller, fencing contractor, pastoralist on the Nullarbor), before moving to Kalgoorlie, where he worked for Great Boulder Mines and then in his own business. In 1980 he was elected for the Labor Party as federal Member for Kalgoorlie, the largest constituency in Australia (and indeed the democratic world), covering approximately 2.5 million

square kilometres, and has held the seat in the five successive elections with increasing majorities. He serves on a number of parliamentary committees and has recently been prominent in public debate over such issues as the republic, Mabo and immigration policy.

Dr Colin HOWARD was educated at Prince Henry's Grammar School, Worcestershire, and at the University of London and Melbourne University. He taught in the Law Faculties at the University of Queensland (1958–60) and Adelaide University (1960–64) before becoming Hearn Professor of Law at Melbourne University for 25 years (1965–90). He was awarded his Ph.D. from Adelaide University in 1962 and his Doctorate of Laws from Melbourne University in 1972. He is now a practising member of the Victorian Bar, being perhaps best known for his constitutional expertise, but specialising also in commercial and administrative law, and has published a number of texts for both lawyers and laymen. During 1973–76 he was General Counsel to the Commonwealth Attorney–General; he is also a long– established commentator on public affairs.

Bevan LAWRENCE was educated at Aquinas College, Perth and the University of Western Australia, graduating Ll.B. in 1966, and has practised law in Perth since 1968. In 1987 he became the spokesman for the group in Western Australia subsequently known as People Against the Australia Card. In 1989 he formed the group, now known as People for Fair and Open Government, whose activities played a significant part in the decision by the then Premier of Western Australia, Dr Carmen Lawrence (his sister) to set up a Royal Commission of Inquiry into what had become known as W.A. Inc. (effectively, the conduct of the State's affairs under the Burke and Dowding Labor Governments).

Dr Campbell SHARMAN was educated in South Australia and is a graduate of the University of Adelaide, the London School of Economics and Political Science, and Queen's University, Kingston, Ontario. Before coming to the University of Western Australia in 1977, where he is now Associate Professor and Head of the Department of Political Science, he held a variety of teaching and research positions at universities in Australia and Canada. He has published articles and monographs on a range of topics including electoral politics, political parties, referendums, the Senate, constitutional change, and Australian State politics, and is currently working on a study of federalism in Australia.

John STONE was educated at Perth Modern School, the University of Western Australia and then, as a Rhodes Scholar, at New College, Oxford. He joined the Australian Treasury in 1954, and over a Treasury career of 30 years served in a number of posts at home and abroad, including as Australia's Executive Director in both the I.M.F. and the World Bank in Washington, D.C. In 1979 he became Secretary to the Treasury, resigning from that post – and from the Commonwealth Public Service – in 1984. Since that time he has been, at one time and another, a Professor at Monash University, a newspaper columnist, a company director, a Senator for Queensland and Leader of the National Party in the Senate, Shadow Minister for Finance and, generally, a contributor to the public affairs debate. He is currently a Senior Fellow at the Institute of Public Affairs and writes a weekly column for The Australian Financial Review.

3 Book Launching Addresses

The Hon. Sir Walter CAMPBELL, AC was educated at Downlands College, Toowoomba and the University of Queensland, where he graduated Ll.B and was admitted to the Queensland Bar in 1948 after having served as a pilot in the RAAF during 1941–46. He became a Queen's Counsel in 1960 and President of the Australian Bar Association (1966–67). In 1967 he became a Judge of the Supreme Court of Queensland, where he served for 18 years, the last three of them (1982–85) as Chief Justice. During this time he also served as Chairman of the Commonwealth Remuneration Tribunal (1974–82), and as the sole member of the Commonwealth Academic

Salaries Tribunal (1974–78). In 1985 he was appointed Governor of Queensland, from which post he retired in 1992.

The Rt. Hon. Sir Harry GIBBS, GCMG, AC, KBE was educated at Ipswich Grammar School and Emmanuel College at the University of Queensland, and was admitted to the Queensland Bar in 1939. After serving in the A.M.F. (1939–42), and the A.I.F. (1942–45), he became a Queen's Counsel in 1957, and was appointed, successively, a Judge of the Queensland Supreme Court (1961–67), a Judge of the Federal Court of Bankruptcy (1967–70), a Justice of the High Court of Australia (1970–81) and Chief Justice of the High Court (1981–87). Since 1987 he has been Chairman of the Review into Commonwealth Criminal Law and, since 1990, Chairman of the Australian Tax Research Foundation. In 1992 he became the founding President of The Samuel Griffith Society.

The Rt. Hon. Sir Paul HASLUCK, KG, GCMG, GCVO was educated at Perth Modern School and the University of Western Australia. After gaining his M.A. there he worked for some years as a journalist with The West Australian and as a lecturer in the History department of the University of Western Australia (1939–40) before joining the Commonwealth Department of External Affairs in 1941. His diplomatic posts included that of Counsellor in the Australian Mission to the United Nations, New York (1946). After his resignation from the Department of External Affairs (then under the ministerial charge of Dr. H.V. Evatt), he was appointed Reader in History at the University of W.A. in 1948, before winning the federal seat of Curtin for the Liberal Party in 1949. Over a parliamentary career of 20 years he served as Minister for Territories (1951–63), Minister for Defence (1963–64) and Minister for External Affairs (1964–69), before being appointed Governor–General of Australia (1969–74). He was the author of two volumes (The Government and the People) of the Australian Official War History, as well as a number of works of biography, historical and political reflection, and verse. He had a lifelong interest in, and sympathy for, the Aboriginal people of Australia, and several of his books were devoted to various aspects of their situation. Sir Paul's long and honourable life ended with his death on 9 January, 1993.

