Proceedings of the Fourth Conference of The Samuel Griffith Society

Chancellor On The Park Hotel, Brisbane

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Foreword

John Stone

In the Foreword to Volume 2 of these Proceedings, arising from the Society's July, 1993 Conference I remarked that, during the preceding twelve months, three areas in the overall constitutional debate had "taken on enormously enhanced importance": the republic debate; the Aboriginal question (the Mabo Case and all that); and the interpretation by the High Court of the external affairs power, Section 51(xxix).

Twelve months later again, those three topics remain to the fore in the general constitutional debate, and it is appropriate therefore that these Proceedings of the Society's most recent Conference, held in Brisbane on 29–31 July, 1994 should reflect that emphasis.

Interestingly, however, the debate which has arisen out of Mabo, and the growing focus upon the perversion of our whole Constitution to which the High Court's interpretation of the external affairs power has given rise, have also begun to lead to a focus upon the Court itself. Its composition and manner of appointment, its openly exposed pretensions to "legislate" in areas where it is clearly for elected legislatures to do so, and the remarkable interventions in the public debate by some of its members, and particularly its present Chief Justice, Sir Anthony Mason, are all matters which are now generating the most lively discussion in their own right. Thus the first paper in this volume, namely the address by Mr S E K Hulme, QC to the opening dinner of the Conference, is of particular interest, dealing as it does so deftly with a number of those aspects of the Court's performance today.

Arising also out of the debate on the external affairs power are the growing concerns about the manner in which our Government in Canberra has recently moved to invite non-Australian bodies to adjudicate formally upon our internal affairs. The attack upon both our international independence and our domestic democracy which these developments entail was, therefore, appropriately addressed by two of the papers before the Conference.

In that same Foreword referred to earlier, I expressed the view that most of the issues to whose discussion The Samuel Griffith Society is devoted "come back, in the end, to one simple question: do we, or do we not, wish to see more power being exercised in Canberra?"

There is no doubt as to the answer of the Australian people to that question. Thus, it may be no accident that greater interest is now being displayed throughout Australia in a menu of possible "people's power" dishes going under the generic names of "citizens' initiative" and "voters' veto".

In a separate but related context, growing dissatisfaction is also being expressed with the monopoly at present enjoyed by the Commonwealth Government in the proposal of referenda under section 128 of the Constitution; the feeling is growing that that power should be extended also to the Parliaments of the States under certain clearly defined conditions.

For the first time since the Society's inception, its Conference program on this occasion was marred, formally at any rate, by the politically induced last-minute withdrawal forced upon Mr Peter Reith, MP, who had been scheduled to speak on the topic Let's Give Democracy a Chance. One result of that development was a lively and intelligent discussion of the issues by the audience generally during the time originally scheduled for Mr Reith's paper. Among other things, that discussion suggested that, despite the general reluctance of many politicians on the matter, and particularly of those making up our various Executive governments, the voters will more and more demand a more direct voice in their own governance. In the market-place of

politics, the (major) party which is first prepared to offer it to them will undoubtedly enhance its appeal substantially by doing so.

Needless to say, this is not an outcome likely to commend itself to those who wish to see more power focused in Canberra, and more of that Canberra power concentrated there in the hands of small elites. For those very reasons, it is likely that discussion of the issues involved in the concepts of "citizens' initiative" and "voters' veto" will be appropriate to this Society in the future.

To conclude, the eleven papers which make up this fourth Volume of the Society's Proceedings again provide solid fare for those interested in the workings of our Constitution, and concerned about some of the directions in which they have been developing. To adapt the well-known, albeit unfortunate, phrase of the Prime Minister's, they constitute another step in the fundamentally democratic process of publicly providing the materials for "the debate we have to have".

It is to that debate that this Volume, like its three predecessors, is dedicated.

Dinner Address

Hit and Myth in the Law Courts

S E K Hulme, AM, QC

Not unexpectedly, in this company, I will talk tonight about only one court; the one on your left as you cross the bridge over the lake. I want to do two things.

I want firstly to consider a belief and a practice and a proposal concerning the High Court, in terms of the Court as it is, rather than in terms of the Court as it was. In doing that I want to say something of who used to come to the Court, and how; and who come to the Court now, and how.

And secondly I want to share with you some reflections on statements made in recent months by the Chief Justice of the High Court.

Where High Court Judges Come From,
and Certain Implications of That

I turn to the belief and the practice and the proposal I mentioned. I remind you of three things.

The first is that one still finds supposedly intelligent commentators making disapproving references to the practical monopoly which the practising Bar has over appointments to the High Court, and suggesting that the field of appointees ought to be extended to include solicitors and academics.

The second is that, in line with the constitutional principle that a judge ought to have nothing to fear and nothing to hope for from the government which appointed him, there long existed a general practice of not promoting judges, within a system of courts run by the same government, either from court to court, or within a court, as by promotion to Chief Justice.

The third is that in recent years there have been several political calls for appointments to the High Court to be made conditional upon the appointee passing scrutiny by a politically based committee (probably a Senate committee). The origin of the idea lies of course in the United States Constitution, which requires that all federal appointments be made "by and with the advice and consent of the Senate". Where a proposed appointment is the subject of dispute, inquiry is made by a Senate committee whose hearings can, by courtesy of television, stop the nation.

Keeping those matters in mind, I turn to consider how we select our High Court judges, and who gets selected.

At the outset I should express without satisfaction my firm belief that there is no good system for selecting judges. At any rate no good system has to my knowledge been found. Probably some systems are less bad than others, but which those are is not easy to tell either.

So far as the High Court is concerned, the situation which in practice produced the best result was one where the incumbent Prime Minister happened to be closely acquainted with the incumbent Chief Justice of the High Court, the Prime Minister happened to be acquainted with the relevant people and their skills, the Prime Minister dominated his Cabinet, there was no formal process of consultation with other governments, and politicians generally and the media and the general community took no great interest in the matter. In that situation, from 1950 to 1958 R G Menzies as Prime Minister — certainly without much discussion with anyone else save perhaps Sir Owen Dixon — selected successively Mr Wilfred Fullagar, Mr Frank Kitto, Mr Alan Taylor, Mr D I Menzies, and Mr Victor Windeyer. Led by Sir Owen Dixon, whom Menzies

paused to select in 1952 as Chief Justice, the diverse talents of the group produced a Court without parallel in the English- speaking world. The players were there, and one by one the selector picked them. With speed and certainty, block by block Menzies put together a High Court such as this country had not seen. As with much else that he did, there was little drama. It all just seemed to happen, as if the world is like that, and no one could ever have dreamed of appointing anyone else. It was in fact a very great achievement.

To say that is to say that the 1950s presented a particular situation which the right person could and did utilise to the advantage of the Court and the nation. Nothing in what happened represented a system capable of permanent application.

Several developments have taken place. Many factors, a few of which are the increasing size of Australian cities, the increasing shielding of Ministers behind security guards and minders, and the increasing range of matters with which Ministers and Prime Ministers find it necessary to concern themselves, have steadily reduced the extent to which a Prime Minister or Attorney General or any other Minister is likely to have effective knowledge of the field of likely appointees, still less personal acquaintance with them. At the same time, especially since the High Court moved to Canberra and entered the Press Gallery beat, though the change began earlier, the media have taken a very close interest in the High Court. That interest obviously extends to the appointment of new judges. There has developed a strong political and party interest. And although the general community seems to remain firmly less than excited, community pressure groups are beginning to show interest, though so far not to the extent evident with the State courts. One waits to see the pressure which the next six months brings for the appointment of a woman as Chief Justice.

The combination of less knowledge among those ultimately responsible, and considerably more party and media interest, has produced an increase in the extent to which information and advice is sought from officials within the bureaucracy. Further, the Commonwealth government has established a formal system of consultation with State governments as to all new appointments.

It seems likely that these developments have played a substantial part in contributing to clear changes in the pattern of appointments.

Let us go back to the years before Menzies, treating his 1950s period as a watershed.

The persons appointed to the High Court before the 1950s can be grouped as follows:

Members of the Bar who had had parliamentary careers (Founding Fathers Barton and O'Connor in 1903, and Isaacs and Higgins in 1906; Evatt and McTiernan in 1930; Latham in 1935).

Members of the Bar who had not had parliamentary careers (Gavan Duffy, 1913; Starke, 1920; Dixon, 1929). Knox is in spirit in this team, though in his youth he did have four years (1894-98) as member for Woollahra, in the State house.

Judges promoted from State courts. It is hardly necessary to stand in the streets of Brisbane and remind an audience that the High Court's first Chief Justice, Sir Samuel Griffith, had been Chief Justice of Queensland for ten years. Later there came two appointments of State judges newly-enough appointed to still be in close touch with High Court work, namely Rich in 1913 and Williams in 1940. Chifley's appointment of Webb in 1946, after a long State appointment, was seen as unusual, and it came as a surprise. It has often been said that its cause was Chifley's impatience when vociferous colleagues remained firmly deadlocked between two more likely candidates (J V Barry, from Victoria, and Harry Alderman, from South Australia).

One was a Commonwealth Crown Solicitor (Powers 1913, who was a solicitor and had in much earlier days (1888-94) had a short parliamentary career in Queensland).

Of the High Court's five Chief Justices up to the 1950s, three came new to the Court as Chief Justice (Griffith, 1903; Knox, 1919; and Latham, 1935). Two were promoted from within the Court, both by the rather lost Scullin government (Isaacs, 1930; and Gavan Duffy, 1931).

Menzies' 1950s appointments demonstrated his views. No appointee had had a parliamentary career. Three (Kitto, Menzies, Windeyer) came direct from the Bar. Two were State judges recently appointed (Fullagar, Taylor).

In the 1960s Menzies made two appointments of different type. One (Owen, in 1961) was a long-serving State judge, appointed after Fullagar's early death. The appointment was made in particular circumstances. It does not fit the pattern of Menzies' other appointments, and it cannot be said to reflect a determination to put the claims of the Court first. The final appointment was of Barwick, as Chief Justice following the retirement of Sir Owen Dixon in 1964. Barwick had of course had an active if short parliamentary career, during which he had managed to frighten the life out of the two perceived successors to Menzies, Holt and McMahon.

Menzies selected two Chief Justices. The first was by promotion from within the Court. The appointment was of Sir Owen Dixon. In a sense Menzies had little choice but to promote. No one who knew him would doubt that Dixon would have served most loyally, had a new Chief Justice been brought in. But the position would have been ludicrous. In sheer shame it was not easy to bring someone in to preside over one of the common law's great judges, a figure of world fame.

Some indeed had seen one possibility. If there happened to be available someone who at the age of twenty-three had won what remains Australia's greatest constitutional case, someone who by the age of thirty-five had been pre-eminent at the Australian Bar, someone who had been since 1935 a Bencher of Gray's Inn, someone who would bring to the position the prestige of having twice become Prime Minister of Australia, someone whose heart was still believed to be in the law rather than in politics, then it just might seem permissible to put that person to preside over a Court which included the nonpareil. Not altogether surprisingly there was publicly aired the question whether Menzies would consider it appropriate to appoint himself.

Whether Menzies was tempted I know not. Certainly he did not appoint himself, and he did appoint Dixon.

Menzies' second appointment of a Chief Justice was of Barwick. This time a newcomer was brought in. It was certainly a political appointment in the sense that Barwick was at the time a politician. But it was an appointment which would have been justified had Barwick never gone near politics. For throughout the 1940s and 1950s, before his entry into politics, Barwick had reigned with unchallenged eminence at the Australian Bar.

