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.