The Hon. Justice Roderick MEAGHER was educated at St. Ignatius College (Riverview), Sydney and St. John's College, Sydney University (BA, Ll.B). He was admitted to the New South Wales Bar in 1960, at the same time lecturing in the Faculty of Law at Sydney University. He was subsequently appointed Queen's Counsel and served as President of the New South Wales Bar Association (1979–81) before being appointed, in 1989, a Judge of the Supreme Court of New South Wales and Judge of the Court of Appeal, in which post he currently serves. He is the author, and editor, of a number of major legal works.

The Hon. Ian MEDCALF, QC was educated at Albany High School, Scotch College, Perth and, after serving in the AIF during World War II, at the University of Western Australia (Ll.B). He worked for some years in Perth as a barrister and solicitor, and member of the boards of a number of major public companies, before entering the Legislative Council of Western Australia as a Liberal member for the Metropolitan Province in 1968. During 18 years in the State Parliament (1968–86) he served as Attorney–General and Minister for Federal Affairs (1975–83) and Leader of the Government in the Legislative Council (1980–83). After the change of government in 1983 he was Leader of the Opposition in the Legislative Council (1983–84) before his retirement from the Parliament in 1986.

Appendix IV

The Samuel Griffith Society

The purposes of The Samuel Griffith Society are as follows:

1) To found a Society named after Sir Samuel Walker Griffith, First Chief Justice of the High Court of Australia. As Premier of Queensland and subsequently Chief Justice of the Queensland Supreme Court, Griffith was one of the prime movers of Federation. During his term as Chief Justice of the High Court from 1903 until his debilitating illness in 1917, he consistently supported the rights of States against the powers of the Federal Government.

2) To set out as a preamble to the specific purpose of the Society a statement of the role of constitutions and parliamentary and legal institutions in the following terms:

One important function of political constitutions, and indeed of all political institutions, should be that of maintaining civil peace and concord, and of protecting the citizen from the arbitrary abuse of power, including executive power.

People who have experienced nothing but peaceful association within the society in which they have grown up, take the incalculable benefits of such civil quietness for granted. The terrors of civil war or threats of civil war, of savage government repression, seem to most native born Australians to be beyond comprehension, and certainly beyond the realms of possibility here.

Nevertheless civil unrest – ethnic, political and religious violence – has been endemic throughout recorded history. Arbitrary arrest and imprisonment has, likewise, been commonplace.

Those countries which have achieved long periods of unbroken civil peace, with societies which have lived under the rule of law, have also become prosperous. Some of these countries have written constitutions. Others, such as the United Kingdom, do not.

Australia has an unbroken record of constitutional government, and rule of law. It was one of the first nations to establish universal suffrage. It has been entirely free from any hint of civil war. Up until the Great War of 1914-18 Australia was also in per capita terms, the richest country in the world.

The strength of our parliamentary and legal institutions, of our political conventions and modes of behaviour is, arguably, Australia's greatest asset. The Constitution which Australians drafted and accepted in the 1890's, and which established the framework of the Australian nation as a sovereign federal state, is the keystone of this structure and has served us well. It has protected our democracy, and our liberties, by providing for independent centres of political authority and the diffusion of power which flows from that. The Australian people have voted many times against proposed amendments. We must presume that they regard the Constitution, on the whole, with approval.

All institutions, nevertheless, require refurbishment and repair. There is growing concern at the decline in the prestige, standing and influence of parliament, and the growing centralisation of power and authority in the executive. There is also concern at the expansion of the power of the Commonwealth at the expense of the States, the increasing centralisation of power in Canberra, and the consequent growth of a Commonwealth bureaucracy which, in many areas, deals with matters which were originally the sole concern of the States.

As we approach the centenary of the passage of the Commonwealth of Australia Act (1900), by the British Parliament, a vigorous debate is building up, focussed on changes which people wish to see made to the Constitution, to the place of the monarchy in that Constitution, and to our parliamentary institutions.

The founders of The Samuel Griffith Society wish to encourage and promote the widest possible debate not only on particular constitutional issues but on the health of our political and legal institutions generally. We intend to emphasise federalist views and to reverse the Canberra–led erosion of our federal institutions.

3) In the light of the foregoing, the Society proposes the following objectives:

General

. to promote discussion of constitutional matters through the articulation of a clear position in support of decentralisation of power through the renewal of our federal structure;
. to defend the great virtues of the present Constitution against those who would undermine it in order to supplant it with a unitary state;
. to restore the authority of parliament and defend the independence of the judiciary;
. to foster and support reform of Australia's constitutional system to these ends.

Specific

. to arrange conferences, hold meetings, publish papers, and inform people and governments in accordance with the general objectives set out above;
. to thereby encourage a wider understanding of Australia's Constitution and the nation's achievements under the Constitution.

Priority Areas

The following areas of priority have been identified in the wider debate over Australia's constitutional future:
. the need to redress the federal balance in favour of the States, in view of the excessive expansion of Commonwealth power and the need to decentralise decision making;
. the need to safeguard judicial independence in light of increasing executive encroachments;
. the need to re-assert the role of Parliament (including that of the Speaker and President of the Senate) vis a vis the Executive;
. the need to review the financial arrangements between the Commonwealth and the States with a view to achieving a more equitable and efficient division of taxation power and a greater sense of financial responsibility on the part of all Governments;
. the need to redress the duplication of bureaucracy by clearly defining the respective spheres of Commonwealth and State interest and by eliminating Commonwealth influences in matters that should be the concern of the States;
. the need to consider, and as appropriate, develop alternative methods of constitutional amendment, such as State's initiatives.

Immediate Aims

To arrange and conduct, as soon as possible, a general conference for constitutional reform.
To attract for the Society a stable membership and funding basis.