Such, briefly, was the history of appointments to the High Court, before and under Menzies. In the years since, much has changed.

In the 36 years since the appointment of Sir Victor Windeyer in 1958, there has been appointed to the High Court one barrister in general practice; just one. That was Mr K A Aickin, in 1976. I record that he had not had a parliamentary career.

Five judges have been promoted from a State court: Sir Cyril Walsh, promoted from the Supreme Court of New South Wales in 1969, Sir Ninian Stephen, promoted from the Supreme Court of Victoria in 1972, the present Chief Justice, Sir Anthony Mason, promoted from the New South Wales Court of Appeal in 1972, Sir Kenneth Jacobs, promoted from the New South Wales Court of Appeal in 1974, and Justice McHugh, promoted from the New South Wales Court of Appeal in 1989. Sir Kenneth Jacobs and Justice McHugh had both reached the Court of Appeal by promotion from the Supreme Court of New South Wales.

Three judges have been promoted from the Commonwealth Government's own Federal Court: Sir Gerard Brennan in 1981, Sir William Deane in 1982, and Justice Toohey in 1987. Sir Gerard Brennan had reached the Federal Court from the former Commonwealth Industrial Court, and Sir William Deane by promotion from the Supreme Court of New South Wales.

Sir Harry Gibbs was promoted from the Commonwealth's own Federal Court of Bankruptcy, in 1970. Sir Harry had reached that court by translation from the Supreme Court of Queensland.

There have been appointed as judges three State Solicitors-General, Sir Ronald Wilson in 1979, Sir Daryl Dawson in 1982, and Justice Mary Gaudron in 1987. A fourth judge, Sir Anthony Mason, had been a Commonwealth Solicitor-General prior to his appointment to the New South Wales Court of Appeal.

There has been appointed as a judge one Commonwealth Attorney-General, Justice Murphy.

Of the two Chief Justices appointed since Barwick, Sir Harry Gibbs was promoted from within the Court in 1981, and Sir Anthony Mason was promoted from within the Court in 1987.

The result is that the present High Court consists entirely of promoted judges or promoted Solicitors- General. Of the seven present judges, two were appointed while Solicitors-General, three were promoted from the Federal Court, and two (one of them also a former Solicitor-General) were promoted from the New South Wales Court of Appeal.

The change has no doubt several causes. One of them must be the more formal system of selection of which I spoke earlier. It is difficult to imagine an officer of the bureaucracy conceiving that a plain barrister could have a claim superior to or even the equal of someone already a judge or a Solicitor-General, or if he did conceive it, thinking it politic to make a recommendation accordingly. A recommendation of someone already a judge, or already the holder of a high government office, cannot but seem more respectable and safer than a recommendation of someone not so honoured, someone carrying out his activities for private and almost certainly excessive gain. The fact — as I understand it — that the system of consultation with States results in most States recommending their Solicitor-General, at any rate on the second vacancy occurring during his term, cannot but exacerbate this approach.

Whatever the causes, the pattern seems well-established, and it is I think likely to persist. Exceptions are likely to be very exceptional, and will probably have their roots in politics. (There are some signs that a politically-related appointment of a Chief Justice may be hatching now.) What is undeniable, and new, is the silent emergence at this level of a career judiciary in which promotion has become the accepted norm. In general, the usual path to the High Court will lie via the Federal Court, or via service as a Solicitor-General, or (less often, but sometimes) by way of promotion from a State Court of Appeal (which courts offer greater exposure and prestige than mere divisions of State Supreme Courts). And the principal way to become Chief Justice is likely to be by promotion from within the Court.

Several things follow.

One concerns the Federal Court. Unless you happen to be a Solicitor-General, your best way of reaching the High Court will be to take an appointment on the Federal Court, and once there to deliver judgments the thoughtfulness and scholarship of which cry aloud for your talents to be made available to the whole nation on the High Court. To a significant extent the High Court will be composed of judges whose performance in the Federal Court has commended itself to the Commonwealth. It is I think entirely unsatisfactory that a court should be staffed to any extent at all by judges who wish they weren't there, and who are there only because they see service on that court as offering their best chance of being put on another court, and who may slowly realise that they aren't going to be. It is doubly unsatisfactory when the Government which makes the decision whether to put the judge onto that other court is one of the litigating parties in a very high proportion of the cases coming before the court. How might a tax-evader have felt in recent years, if due to get a judgment from a Federal Court judge perceived as currently under consideration for a vacancy on the High Court?

Secondly, it will be apparent that the call for the claims of barristers to be put aside in order to allow the appointment of solicitors and academics is entirely misplaced. The fact is that barristers are not being appointed. You may of course wish to ask whether solicitors and

academics ought to be appointed rather than judges and Solicitors-General. Whatever your answer, that is and seems likely to remain the practical question.

Thirdly, it is small wonder indeed that judges have rejected suggestions that appointments to the High Court be made conditional on passing political scrutiny by way of public hearings.

A private citizen savaged and rejected in such a hearing can retreat and seek solace in the work and rewards of private practice. A very different scenario might be written for a potential appointee who already holds an honourable official position. What fate would await a judge of the Federal Court who was found by a Senate Committee to be unworthy, for some reason real or imagined, to sit on the High Court? What would be his position if, when opposition developed, the government chose not to go ahead with the appointment? Or if the candidate himself felt obliged to request that in the emerging circumstances the appointment not go ahead? Depending no doubt on the issues, one can imagine an honourable man deciding that he ought not to continue in his existing office. Given the right kind of dispute, one can imagine a judge being harassed until he did so. And he might not yet have served long enough to receive any superannuation.

In a world where the likelihood is that every potential appointee to the High Court will already hold an honourable official position, scrutiny by some form of political committee would offer hazard extending beyond what has been realised.

A final reflection in this area of judicial appointments. In 1929 more than sufficient difficulty was found in inducing Mr Owen Dixon to go to the High Court, even though he was to go straight there. Under the system now prevailing the odds are that Mr Dixon would have remained just that, and never become a judge at all.

Of Fairy Tales and Other Things

In this assembly one can say, without giving references, that in recent years the High Court has been the subject of some criticism for what the Court would call the boldness and critics might call the departure from principle of certain of its decisions, for the extent to which it is allowing the foreign affairs power to swallow up the rest of the Australian Constitution, and other such matters.

In November, 1993 the Chief Justice delivered an Oration entitled in some printings The Role of the Judge at the Turn of the Century and in other printings The Role of the Courts at the Turn of the Century. I observe that in relation to a number of matters, such as procedural problems in the courts, the Chief Justice's Oration contains much good sense. It says things which need saying. I am concerned tonight with certain more general aspects, where, as it seems to me, more needs to be said by others.

Criticism and Silence

I notice firstly that the Chief Justice says that the law of contempt forbidding what is misleadingly called "scandalizing the court" is not enforced today as strongly as it used to be. I cannot myself recall any instance of these laws being enforced at any time during my forty years at the Bar, but no doubt one can forget. I can say that I am aware that in the Mabo context critics have thought it desirable to seek advice as to how far their criticism can safely go, and I have never previously known respectable persons give such matters a thought.

I cannot forbear disclosing to you, and at the same time recording for posterity, quite irrelevantly, one comment concerning an instance of enforcement in 1935, in the presumably severe era. The case concerned an editorial in The Sun newspaper, of Sydney. The editorial noted that the Assistant Treasurer, Mr Casey (much later Lord Casey, KG, and Governor-General) had complained of the manner in which the High Court "knocked holes in the Federal laws". (Ironically, the reverse of the criticism made today.) The editorial went on to talk of laws

being "perforated by the keen legal intelligences of the High Court Bench". It queried whether "the ingenuity of five bewigged heads cannot discover another flaw", and went on in like vein. The Court decided that there was contempt, recorded a conviction, and imposed a fine of œ50 on the editor and œ200 on the company. Mr Justice Starke, who never wore a wig, dissented as to penalty, thinking that conviction and an order for the payment of costs were sufficient punishment, without a fine. When asked by his son why he had been so lenient, he replied, with some misstatement of the precise evidence, "My boy, if he'd referred to four bewigged old fools it wouldn't have been contempt at all." No wonder Starke's colleagues loved him.

At p.7 his Honour says that because there is today more criticism of courts, the policy of judges will be to speak back more. His Honour ventures the thought that in the long run the benefits of enhanced debate will promote better understanding of the law, and that this may outweigh the negative aspects of criticism of the judiciary.

Yes, and, er, No. One can easily see the need to provide factual information to the media, and the desirability of establishing some facility for doing so. The Supreme Courts of New South Wales and Victoria have appointed a Public Information Officer, with the function of keeping the media informed. The appointments are regarded as very successful. Again, one can see the benefits of judges joining in discussion on matters to do with the courts, so long, as Chief Justice Gleeson of New South Wales has said, as the subjects for discussion are carefully chosen. His Honour mentioned as totally unacceptable any discussion of particular cases. Entry by judges into that area seems inherently dangerous.

One has to start with the fact that judges never have been silent. The judge makes his prime statement of what he has to say when he publishes his reasons for judgment. In doing so he has total privilege, and he has the protection of the laws as to contempt of court. Where the judge has traditionally been silent, has been in relation to subsequent criticism. I agree, and regret, that there have been occasions when Attorneys- General have not answered criticisms of courts and judges in the manner which the very special nature of that office ought to have caused them to. Attorneys-General have of course a difficult role. Historically they have, and they are supposed still to have, a duty to the law, to the courts, and to the judges. They are also part of a Ministry, and they have a loyalty to the government. They are supposed to put their duty to the law first. They are the only ministers the subject of conflicting demands in this way. Not unexpectedly, the way we run things in this country, the claims of party have too often been seen as supreme, and Attorneys- General have failed in their supposedly paramount duty to the courts and judges. I add that Bar Councils likewise have been silent when they ought to have spoken. I can well understand courts, which would prefer to be silent, feeling unprotected and forced to speak.

But much will be lost, if there is entry by judges into heavy debate, especially debate as to specific decisions (as we have already seen, alas).

For a start, the judge must realise that while what he says in his court is the law, unless someone can and does overrule him, what he says elsewhere has no special force. The law, Oliver Wendell Holmes finely pointed out, has no mandamus to the logical faculty. Still less does the judge when acting privately.

Again, is the judge to bring with him into the lecture theatre and the intellectual magazines and the correspondence columns any vestige at all of the protection which the laws as to contempt of court give him when he sits and speaks in his court? Will he be content to argue with no more protection than any other citizen? Will he make that plain to the world in advance?

Is it good for the court and the prestige of its decisions, that in the public perception the judge has just lost the public debate?

These are matters which the High Court must consider, before going further down the path of speaking out in response to particular criticisms.

A Puzzling Passage

I turn next to an uncontroversial passage, because I find it a puzzlement.

At p.18 his Honour notes the approval which the High Court gave to the initiative taken by the New South Wales Court of Appeal in Trident General Insurance Co. Ltd. v McNiece Bros. Pty. Ltd. (1988) 165 C.L.R. 107. He notes that unspecified innovations by Lord Denning as Master of the Rolls did not receive from the House of Lords the approval which the New South Wales Court of Appeal's boldness received in Trident, and says "At that time the House of Lords took a more conservative view of the role of an appellate court." That might mean "a more conservative view of the role of an appellate court than it does now", but coming straight after the reference to the High Court's endorsement of Trident I think it means "a more conservative view of the role of an appellate court than the High Court does". But the very next sentence says that there is no parallel between the relationship between the House of Lords and the Court of Appeal, and that between the High Court and Australian intermediate courts. Question: What point is the Chief Justice making? And if some comparison is being made, what meaningful comparison emerges from showing what one ultimate court of appeal did in one case, and another ultimate court of appeal did in unspecified other cases?

The matter is a small one, but it is typical of several passages where the Oration clearly intends to say something, but does not make clear precisely what.

Fairy Tales and the Creation of Law

The final matter is more important. At pp.21ff the Chief Justice says that the incidental creation of law is implicit in the role of the judge, and that criticism of the Court for undertaking a legislative role seemed to imply that the Court exceeds its role if it makes law. "Only a person entirely ignorant of the history of the common law could make such a suggestion." At p.22 the Chief Justice says, "It is scarcely to be credited that anyone with any understanding of the judicial process now believes the fairy tale that judges `discover' the law and then declare it, without actually making it, as though the judges resembled the Delphic oracle in revealing the intention of the pagan gods."

Needless to say the passage got a good press, as Chief Justices are apt to do when they refer to fairy tales and the oracle at Delphi. Fairy tales were in vogue again, at p.8 of an address to the Sydney Institute in March, 1994:

"What I have just said may not be welcome news to those who believe that the courts do no more than apply precedents and look up dictionaries to ascertain what the words used in a statute mean. No doubt to those who believe in fairy tales that is a comforting belief. But it is a belief that is contradicted by the long history of the common law."

Good flowing stuff, but far more impressive if not directed against a man of straw. When I read it, I wondered to whom the Chief Justice was referring. Immodestly, for one brief moment I wondered whether he was referring to me. That seemed unlikely, for various reasons,one of which is that I have never thought or said anything along the lines indicated in either passage. Was the reference to Sir Owen Dixon? Very unlikely. The Chief Justice has more than once made plain his great respect for Sir Owen Dixon, and again Sir Owen never, to my knowledge, said anything at all resembling the views criticised in those two passages. Who then has said anything like them? There I find myself bewildered, for I know of no one who denies, and I know of no one who has within the last hundred years denied, that in some sense judges, especially appellate judges, make law.

Certain things need of course to be added. Very shortly:

Judges make law in a very special way, under special conditions and within special parameters.

Telling a judge that what he says will be the law is no help to a judge who is trying to formulate what he is going to say.

The doctrine of the law is that the correctness or otherwise of what the judge says can be judged against the principles of legal reasoning. There is no exemption for the judge's own contribution. He may be able to point to it as his personal contribution. It will be right if, but only if, it is perceived as consistent with legal principle.

None of this is new. Almost forty years ago, Sir Owen Dixon received the Henry E Howland Memorial Prize, from Yale University. He was asked to honour the occasion by the delivery of a paper. The result was a paper Concerning Judicial Method, in which Dixon spelled out his views on certain matters very relevant today. You will find it reprinted in Jesting Pilate (Law Book Co., 1965). It was Lord Wilberforce who said, "There is no such thing as substandard Dixon, but from time to time there is Dixon at his superb best". This paper at Yale is Dixon at his superb best. It is not always easy, for thought packs on thought. Every word has been chosen carefully and needs to be read carefully. I quote several passages below, for they set out better and more authoritatively than I could ever hope to do the principles which underlie the concern which people feel as to the present High Court.

It is of course true that the law is not lying there waiting to be "discovered". But it is not true that judges can say whatever they like. Dixon speaks first of the doctrine that it is meaningful to say that what the court says, whatever its source, may be "right" or "wrong":

"Such courts (courts of ultimate resort) do in fact proceed upon the assumption that the law provides a body of doctrine which governs the decision of a given case. It is taken for granted that the decision of the court will be `correct' or `incorrect', `right' or `wrong' as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption, but it is basal. The court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness."

That assumption underlies the whole process of argument conducted before the Court by highly-paid persons believed to be able to argue and persuade and convince:

"The argument is dialectical and the judges engage in the discussion. At every point in an argument the existence is assumed of a body of ascertained principles or doctrine which both counsel and judges know or ought to know, and there is a constant appeal to this body of knowledge. In the course of an argument there is usually a resort to case law, for one purpose or another. It may be for an illustration. It may be because there is a decided case to which the court will ascribe an imperative authority. But for the most part it is for the purpose of persuasion; persuasion as to the true principle or doctrine or the true application of principle or doctrine to the whole or part of the legal complex which is under discussion."

When the court decides, no doubt what it has decided is, while it stands, the law. Yet lawyers will still stand aside and wonder whether it is good law or bad law. Academics and practitioners will write articles praising or criticising decisions as consistent with principle or inconsistent with principle. Mandamus will still not lie to the logical faculty. Whether the law as declared is good law or bad law is a decision which will ultimately be made not by the deciding judge, but by posterity.

Dixon was equally aware of the contribution of the judge, and of the proper limits of that contribution. He makes an interesting remark on it in a letter he wrote to his judicial friend the great Felix Frankfurter, of the Supreme Court of the United States. In picking up the letter and expressing the hope that someday Dixon's letters will be collected and published, I cannot forbear quoting another irrelevant remark about Sir Hayden Starke. Dixon writes, "It is true that

he did not die until he was over eighty-seven, and although I am beginning to regard that as premature it is not a widely held opinion".

Dixon was well aware of the judicial making of law. He says to Frankfurter:

"Denning has been in India to the meeting of the International Commission of Jurists. He is reported to have gone very far in his statement of the judicial function in making law. His statements are reported as if he treated it as an arbitrary act, which I find it hard to believe. On the whole controversy, which in England now seems to centre around him, I have felt that it is unwise for a judge to speak publicly. He ought to appear to believe that he has some external guidance even if in his ignorance he regards it as untrue. In the Darwinian processes of adaptation to environment such a bird as the honey-sucker ought not consciously to enlarge his bill by stretching it even if reaching for the honey causes him to do so. In any case law-making ought not to be regarded as honey."

In his Yale paper Dixon had given a more closely reasoned statement of his views:

"No doubt courts are much more conscious than of old of the formative process to which their judgments may contribute. They have listened, perhaps with profit, to the teachings concerning the social ends to which legal development is or ought to be directed. But in our Australian High Court we have had as yet no deliberate innovators bent on express change of acknowledged doctrine. It is one thing for a court to seek to extend the application of accepted principles to new cases, or to reason from the more fundamental of settled legal principles to new conclusions, or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from long accepted legal principles, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content. The latter means an abrupt and almost arbitrary change. The objection is that in truth the judge wrests the law to his authority. No doubt he supposes that it is to do a great right. And he may not acknowledge that for the purpose he must do more than a little wrong. Indeed there is a fundamental contradiction when such a course is taken. The purpose of the court which does it is to establish as law a better rule or doctrine. For this the court looks to the binding effect of its decision as precedents. Treating itself as possessed of a paramount authority over the law in virtue of the doctrine of judicial precedent, it sets at nought every relevant judicial precedent of the past. It is for this reason that it has been said that the conscious judicial innovator is bound under the doctrine of precedents by no authority except the error he committed yesterday."

There it is, enunciated once and for all. Read it, and read it again. There, nearly forty years before Mabo was decided, is the basis for the wide criticism of the decision in Mabo, and of the making of the decision in that case. There is all the difference in the world between the judge who is bound to take a step, in order to decide a case, and the judge who wishes to take a step because he thinks it a step which ought to be taken. If ever there was a situation which cried out for caution, for care, for proceeding with deliberation, step by step, it was the situation one part of which was brought to the Court in Mabo. Instead the whole thing was decided ahead of the necessity of the case, in a manner people can be forgiven for seeing as "abrupt and almost arbitrary".

Again, on the other great constitutional issue of the day. We have a Constitution which provides a particular balance between Commonwealth and State powers, and which prescribed a particular system for its own amendment, putting the decision as to amendment in the hands of the people the Constitution exists to serve. There now stands alongside all that a doctrine under which the

Executive Government of the Commonwealth can, without reference even to the Parliament of the Commonwealth, enter into a treaty, the mere entry into which changes the balance of power between Commonwealth and States, giving the Commonwealth power to enact laws which a moment before it could not.

The onlooker sees a Commonwealth Government using the foreign affairs power to control the activities of State governments which it has failed to induce to come into line with its wishes, and making open threats to make further use of that power for that reason. The onlooker sees a High Court, the protector of the Constitution, which has not found it possible to draw from the Constitution any implication limiting the destruction which the foreign affairs power is causing to the whole balance of power between Commonwealth and States. The onlooker remembers some final words of Dixon:

"Since the Engineers' Case, a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems to be the last to which it could be applied." (Essendon Corporation v Criterion Theatres.)

These are the things which worry. These are the things which cause concern. These are the things which call for answer. And if judges themselves do mean to answer the criticisms of many and respectable and responsible and respectful critics, they should deal with the criticisms quietly and thoughtfully and with respect. If not, it will be all too obvious who are talking fairy tales.

Introductory Remarks

John Stone

Sir Harry and Lady Gibbs, ladies and gentlemen: welcome to this, the fourth major Conference of The Samuel Griffith Society.

To say that it has begun with a bang in fact, two bangs would be an understatement.

The first bang it might be better to call it a loud report was provided by Mr SEK Hulme's address to the Society at our opening Dinner last night.

This was no mere "after dinner address", but a lengthy, serious and in the end hard-hitting examination of one of the chief problems facing our Constitution today namely, the calibre of some of those charged with the great responsibility of judicially interpreting it.

The wit and the humour which we have all come to expect from Mr Hulme were there also, but his address last night, first and foremost, treated seriously a serious subject. It will, I predict, be even better when we come to read and ponder it as distinct from merely listening to it after it is published in the Proceedings of this Society.

I referred earlier to two bangs, and those of you who, this morning, had only The Courier Mail to read may wonder to what I am referring because, so far as I can see, that once esteemed newspaper carries no report of substance on yesterday's meeting of State Premiers and Chief Ministers in Sydney.

To be precise, its front-page article, headlined "States to tackle crime", focuses entirely upon the decision by that meeting yesterday on that one matter.

I do not wish in any way to diminish the importance of that matter, and I welcome the decision by the Premiers and Chief Ministers to convene a Conference later this year to address it.

All other considerations apart, such a meeting will thereby underline that the States have full powers to address such issues, without any need for the Commonwealth to tell them to do so, or indeed much need for the Commonwealth to be involved at all a precedent with, I trust, much wider potential application.

My key point, however, is that contrary to the impression which hapless Courier Mail readers would obtain this morning, yesterday's meeting in Sydney dealt with much more important matters than that.

Contrast that Courier Mail front-page, for example, with the front page of The Australian, with its headline "States in push for new Federation".

It is true that, in line with its self-appointed mission these days, The Australian gives even greater front- page prominence to a large photograph of Mr Mick Dodson, the Chairman of the so-called Aboriginal Council for Reconciliation who, clad in his usual funny hat, is reported to be enjoining us that "Reconciliation [is] a Challenge to Society".

Nevertheless, the article reporting yesterday's meeting in Sydney suggests that something remarkable may, just possibly, be happening.

Indeed, if the word had not been so thoroughly debased by people like our Prime Minster, I might even go so far as to describe yesterday's meeting as an "historic" one.

The four page communiqu,, a copy of which I have here thanks to a special messenger service from Sydney yesterday evening (in the shape of one of our members), has appended to it the signatures of all six Premiers, and the Chief Ministers of both the Northern Territory and the ACT.

These are early days, but I congratulate them all.

When did we last have such a gathering "committing themselves to building a new Australian Federation based on", inter alia, the following principles:

"that the Federation enables government to be close to the people, and responsive to local and regional needs";

"that the Federation enhance the cohesiveness of the Australian nation by being responsive to the needs of regional diversity, rather than being dismissive of that diversity"; and

"a Federation that fosters a competitive national economy based on the fundamental principle of `competitive federalism'". (Emphasis added).

As to that last, members of this Society will recall the paper on Making Federalism Flourish presented to our second major Conference, just a year ago in Melbourne, by Professor Wolfgang Kasper, which was in essence a strong plea for competitive federalism as a means of energising both the Australian economy and polity.

As I said earlier, this is the second "loud report" with which this Conference begins. It is too early to know whether it may merely flare up like a Roman candle, and then once again gutter into failure. The portents to the contrary, however, seem good; and if they prove accurate, this "bang" will, in years to come, remind us that we were present last night in Brisbane on the day on which this explosion was first heard.

I referred last night, briefly, to the fact that we had earlier invited the Premier of Queensland, the Hon Wayne Goss, to address last night's opening Dinner, and it is appropriate that I should record this morning some details of that exchange.

On 24 May, 1994 I wrote to Mr Goss on behalf of our President, Sir Harry Gibbs. I remarked that this Society "is of course named after a great Queenslander (and one of your predecessors as Premier of that State)", and went on:

"While some of the constitutional positions which [the Society] stands for would not, I know, commend themselves to the Labor Party, its fundamental tenet is the basically federalist one that, particularly in a country like Australia, no good can come from the ceaseless concentration of more and more power in Canberra at the expense of State Governments . . ..

"If you were able to speak to us, the topic I would like to suggest to you (and on which I feel you could speak from the heart both as a Queenslander and as the Premier of a Government which necessarily finds itself involved in manifold dealings with Canberra) is The Branch Office Complex: A Federalist Response.

"Such a topic would, I suggest, give you scope not merely to speak of the problems which ensue within a Federation once the financial powers of the States are no longer commensurate with the performance of their proper functions, but also (should you wish) to develop the point that, in a society which is increasingly concerned with human rights and individual liberties, those rights and liberties are much more likely to be preserved where power is decentralised than where (as increasingly is the case today in Australia) it is centralised".

Now as you all know, Mr Goss was unable to accept our invitation because, as he put it, he "will be attending a meeting of Premiers in Sydney during that day, and . . . you would understand that it is difficult with such meetings, which do not have defined concluding times, to schedule other commitments". Accordingly, Mr Goss asked that his apologies be conveyed to this "organisation, and trusts that [we] have a successful dinner and conference".

I may only say that we were grateful, at the time, to have this courteous response from the Premier, and I am equally pleased to see that, at yesterday's meeting of Premiers and Chief Ministers in Sydney, to which I referred earlier, his name appears as a full co-signatory to the Communiqu, there issued.

Our first bracket of two papers today is on the theme "The Aboriginal Question", which was first raised at our inaugural Conference in Melbourne just two years ago. To lead off in this session we have a paper entitled The Aetiology of Mabo, by Dr Geoffrey Partington, whom I shall now have the pleasure of introducing.

Chapter One

The Aetiology of Mabo

Geoffrey Partington

Aetiology is the study of causes, especially the causes of diseases. I can only touch now on one strand in the pathogeny of the full-blown Mabo Judgment of 1992, namely the contribution made by Dr Henry Reynolds to the High Court of Australia's conscious rejection of Australia's history.
The Commonwealth Government's "Discussion paper" on Mabo, itself a work of advocacy rather than analysis, freely concedes that "up to June 1992, grants of interests in land were made before native title was recognised in Australian law".1 Justices Deane and Gaudron did not seek to conceal that they had repudiated what they termed "a basis of the real property law of this country for more than a hundred and fifty years".2 The essence of what they rejected was the legal doctrine that the original British claim of sovereignty extinguished all prior rights to property, so that after 1788 all titles, rights and interests whatsoever in land were the direct consequence of some grant from the Crown.
In justification of their repudiation their Honours referred to "the conflagration of oppression and conflict which was, over the century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame".3 They concluded that "the nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices".4
On what grounds did their Honours reject the Australian past as unutterably shameful? Justices Gaudron and Deane said they had been "assisted not only by the material placed before us by the parties but by the researches of the many scholars who have written in the areas into which this judgment has necessarily ventured. We acknowledge our indebtedness to their writings and the fact that our own research has been largely directed to sources which they had already identified".5 Who were these scholars? Very few historians are mentioned in their Honours' footnotes, but we find there that they read The Historical Records of Australia, which are not interpretative, one book each by Ernest Scott and Sir Kenneth Roberts- Wray, who give no support to their position, an article by R.S. King, and Henry Reynolds' 1987 The Law of the Land.6 There can be no doubt that their Honours were influenced particularly strongly by Reynolds. Indeed, several important passages of their judgment are virtual paraphrases of Reynolds. Justices Dawson and Toohey also cited Reynolds' The Law of the Land on pastoral leases in Queensland.7 Gordon Briscoe, a research scholar of Aboriginal descent critical of Mabo, claims: "The weakness of the Mabo decision lies in the way that one historical idea raised by one historian, Henry Reynolds, and one ethnographic document made up the sole proof relied on by the Court".8 On the opposite side of the argument Mr Noel Pearson of the Hope Valley Aboriginal Community holds that it was Reynolds who demonstrated "that native title was recognised by the Imperial government in the nineteenth century and respect for this title was supposed to govern colonial `settlement' in Australia. Reynolds shows how the colonists contrived to deny these rights".9
In The Law Book Company's 1993 Essays on the Mabo Decision, all of which were written in support of Mabo or demanding its further extension, several contributors acknowledged Reynolds' contribution to the struggle.10 Susan Burton Phillips attributed to Reynolds "historical

material reflecting the concerns of Australian colonial administrators that access to and use of land be retained for the indigenous inhabitants"; Nonie Sharp referred readers to Reynolds for the meanings of terra nullius; Michael Mansell referred to Reynolds as a "noted commentator" who favours a separate Aboriginal Republic in Australia, which Reynolds may not in fact support; Garth Nettheim drew attention to Reynolds' definition of "the distinctive and unenviable contribution of Australian jurisprudence to the history of the relations between Europeans and the indigenous peoples of the non-European world" which is denial of "the right, even the fact, of possession".

Eddie Mabo himself was once Reynolds' research assistant at James Cook University. Reynolds relates that he and his colleague Noel Loos "had the unpleasant task of explaining to him (Mabo) the doctrine of terra nullius . . . It was a shocking revelation and one that hardened his determination to fight for justice."11 Reynolds added that the ingredients of the Mabo case came together "at a land rights conference at the university in Townsville where he (Mabo) and several of his associates met some of the leading land rights lawyers and academics".12 One must agree with Reynolds' own contention that:

"There can be little doubt that the History Department [of James Cook University] played a major role in the fundamental re-interpretation of Australia's past which found expression in the Mabo decision."13

As with many great discoveries there is some dispute about influence and precedence. Mr Greg McIntyre, a Perth barrister who was solicitor in the Milirrpum and Mabo cases, claimed that "the Mabo case was conceived as a test case arising from a meeting of Barbara Hocking (a Melbourne barrister), Eddie Kiokie Mabo, Fr. Dave Passi, Flo Kennedy (of Thursday Island), Nonie Sharp (of La Trobe University) and the writer at a conference on Race Relations and Land Rights at James Cook University in 1981".14 However, despite his omission of Reynolds' name, Mr McIntyre acknowledged the importance of the role played by the James Cook University in the origins of Mabo.

Reynolds' early work

In his early writings during the 1970s on Aboriginal history Reynolds had little interest in land rights or the doctrine of terra nullius, the subjects on which his later work most influenced the High Court. His earlier objective was to overthrow established views that there was little serious Aboriginal resistance to British colonization of Australia and that Aborigines had little interest in the skills, techniques and culture of the colonists. Reynolds maintained that Aborigines were both highly belligerent and able to make good use of such innovations as were relevant and profitable to them.

a. Aboriginal bellicosity

The early British and Irish colonists of Australia included many very violent people, but Reynolds' chief interest was "not with European brutality towards the blacks but with Aboriginal violence perhaps their counter-violence".15 He set out to banish "legends" that Australian history was "uniquely peaceful" and Aborigines "an inimitably mild race" which abjectly acquiesced in British colonization.16 Reynolds denied that "blacks were helpless victims of white attack" or "passive objects of European brutality".17 He declared that they "did not sit around their camp fires waiting to be massacred" but that, allowing for differences in fire-power, they gave as much as they got.18

Reynolds noted that revenge killing for the death or serious injury of kin was common in traditional Aboriginal society and that "death was universally attributed to malevolent sorcery".19 When whites offended them, Aborigines had to decide whether to punish particular individuals or to hold whites collectively responsible. Reynolds drew special attention to

evidence that Aborigines intended "to attack and kill whites whenever they met any" in order to gain vengeance. He estimated that in Queensland alone Aborigines killed about 850 colonists, among whom he included Chinese, Melanesians and Aborigines co- operating with the colonists. His estimate for the whole continent was between 2,000 and 2,500 deaths caused by Aborigines, as against some 20,000 Aboriginal deaths directly through white or black trooper violence.20 There were also many large-scale attacks by Aborigines on sheep and cattle, the numbers lost in single campaigns running into thousands, bringing financial ruin to many settlers.

Reynolds wrote of insecurity among miners and townspeople as well as pastoralists and farmers, and widespread fear, especially for the safety of women and children, in many Queensland towns. Reynolds condemned earlier radical historians for dismissing black trackers and troopers as "people without will of their own" who "were bullied or tricked into working with the Europeans". He conceded that, whatever may have been the level of violence by whites in frontier conflicts, "the same judgment" must be made about "Aboriginal stockmen, troopers and trackers who were so often by their side."21 He became highly impressed with Aboriginal military skills, and maintained that strange blacks were perceived by other Aborigines as a greater danger in warfare than strange whites.

Perhaps fearful that his emphasis on Aboriginal violence might strengthen negative stereotypes, Reynolds attacked the "unfavourable conception of the brutal and debased savage" which, he claimed, "was still afloat in the parish ethnology of Britain".22 He condemned Social Darwinism and similar theories which hold that some individuals and/or societies are more advanced or civilized than others. However, he did not chide Karl Marx and Frederick Engels, although he must know of Engels' work in this field.

Engels and Marx accepted the division of the human past made by the American anthropologist Lewis Henry Morgan into "three main epochs, savagery, barbarism and civilisation". Morgan separated savagery into a "lower", "middle" and "upper" stage. Although no direct evidence remained of the lower stage of savagery, postulated as a transitional stage from ape-like ancestors, Engels wrote that "the Australasians and many Polynesians are to this day in this middle stage of savagery". Engels held that the lowest stage of human development still surviving was represented by "the Australian Negroes of Mount Gambier in South Australia".23 Until recently, left-wing Australians followed the eminent Marxist prehistorian, Vere Gordon Childe, in using terms such as savage and barbarian in much the same way as did nineteenth century anthropologists and social scientists denounced by Reynolds.

Despite his castigation of colonists or anthropologists who classified Aborigines as savage or primitive, Reynolds' own sources make it very understandable why such views were held. Some Aborigines believed the first British ships they saw were "huge winged monsters" or trees growing in the sea. Other Aborigines thought the British were their dead kinsmen who had "jumped-up" as whites, and that they themselves in their turn might return to earth after death as whites with all their powers and goods. Reynolds insisted that "it is important to stress that far from being an example of childlike fantasy, fancy or primitive irrationality, this view of the Europeans was a logical conclusion".24 This was not the view taken by British officials, who counted their own misidentification as reincarnated Aborigines as part of the evidence for the difficulties of making treaties with Aboriginal groups, and more generally of achieving common understandings.

Reynolds noted that "Aborigines clung to their own theory of illness, despite the traumatic impact of introduced disease", and believed smallpox and other epidemics were the work of sorcerers from other Aboriginal groups, who were capable of killing, sometimes from a distance, with bullocks' teeth, sheeps' jawbones and fragments of glass.25 These beliefs and practices also seemed to Reynolds to be "perfectly logical . . . given acceptance of a few basic assumptions".26

He seems to have taken satisfaction in noting that "twentieth century studies make it clear that faith in magic . . . has been one of the most enduring features of traditional culture".27 After describing the disastrous results of many Aboriginal miscalculations he claimed: "it was a course of action fraught with risk, yet the Aboriginal renaissance of the last decade suggests that ultimately the sacrifices were justified".28 Such encouragement to Aborigines to retain ancient errors actually hinders such a renaissance from taking place.

Thus Reynolds challenged the "myth" of Aboriginal passivity in the face of white colonization and exulted in the violence of Aboriginal resistance. He may have exaggerated the amount of violence in relations between Aborigines and settlers during the nineteenth century, as has been claimed by other scholars, such as Bain Attwood, Marie Fels and Ann McGrath.29 What cannot be doubted is that in so far as he was right, to that same extent he demonstrated how difficult it was to include Aborigines in the civil societies developed in the Australian colonies, or to implement the types of shared land usage between whites and Aborigines proposed in Westminster and Whitehall, and subsequently lauded by Reynolds as the policy which the colonial governments should have adopted. Furthermore, when the myth of Aboriginal non-violence was resurrected in the Mabo Judgment Reynolds did not demur.

b. Constructive Aboriginal responses to white society

As well as depicting Aboriginal violence in detail, the early Reynolds also wished to show that Aborigines, far from being frozen in traditional practices, made substantial constructive accommodations to new ways. Reynolds then perceived many advantages for Aborigines in contacts with whites. Many contacts were involuntary and of a destructive character, but others were voluntary and potentially very valuable and helpful to Aboriginal development. Reynolds acknowledged that white settlements acted as a magnet to Aborigines. In some cases the attraction was that only there was food available after white incursions disrupted traditional food supplies, but the pull was frequently of a different kind. Reynolds noted that:

"European goods like steel axes and knives, pieces of iron, tins, cloth and glass were all eagerly sought and used by Aboriginal tribes even before contact had been made with settlers on the advancing frontier. Western food, tobacco and alcohol also exerted a tremendous attraction."30

Reynolds criticised "activists" who "ignored and despised" Aborigines working with or assisting whites, or unfairly condemned black troopers, stockworkers and servants "either as collaborators and traitors to the Aboriginal cause or as people with wills so weak that they lacked minds of their own and became, as a result, willing tools of the whites".31 Reynolds considered that Aboriginal co-operation, when it was forthcoming, was rational and productive. There is no reason to challenge that view.

Post-contact changes in Aboriginal ways included long distance migrations to enter white settlements. Reynolds has often cited Professor Stanner's account of voluntary mass movement of Aborigines from the Fitzmaurice River area of the Northern Territory. Stanner, who with Professor R M Berndt was one of two expert witnesses called by the plaintiffs in the Gove Land Rights or Milirrpum Case, reported that their "appetites for tobacco and to a lesser extent for tea became so intense that neither man nor woman could bear to be without", and as a result "individuals, families and parties of friends simply went away to places where the avidly desired things could be obtained". Stanner considered that "voluntary movements of this kind occurred widely in Australia", so that "we must look all over again at what we suppose to have been the conditions of collapse of Aboriginal life". The reported arrival of Europeans "was sufficient to unsettle Aborigines still long distances away", and "for every Aborigine who, so to speak, had Europeans thrust upon him, at least one other had sought them out". Stanner concluded that "disintegration following on a voluntary and banded migration is a very different kind of problem from the kind we usually picture that of the ruin of a helpless people, overwhelmed by

circumstances". One idea Stanner thought needed "drastic revision" was that "to part an Aboriginal from his clan country is to wrest his soul from his body".32

The early Reynolds endorsed Stanner's account and referred to "the more or less voluntary coming in of Aborigines to European settlements".33 Ten years later he still admitted that "during the twentieth century there have been many well-documented examples of voluntary migration from tribal homelands in towards European settlements", but suggested that Stanner's account of the nineteenth century was "not so much wrong as anachronistic".34 Yet Reynolds' own sources show clearly that the same thing often happened during the first century of Aboriginal contact with the British. When the Mabo Judgment resurrected the myth of a timeless nexus between Aborigines and land, Reynolds did not demur.

Although Reynolds drew attention to examples of successful Aboriginal adaptation to the totally new situations created by British colonialization, he also provided evidence of failures to do so.35 This was often the fault of the colonists. Aborigines who made great strides in mastering the ways of white society were often rejected and subsequently sank into ruin. Even the most accomplished Aboriginal males were rejected sexually by respectable white women. Admission into respectable male white society was often difficult, too, so that educated Aborigines were thrust into the company of the least desirable white companions. White artisans were frequently hostile to the entry of Aborigines into their trades on the grounds that wages and conditions would suffer.

The overall view of the early Reynolds, however, was that assimilation took place on only a very limited scale, not so much because of white resistance or Aboriginal incapacity as of deliberate and highly defensible Aboriginal rejection of white ways. He interpreted Aborigine opposition to education of their children by white people as resistance to "assertive promotion of European culture and the continuous subversion of their children."36 Reynolds claimed that "many Aborigines have not wanted to emulate white Australians and have manifested a cultural resistance which is rooted in their ethnic history".37 Aboriginal men often prevented inter-racial co-operation. Reynolds noted that the "array of methods" used to preserve their authority, especially over women, included "threats, sorcery, ritual spearing, even execution." He conceded that:

"Aboriginal women may have gone to European men willingly and actually sought them out, either to escape undesired marriage or tribal punishment or to gain access to the many attractive possessions of the Europeans.38"

Yet he could also write that the coming of the British simply meant that "many thousands of years of freedom from outside interference were coming to an abrupt and bloody end",39 and claimed later that Aborigines lost all and gained nothing by British colonization.

Terra nullius

Reynolds' early work on Aborigines paid little attention to land ownership. In 1987 he admitted that his interest in land rights questions was a "very belated development" and he "had gone on for years accepting at face value ideas and interpretations that were wrong." Even when he became interested in issues concerning land, especially in relationship to the doctrine of terra nullius, the subject on which he exerted greatest influence on the Mabo judges, he was deeply ambivalent. Sometimes he agreed that in 1788 Britain gained sovereignty over Australia in terms fully acceptable in international law:

"The British claim of sovereignty over the whole of Australia was not surprising given the attitudes of European powers. It would have been unexceptional at any time in the nineteenth century."40

On other occasions, however, he argued that British sovereignty could only extend to the power of keeping out other European or "civilized" powers, and only then "as far as the crest of the watershed flowing into the ocean on the line of the coast actually discovered".

Reynolds has also been inconsistent in his analyses of the legal doctrine that Australian colonies were colonies of settlement. He wrote of New South Wales that "the legal situation was clear from the beginning": namely that it was "a colony of settlement, not conquest. The common law arrived with the First Fleet; the Aborigines became instant subjects of the King, amenable to, and in theory protected by, the law."41 He conceded that Blackstone, who was regarded as authoritative on the matter in subsequent cases in several countries with legal systems based on English common law, "drew a clear distinction between colonies won by conquest or treaty and those where `lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother countries'". In colonies of settlement "English law was `immediately there in force' on the assumption that no prior legal code and no land tenure had ever existed". In other words it was terra nullius. At other times Reynolds made the very different claim that the phrase "desert and uncultivated" is "ambiguous", since it might or might not mean "uninhabited", and suggested that Blackstone really meant uninhabited, or else would have used the phrase "desert or uncultivated", not "desert and uncultivated".42

In truth there was and should be now little confusion on the matter. The words of the Privy Council in Vajesingji v Secretary of State for India in 1924 are among many pronouncements that defined the concept of terra nullius very clearly: "territory hitherto not occupied by a recognised ruler".43 New Holland was considered a paradigm case of terra nullius because the British could identify no territorial units with a recognisable form of government, not because of a mistaken belief that it had no Aboriginal inhabitants. It is the High Court which is mistaken in believing that British explorers, Whitehall officials or Australian colonists held the mistaken belief that Australia was uninhabited or nearly so. It owes its mistake in large measure to Henry Reynolds.

Reynolds claimed that "over much of the continent the Aborigines clearly had possession of a character of which the land was capable",44 but, except in the least fertile areas, this is not true and at best confuses actual and potential use. No land in Australia before 1788 was used for purposes of agriculture, horticulture or animal husbandry as these were, and are now, understood, so that all land subsequently put to these uses rebuts his claim that Aborigines already used them in those ways of which they were capable.

Reynolds countered the argument that Aborigines possessed no land rights because they did not till or enclose land by noting that much land recognised to have full legal title in Britain was not tilled or enclosed.45 But it was clear to all in Britain what the boundaries were between the enclosed and the open or between the sown and the wild, which land was under which type of use and, even more to the point, who owned it and under what title, whereas it was very unclear to the best intentioned settler or colonial official which land in Australia was held by whom and for what purposes.

Native title

Reynolds claimed that pre-Mabo Australian cases differed from opinions offered in other legal systems based on English common law, especially those of Chief Justice Marshall in the United States Supreme Court. I cannot demonstrate here the errors in Reynolds' interpretation of United States, New Zealand and other precedents, but can only note that he favoured the non-Australian authorities and dismissed Australian judges as puppets of squatters and others who gained from illegal expropriation of Aborigines.

However Reynolds did concede that the Australian situation was "less clear-cut" than that in North America or New Zealand, especially since there were no treaties with Aborigines. Indeed,

his own judgments on whether Aboriginal native title to land was recognised in Australian law have been far from clear-cut. He has ardently argued in favour of two propositions, each of which is highly dubious in its own right and which are utterly incompatible with each other. The first proposition is that British and Australians, judges, lawyers, politicians and colonists, were all grievously at fault because they refused to recognise Aboriginal communal native title or any comparable conception of land rights. The second proposition is that some form or other of Aboriginal communal native title was generally accepted by these same judges, lawyers, politicians and colonists, and was mainstream opinion.

Among dozens of Reynolds' variants of the first proposition are:46

"The official view is clear. The British claimed not only the sovereignty over New South Wales then comprising the whole eastern half of Australia but also the ownership of all the million and a half square miles contained therein."

"Mr Justice Isaacs . . . declared: `So we start with the unquestionable position that, when Governor Phillip received his first Commission from George III on 12th October, 1786 the whole of the lands of Australia were already in law the property of the King of England."

"The commonly accepted view has always been that the Aborigines had no land rights because they were not farmers, did not enclose the land and did not till the soil."

"It was easier and much more advantageous to argue that the Aborigines were living in a state of primaeval simplicity where the soil and pasture of the earth `remained still common as before, and open to every occupant'. Blackstone developed this idea in a passage which echoed through colonial debates about Aboriginal land rights for half a century and more."

"The Act of the British Parliament in 1834 establishing South Australia gave no recognition to Aboriginal land rights."

"Further research may eventually turn up a relevant case or two, but it is reasonable to assume that no colonial court ever defended the Aboriginal right of occupancy."

"Little attention was given to Aboriginal interests in the fierce debates about law and tenure."

"Aboriginal right of use and occupancy and the British recognition of native title were ignored, unenforced and apparently never tested in the colonial courts."

Reynolds advanced versions of the second contradictory proposition just as vehemently, often in the same works. He asserted in 1987 that the "mainstream view has been that native title arose from the incontrovertible fact of occupation", and that native title "was not extinguished because it was neglected or ignored", but "required specific and precise legislation" to extinguish it.47 By 1993 he had become confident that:

"It is beyond doubt, then, that the doctrine of native title was well known and understood in leading legal and political circles in the 1830s and 1840s. Moreover, it was `fully admitted' to be part of the colonial common law which applied throughout the Empire."48

By 1993 it had all become very simple indeed: "Australia started with the land owned by the Aborigines under English common law".49 Apparently neither he, nor members of the High Court who rely upon his testimony, noticed that there might be even the slightest discrepancy between the two sets of assertions.

Reynolds' own sources make his second proposition manifestly untrue. There is nothing in his work or in the judgments made in Mabo by the majority of the High Court to challenge the historical truth of the minority judgment made by Justice Dawson, who noted inter alia50:

"The laws which were passed in New South Wales make it plain that, from the inception of the colony, the Crown treated all land in the colony as unoccupied and afforded no recognition to any form of native interest in the land. It simply treated the land as its own to dispose of without regard to such interests as the natives might have had prior to the assumption of sovereignty. What was done was quite inconsistent with any recognition, by acquiescence or otherwise, of

native title. Indeed, it is apparent that those in authority at the time did not consider that any recognisable form of native title existed."

"None of the measures taken for the welfare of the Aboriginal inhabitants involved the acceptance of any native rights over the land."

"The Crown regarded unalienated waste land as entirely its own to deal with as it pleased."

A similar view was taken in the Gove Lands Case by Justice Blackburn, whose judgment was described by Judge Dawson as based on "a full and scholarly examination",51 and in every other case before 1992 before an Australian court.

Judge Dawson noted52 that "the policy which lay behind the legal regime" so much detested by the other members of the High Court "was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law". His Honour argued that "it requires the implementation of a new policy to do that and that is a matter for government rather than the courts. In the meantime it would be wrong to attempt to revise history or to fail to recognise its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case must be decided". The majority of the High Court decided that historical revision and policy-making were within its competence, irrespective of whether the legal foundations of Australia were impugned or not.

Reynolds claims that "leading English lawyers of the 1830s", such as James Stephen, Pemberton, Burge, Follet and Lushington, were "fully aware of native title and believed that it applied with equal force in Australia as in the other colonies of settlement". This is, of course, a question-begging formulation, since these jurists followed Blackstone in holding that all colonies of settlement by definition adopted the common law, in so far as it could be transmitted, on coming under the sovereignty of the Crown. Reynolds argues that these British lawyers held that Aborigines "retained their rights based on prior occupation until the Crown exerted its exclusive rights of pre-emption", but this again is question-begging, since the central question concerns whether Aboriginal rights were held to be legal or moral and what they might comprise.

Reynolds claims that communal native title was accepted in London by the Colonial Office as "an authoritative assessment of the law as it then stood". On the contrary, British officials and politicians sympathetic to the plight of Aborigines confronted by white tillage and pastoral squatting and by the entire paraphernalia of a new, different and alien society fully understood that the basic legal doctrines of land tenure were fatal to any attempt on their part to press formally for recognition of communal native title. That is why they concentrated their efforts on seeking to ensure that arrangements made by the Crown in the exercise of its legal power over all land titles were as solicitous as possible of Aboriginal interests.

Despite all his efforts to inflate the legal implications for land rights of the struggles of humanitarians to protect basic Aboriginal interests, Reynolds does not suggest that their efforts had much effect on the law. He argues that in the 1840s "Colonial Office officials were clear about what they wanted to achieve", namely, "the reservation in Leases of Pastoral Land of the rights of the Natives".53 He thus seems to concede that Aboriginal native title had not been accepted practice or legal doctrine before the 1840s, since there would then have been no need to try to introduce it during the 1840s. Furthermore, he complains frequently and at length that it was not accepted after the 1840s. Since Aboriginal native title did not exist before the 1840s or after the 1840s, where did it exist during the 1840s?

The absence of legislation establishing or recognising communal native title forces Reynolds to claim that it existed "`less in the Order-in-Council, which was a public document published in the New South Wales Government Gazette, and more in the dispatch [from the Colonial Office] which was only for official eyes" and in the correspondence of Earl Grey and others.54 Yet it is a

well-known principle of law that preparatory papers are inadmissible on the question of the interpretation of a statute. In any case the preparatory papers cited do not substantiate Reynolds' contentions. It is on this fragile basis that Noel Pearson believes that Reynolds has demonstrated "that native title was recognised by the Imperial government in the nineteenth century and respect for this title was supposed to govern colonial `settlement' in Australia". This is the level of evidence which the High Court of Australia apparently found sufficiently convincing to justify overturning a "basis of the real property law of this country for more than a hundred and fifty years".

Reynolds and Great Britain

In 1987 Reynolds denounced the 1889 Cooper v. Stuart decision of the Judicial Committee of the Privy Council that whether a colony had earlier come under the category of conquered or settled was a matter of law, not of subsequent historical enquiry and that Australia had always been classified as a settled or occupied colony. He was indignant that the judgment of "an English law lord who knew little about Australia and Aborigines" was still "binding on Australian courts as late as the 1970s".55 Yet he has often cited at length English authorities much earlier than 1889 to support his own contentions. He depends mainly on the British humanitarian movement, Colonial Office officials and Westminster Parliamentarians to support his contention that Aboriginal native title always formed part of the Australian legal system. He has acknowledged that the expressed intentions of Imperial Governments were invariably benevolent and accepts their sincerity. He has argued that Aborigines would have enjoyed much fuller legal rights and practical advantages if the policies of "imperial reformers" in London had been adopted rather than those of the settler governments. He has complained that British governments did not interfere more often and more decisively to veto Aboriginal land policies of Australian colonial governments after the 1850s. He has argued that "the Imperial motherland which essentially gave to the colonies power over land and affairs said to the Australian colonies at the time of the transfer of power: in taking the land off these people you have taken on a sacred trust of great proportions to look after, be responsible and spend money in providing education and health".56 Australian governments in general have been willing to spend generously for these purposes. He added that "according to the British authorities which we all revere so much [an ironical touch given the audience he was addressing], Aboriginal and European interests run in parallel over the great rangelands of Australia". The British authorities certainly hoped that the interests of the Aborigines and the new Australians could be reconciled, but this did not imply that a form of communal native title was accepted by the Australian courts.

Reynolds argued that with the grant of internal self-government by the Crown the colonies "only acquired a qualified right to dispose of land". This is true in the sense that the colonial governments were bound by the general rule of law, existing legal contracts and agreements entered into by the Crown. There remained, too, the power of the Crown acting through the Westminster Government to disallow colonial legislation on land as on other matters. Nonetheless the rights and powers over land of the colonial governments were extensive and energetically put to use.

Reynolds is right in believing that British governments continued to consider that the 'honour of the Crown" would be involved if successor colonial governments failed to carry out earlier pledges made earlier, but wrong in supposing that Westminster could act effectively to "protect customary land rights". He is wrong on three counts.

Firstly, there did not exist in law any communal native title to protect. Secondly, although Earl Grey and other British ministers drafted shared land leases to enable Aborigines to pursue traditional hunting, gathering and ceremonial activities on land given over to pasture, it was by the 1850s difficult enough from Adelaide, Sydney or Brisbane to compel settlers or Aborigines

to abide by such conditions and impossible from Westminster. The Aboriginal violence so carefully depicted by Reynolds himself was just as destructive of the intentions of land-sharing leases as were squatter violations of their terms. Thirdly, there would have been powerful colonial resentment after the 1850s against imperial interference in internal matters. The most radical policy in colonial politics, opening up the country to selection, was far more inimical to traditional Aboriginal land usage than was depasturing sheep by squatters. It is an irony that the New Left as represented by Henry Reynolds is so antagonistic to the land policies most dear to late nineteenth century Australian radicals and to Old Left historians such as Manning Clark, Russel Ward, Ian Turner and Brian Fitzpatrick!

Reynolds' ideology

Reynolds does not purport to be above political battles. He is proud that his The Other Side of the Frontier "was not conceived, researched or written in a mood of detached scholarship" but was "inescapably political, dealing as it must with issues that have aroused deep passions".57 He "challenges the legal and moral assumptions underlying the European occupation of Australia"58 he often describes white Australians as "Europeans" rather than "Australians". He was glad in 1972 that Australia was feeling "the swell of those anti-western currents which have followed the end of European predominance".59 Reynolds threatened white Australians that, unless Aborigines are satisfied in their demands, "they will seek sustenance in the anti-colonial, anti-European history of the Third World". A year of sustenance by a Third World government might concentrate a few thoughts. He cited with approval an Aboriginal submission to the United Nations Commission on Human Rights which denounced "the original primary genocidal acts" allegedly perpetrated upon them. He believes that in the "dark underside of the Australian mind" there is "violence, the arrogant assertion of superiority, the ruthless, single-minded and often amoral pursuit of material progress".60 Despite his admission that he missed for several years the significance of nineteenth century material he later found essential, Reynolds seems to find it hard to believe that those who disagree with him can be both honest and reasonable. He dismissed dissenters as purveyors of "the self-serving, unscrupulous propaganda of mining and rural interests."61

Even though he once included Chinese, Kanakas and collaborating Aborigines in the total of whites killed in warfare by Aborigines, Reynolds later limited "the moral responsibility for the dispossession" to "all generations of white Australians".62 Why do all non-white immigrants bear less of whatever guilt and moral responsibility has to be borne than do all white immigrants, even those who arrived after them?

Reynolds has asserted that their attitude to Aboriginal historical experience is the litmus test which indicates if white Australians have become assimilated to their continent or are still colonists at heart, and that Australians must refuse to "stand in the eyes of the world as a people still chained intellectually and emotionally to our C19th Anglo-Saxon origins, ever the transplanted Britishers". But he does not specify what in traditional Aboriginal economics, politics, morals or aesthetics should be imitated, or which elements of the British or wider Western heritage should be jettisoned.63 Reynolds has disclaimed "any guilt about black Australia", and expressed concern about the "strong tendency among white Australians towards inverted racism",64 but he has become a leading apostle of white guilt and finds it difficult to avoid that inversion. He stated correctly that "Aborigines have seen so much of the dark underside of white Australia", but did not add that they also saw much that was just and decent, or that much in Aboriginal ways, traditional or contemporary, is unattractive, too.

Reynolds seriously underestimates the massive problems faced by the colonists in establishing a modus vivendi with Aborigines. Forgetful of the massive evidence of Aboriginal violence he

compiled, he contrasts Aboriginal willingness to share with the "morally obnoxious" selfishness of colonists in not sharing their flocks and other goods. He stated bluntly:

"The settlers were transplanting a policy of possessive individualism, hierarchy and inequality. Aboriginal society was reciprocal and materially egalitarian, although there were important political and religious inequalities based on age and sex. Two such diametrically opposed societies could not merge without conflict. One or the other had to prevail."65

Reynolds appears to believe that the wrong one prevailed.

Reynolds may yet live to regret the consequences of his work and prove a Girondin or Menshevik. He wrote recently that:

"Anthropologists introduced western ideas of the sacred into the description and analysis of Australian Aboriginal society and religion. These ideas have since spread from anthropology into legal, political and popular discourse about Aborigines, becoming firmly embedded among the indigenous peoples themselves in the process."

He added that "sacredness can be invoked as part of a political strategy to obtain mundane advantages".66 Such candour makes him very vulnerable to attack from the Left. Reynolds has also shown concern about Aboriginal claims to "own their own history" and to exclude even sympathetic non-Aborigines from it. He fears that Australia may follow down the path taken by New Zealand, where a friend of his "was actually fire-bombed through a window because it was felt she shouldn't be writing Maori history".67

However, Reynolds is blessed with a wife who will not only prevent back-sliding, but will help to force the pace. ALP Left Senator Margaret Reynolds has been Prime Minister Keating's representative on the Council for Aboriginal Reconciliation. She was quick to condemn the guarantee given by Mr Keating and responsible federal Minister Frank Walker to Marshall Perron, Premier of the Northern Territory, that the McArthur Ratification Act would not be adversely affected by the Mabo Judgment. Senator Reynolds asserted that this step 'jeopardised the hard-won, patient and positive atmosphere in the Mabo negotiations . . . Its timing undermines the faith we all have in the process".68 She has also69 called for self-government in areas such as the Torres Strait, Kimberley and Arnhem Land, although she is a strong opponent of the rights given the existing States in the Australian Constitution.

There are even tougher radicals around than Senator Reynolds who see Mabo only as a first instalment in the complete dismantlement of the first two centuries of Australian legal and constitutional development. Law lecturer Valerie Kerruish was so impressed by Reynolds' "passionate contribution to the case for Aboriginal land rights" that she concluded, "If there were such things as unqualified goods, Reynolds' work would be one".70 However, Ms Kerruish immediately qualified her praise by regretting that in his work lurked "a suggestion that the law in general ought to be respected and that some particular institutionalisations of it are corrupt versions of an ideal common law of England or of natural law". For emphasis she added that she takes issue with Reynolds' assumption that there is a form of the common law of England which is entitled to the respect of all, since "the rule of law is not an unqualified good".71 If and when Ms Kerruish becomes one of those educating the judges, including the High Court, in the requirements of international and community opinion, we may look back with some regret to the golden days when the High Court was content to follow Reynolds' version of Australia's history and laws. As the ill-used Edgar declares in King Lear: "The worst is not, so long as we can say, `This is the worst'."

Yet, although what we now face may not be the worst, it is bad enough; bad enough, I believe, to justify our spending some time on examining how the work of Henry Reynolds influenced the High Court in Mabo in its revolutionary repudiation of the Australian past. Reynolds' opinions about Aboriginal violence and accommodation, terra nullius, communal native title and a host of

related matters have some intrinsic interest, but their adoption by the High Court makes them a matter of national importance rather than mere interest. If the Court considered Reynolds authoritative, even my brief analysis is surely sufficient to warrant some questioning of their judgment. If the judges relied mainly on scholars other than Reynolds, who were they? The High Court should share with all Australians the evidence on which it relied in framing some highly contentious historical assessments, particularly that Australia's national past is one of unutterable shame, assessments which the Court made the basis for the transformation of the land laws of the entire continent.

Endnotes:

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52 Ibid., p. 111.
53 Reynolds, 1993b, p. 125.
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58 Reynolds, 1987b, Frontispiece.
59 Reynolds, 1972, x- xi.
60 Ibid., xii.
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62 Reynolds, 1987a, p. 179.
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Chapter Two

Proving Native Title

John Forbes

Admirable ingenuity and oceans of ink have been expended on the theory of native title. Inevitably much of the discussion is still speculative at this stage. Disproportionately little attention has been paid to the likely realities of proof. It is no purpose of this paper to canvass the principle of special assistance to indigenes. The present question is whether there is much point in dressing some of it up as litigation and presenting it to the public as "judgments of the courts".

By June, 1994 claims to 30,000 square kilometres of land and water had been lodged under the Native Title Act 1993.1 Meanwhile allocations of trust land under the Northern Territory Act and various State schemes continue. How difficult (or easy) will it be to prove 'Mabo" title in practice frivolous claims aside? What sort of evidence will pass muster? Will claimants and non-claimants have equal access to evidence? Will respondent governments seriously scrutinise claims in the public interest, or will they be as passive as the Commonwealth in Mabo itself? Will other respondents find costs, delay, lack of access to witnesses or political pressure so burdensome and exasperating that the examination of claims will be less careful than it should be? The verdicts, after all, may be very large.

In theory at least native title claimants have the burden of proof when:

(1) compensation is claimed for extinguishment or impairment between 1975 and 1 January, 1994;

(2) it is claimed that native title still exists;

(3) it is claimed that native title has survived a "Category C" or "Category D" past act; 2

(4) the "right to negotiate"3 and compensation are claimed by someone who at that stage is a mere claimant of native title (title must be established before compensation is actually collected);

(5) when compensation is claimed for compulsory acquisition and the title has not yet been proved; and

(6) when a non-claimant application for a native title "clearance" is opposed by persons claiming such a title.

But in practice, proof will only be required if the claim or objection is not satisfied by "mediation" or "negotiation". In order to enlist these official processes of persuasion it is only necessary to file a claim which is not obviously hopeless.4 Then comes the possibility of inaction, surrender or compromise by a complaisant government or a payout by a non-government party under pressure of costs or delay. In a word, native title can be obtained either by proving it or inducing others to concede it. Will more titles be created by "mediation" than by adjudication?

A native title conceded by respondents and rubber-stamped by the National Native Title Tribunal (NNTT) will be no less secure than one established in a contested hearing. It may then be exchanged for some other form of title,5 possibly of much greater value. The NTA makes no explicit provision for ensuring that exchanges are of commensurate value; indeed, one wonders how inalienable native title, for which no market exists, can be properly valued for this or for compensation purposes generally. Agreed compensation may take the form of real or personal property.6

The Tribunal

All applications with respect to native title must begin in the National Native Title Tribunal or an approved State equivalent.7 Title and compensation claims which are opposed and which are not compromised in the Tribunal go to the Federal Court.8 The NNTT is an unusual tribunal in that it decides only one of several kinds of claim filed in it, namely "right to negotiate matters"9 contested applications for approval of "future acts". Otherwise it is a complicated government bureau which processes unopposed applications and agreements, transfers others to the Federal Court, and serves the Minister as an occasional commission of inquiry.10

The composition of the National Native Title Tribunal is governed by section 110. The President is styled "Justice". Australian politicians have a deep and abiding belief that the citizenry will more readily defer to a tribunal or administrative inquiry headed by someone bearing that title. On several occasions in its short history the Federal Court has served to confer it on persons who really exercise quasi-judicial or administrative (not to say political) functions. A view that this debases the currency has not prevailed. Non- Presidential members of the Tribunal will include "assessors" (as described below), people with "special knowledge in relation to Aboriginal . . . societies", and others chosen by the federal executive.

Whether legal decision makers be called courts or tribunals, justices or commissioners they fall into two broad categories, generalist or specialist. Special-purpose tribunals sometimes function in a politicised atmosphere and tend to be staffed by converts to the relevant cause. A former High Court judge was wont to say that the main qualification for appointment to some modern tribunals is the approved form of bias. A barrister with relevant experience observes that ". . . a lot of people who take these jobs are starry eyed . . . they've got a strong sense of mission and they do their best to get applicants up."11 In these circumstances the legislative process does not cease when the Act receives the Royal assent. The Family Law Act, for example, quickly and quietly accrued judicial amendments which parliamentarians could not achieve, did not contemplate, or were not prepared to sponsor.

Even in relatively apolitical areas, special-purpose tribunals engender a "club" spirit which constrains advocates to argue within narrow bounds of "correctness". The perennial tension between the advocate's long-term relationship with the judges and his short-term duty to his clients is more acute when a substantial portion of his practice is in a special-purpose tribunal, without the daily rotation of personnel which occurs in a regular court, particularly in larger State jurisdictions: "You have to go easy, you can't lose your credibility [scil influence] as counsel, especially when you have to appear before the same commissioner for three years or more".12

The first President of the NNTT lost no time in telling the courtiers of that body that the "stated objective of [the NTA] is to provide for the recognition and protection of native title . . . [and] nobody should be a member of or on the staff of the Tribunal who does not accept the legitimacy of that objective".13

At the commencement of the Tribunal's first case the President proclaimed the Tribunal's anxiety to "mediate" and to sponsor settlements: "[Our] main function . . . is to provide a means by which you . . . may reach a fair and reasonable agreement".14 Applicants were told, in terms reminiscent of early advertisements for the Family Law Act, that NNTT mediation is "not a win/lose process".15 Whether or not a claim could be established after a full hearing, a compromise registered in the Tribunal can "provide . . . for a plan of management which would allow for Aboriginal involvement in the management of the [land] and guaranteed rights of use and development [by] Aboriginal communities".16 "One form of agreement might involve a concession of . . . native title with an agreement involving the Commonwealth, State or Territory government, under which [the conceded title] is exchanged17 for other forms of statutory title or benefit".18 But alas, if no agreement is reached the parties face "a court case with no certainty

about the outcome and all the costs and tensions that court cases generate".19 (In reality costs are unlikely to trouble claimants or sponsor corporations.) It seems reasonable to take these as broad, albeit delicate hints that titles or compensation may sometimes, and perhaps often be secured by pressure rather than proof. Another view is that the "right to negotiate", like the Northern Territory veto, is apt to be an "instrument of blackmail".20 At all events the costs of the speedy escape to which the President refers21 will doubtless be passed on to the community at large by one means or another.

The Role of the Federal Court

If a title or compensation matter is not settled the Tribunal must refer it to the Federal Court.22 In so far as one may speak of tradition in a court of limited (ie piecemeal statutory) jurisdiction created less than 20 years ago, the set-up of the Federal Court for this purpose is most unusual. It is not required to observe the law of evidence.23 This is normal drill in a quasi-judicial tribunal but probably unprecedented in a court of law. In a formula which has become a mantra among promoters of new tribunals,24 the Court is told to adopt procedures which are "fair, economical, informal and just".25

Further, the Court is directed to "take account of the cultural and customary concerns of Aboriginal peoples".26 The intent and likely effect of this provision are by no means clear. Obviously the Court would be bound to take account of those things if evidence of them were placed before it in the normal manner. But if that is all that is meant, the provision is quite superfluous. But if, in fairness to the draftsman, one assumes that it is not superfluous, it appears that a special department of statutory "judicial notice" a broad area in which the court may give evidence to itself has been created. Normally, judicial notice27 and a judge's own investigations28 are very limited sources of legitimate evidence. Are we to take it that this sub-section of the NTA is a charter for the wide-ranging, extra-curial evidence-gathering which occurred in Mabo itself?29 If so, and unless the rules of natural justice have been impliedly abrogated, it will be the duty of the court, in every such case, and before judgment, to tell all parties about any "cultural and customary concerns" which are not in evidence but which it proposes to "take into account".30

We have not yet reached the end of the list of special arrangements. The Court is to be assisted by super-witnesses and potential de facto adjudicators31 styled "assessors"32 who "so far as is practicable . . . . are to be selected from Aboriginal peoples or Torres Strait Islanders".33 The Court's infrastructure offers other congenial employment; the Registrar may engage "consultants".34 The Court may direct evidence to be taken before an assessor,35 and in that event there is no right to cross-examine.36 These provisions are seen as considerable advantages for claimants37 and as commensurate handicaps for other parties:

"[They give] rise to the suspicion that the system is being weighted against development interests and in favour of native title claimants; why should not [they] be subject to the same standard of proof . . . as are other Australians for similar claims?"38

In a formal sense the standard of proof is the same but it is not difficult to see what the author of that passage means. However, in the light of practical evidence problems explained below, these provisions may not make a great deal of difference in the end.

The NTA apart, issues affecting State land would be within the jurisdiction of our most experienced courts, the Supreme Courts of the States. Perhaps it is still possible for them to retain some jurisdiction in these cases which, after all, belong to one of the oldest areas of superior court jurisdiction, real property law.39 The Supreme Courts are still properly described as our superior courts of general jurisdiction. Their judicial histories do not cover a mere twenty years, but 100 to 150 years. The Supreme Courts are not confined to a piecemeal statutory charter, and they handle State and federal criminal matters in which the law of evidence is most

exacting. Appointments to Supreme Courts are more visible to the legal profession, and are not in the gift of just one central government which may hold the power of patronage for many years.

Issues in Native Title Cases

The NTA "does not dispense with problems"40 arising from the very broad, not to say nebulous Mabo criteria. It makes no attempt at codification.

Whose Title?

First, the proper claimants must be identified. In Mabo the High Court wandered to and fro among "indigenous inhabitants", "clan or group", "people", "community", "family, band or tribe" and several other expressions. The Act seeks to dispel this miasma by creating "approved" corporations to assist claimants and to hold property on their behalf.41 Power tends to be centripetal, and from time to time it may be doubted whether these title brokers are duly representative. Groups in the Northern Territory have challenged the hegemony of the Central and Northern Land Councils,42 and in one instance43 the Federal Court had to order a Council to assist a group of which the Council did not approve. It is to be hoped that distribution of benefits to all beneficiaries will be just and efficient although recent history is not particularly encouraging.44 There is a question whether emoluments absorbed by a labyrinth of "representative" corporations and sub- corporations will leave sufficient funds to those for whom the elaborate structure has been erected.45 If only an oligarchy prospers, the self-reliance to which we all look forward will once more be postponed.

The Customary Connection

The next step is to establish a sufficient connection between the claimants and a specific46 tract of land. This is a question of "presence amounting to occupancy" from a time "long prior" to the "point of inquiry".47 Plainly these tests leave room for creative jurisprudence, particularly when the rules of evidence and normal court procedure do not apply. It is no objection that native customs at the time of European settlement are "incompletely known or imperfectly comprehended".48 Nor does it matter that the customs did not exist at the time of British settlement or even 100 years ago, because they may continue to evolve up to the time of litigation. It is enough that "any changes do not diminish or extinguish the relationship between a particular tribe . . . [and] particular land"49 and that "the people remain as an identifiable community".50 According to Toohey J this notion of continuity is sufficiently elastic to survive European influences, such as the "profound" effects of Christianity, the use of schools and other modern facilities, and (in the case of the Murray Islanders) a change from gardening, fishing and barter to a cash economy substantially dependent upon welfare payments and other government assistance.51 These are elusive targets for any opponent, and it appears that arguments based on uncertainty or discontinuity of alleged customs can expect a rough passage,52 not least in special tribunals. Even in the Murray Islands case as Deane and Gaudron JJ conceded the evidence exhibited "areas of uncertainty and elements of speculation".53 "There may be difficulties of proof of boundaries or of membership of the community . . . but those difficulties afford no reason for denying the existence of a proprietary community title . . . 54. A court may have to act on evidence which lacks specificity . . . ".55 Mabo suggests that claimants' evidence will be treated gently.

Creativity in the Federal Court or the NNTT may be encouraged by some extra-judicial precepts of Chief Justice Mason. A remarkable sequel to Mabo was a sustained effort by the Chief Justice to defend that decision in particular and judicial legislation in general. (What would the reaction have been if the dissenting judge, Dawson J, had traversed the country or the newspaper columns expounding his view of the proper limits of judicial power?) The Chief Justice defended the

decision on two grounds: first, that judicial legislation is part and parcel of the common law. This truism was adorned with heavy patronage of anyone so "ignorant"55 and so addicted to "fairy tales"57 as to question it. However, the Chief Justice ignored the real issue, namely the difference between incremental development over many years and a sudden, major volte- face58 a difference of degree which is arguably a difference in kind.

Sir Anthony's second plea is more intriguing:

"I think that in some circumstances, governments . . . prefer to leave the determination of controversial questions to the courts rather than [to] . . . the political process. Mabo is an interesting example."59

Unfortunately we are not told how the legislative judge decides that government has "left it" to him. But can the silent thought-process be other than this? "Parliament has not legislated. I think it should have. So I will."

What Particular Rights, if Any?

Assume that a claimant group, a tract of land, and "connecting" customs have been ascertained with some degree of certainty. Now the nature and extent of the subject title have to be determined. There are no a priori answers; potentially every case is unique:

"The content of the traditional native title . . . must . . . be determined by reference to the pre-existing native law or custom . . . [It] will, of course, vary . . . It may be an entitlement . . . to a limited special use of land in a context where notions of property in land and distinctions between ownership, possession and use are all but unknown."60

The rights may range downwards from something akin to freehold to occasional rights of passage.

Access to Evidence: Will some Parties be more Equal than Others?

There will be no discussion here of technical rules of evidence. Learned papers have been written about their application to native title claims,61 but with due respect the relevance of those writings is not apparent. Even if the rules of evidence applied here (which they do not), they could formally be satisfied by appealing to some obscure exceptions to the rule against hearsay.62

The present question is not one of legal theory but of reliability and accessibility. Present indications are that, hopeless claims aside,63 it will be easy to mount a prima facie case of native title and very difficult to contest it, because the vital witnesses will often be at the beck and call of the claimants or their sponsor corporation.

Much of the evidence in these cases will come from members of the claimant group, asserting what others have told them about the words or actions of ancestors more or less remote. In Northern Territory land rights cases64 this "lay" testimony is commonly called "traditional evidence". "Traditional" witnesses will be supported by the "expert" evidence of anthropologists or other social scientists who will in turn depend, at least in part, upon what past or present members of the claimant group have told the witness or his professional colleagues. In short, "lay" evidence may be recycled in scientific packaging.

"Traditional" Evidence

This will often consist of hearsay upon hearsay, and apart from the difficulties of cross-examination which gave birth to the hearsay rule other parties may have to cope with recent invention of what purports to be ancient history. A former Supreme Court judge with more trial experience than some members of the High Court suggests that customs "are likely to be recalled in a manner favourable to the claimants which is, after all, simply human nature."65 A government lawyer in Darwin who regularly deals with land claims says that:

"Anthropologists and lawyers for claimants stay with the people concerned and work up their evidence with them the night before. There is an employee of one of the Land Councils who is notoriously unethical in preparing and presenting witnesses. Land Councils treat old and unsophisticated people who are the nominal claimants as their personal property. Land Councils have unlimited access to them, others have none."66

Another lawyer with relevant experience, Graham Hiley QC, gives an interesting account of practice in Northern Territory cases.67 He describes an extraordinary process of "group evidence" which "enables collaboration and concoction" and which makes it ". . . difficult to identify precisely which person knows what and which knows nothing . . . Reading the transcript [afterwards] one could . . . assume that all of the members of that group had that knowledge"68. Hiley adds that leading questions and the paraphrasing of indistinct answers are common in the Territory tribunal.69

When cross-examination is allowed in NTA cases70 it will be hard to test direct evidence, let alone hearsay, if a non-claimant party has little or no access to alternative versions. Evidence of the kind which Hiley describes is extremely difficult to cross-examine and to assess, even if it were "correct" to attempt such an exercise in the club atmosphere which special tribunals engender. In dealing with assertions of native customs, a standard technique of cross-examiners reference to prior inconsistent statements will rarely be available. Claimants' evidence may self-levitate by finding its way into assessors' reports.71 Very occasionally it is possible to make bricks without straw. A Sydney barrister with a Territory practice states:

"If you are lucky you can go to the history books and find out that people who are claiming a connection from time immemorial only go back to 1930."72

The same barrister adds:

"It's not the same tradition when you question every one of the Aborigines. Quite often you find that there are huge73 discrepancies between what the claimants, or some of them, are now saying and what the anthropologist may have written in his report. They say `Our law never changes' but internally they're highly political, and there are struggles for control of land all the time."

However, the nearest approach to primary facts in this type of litigation is what claimants say they have been told and believe about territories and "connections".74 The first inquiry into South Australia's Hindmarsh Bridge project was told nothing about certain "spiritual beliefs" while a second inquiry, a few months later, heard a great deal about them.75 One wonders whether events of this kind will support "revised native title applications" under the NTA.76

It is uncertain whether the special adjudicators will take long-established precautions with assertions which are easy to make and well nigh impossible to check,77 and with "experts" whose professed "science" is dubious or whose impartiality is questionable. Certainly they were taken by Moynihan J, the Supreme Court judge who actually saw and heard the Mabo witnesses, but the High Court paid remarkably little attention to his pointed comments on matters of credit. (Perhaps an enigmatic remark that the primary findings "unavoidably contain areas of uncertainty"78 marks the burial place of those comments.) No doubt the traditional evidence in Mabo was strong; the area claimed was compact, well-defined, and the people were non-nomadic. It was a very carefully selected, if not unique, test case. However, some of Moynihan J's comments are of wider significance. He suspected that evidence of certain "immemorial customs" owed a good deal to "The Drums of Mer", a travelogue by a popular writer of the 1940s.79 He questioned a lavish use of interpreters:

"On a number of occasions I soon gained the impression that the witness both understood and could speak English . . . The arrangement gave the opportunity to . . . hear the question twice and time for the witness to collect his or her thoughts and to collaborate . . . on an answer".80

Moynihan J was "not impressed with the creditability of Eddie Mabo" who seemed "quite capable of tailoring his story to whatever shape he perceived would advance his cause".81 A most careful perusal of the High Court judgments will not alert the reader to these comments by the only judge who saw and heard the witnesses.

At a land rights conference in Queensland last year a federal government adviser urged delegates to go forth and research their "rights" without delay. One need not presume that the word "research" was used as a euphemism for something more creative, but the scope for reliable reconstruction seems quite limited. Maps of tribal areas which can still be recalled are hotly disputed, even when they are based on years of field research.82 Scholars in this field have observed that Land Councils "have the resources, contacts and influence to . . . establish the extent of traditional territories in [their] regions" but they and their lawyers find it convenient "to negotiate claims without any self-imposed limits".83 One map-maker recommends that native title issues be settled without "reinventing knowledge or elaborating traditions that are imperfectly known".84

The Expert Evidence

Land rights litigation has created a new and rapidly growing expert-witness industry. Anthropologists, once rarely seen in a witness box, are now as much in demand in these cases as neurologists and orthopaedic specialists are in personal injury litigation.85 But while most of the latter are independent practitioners, the "experts" used by native title claimants are usually employees of the Land Council which sponsors the claim86 and have spent long periods in close association with the nominal applicants on whose behalf they testify. In other litigation this would certainly not enhance an expert's credit, but special tribunals develop cultures of their own. Judicial doubts about "experts" who thrive on forensic appearances and practise advocacy from the witness box are not so candidly expressed today, but ruminations of a distinguished English judge are still worth considering:

"[I]n matters of opinion I very much distrust expert evidence, for several reasons. In the first place, although the evidence is given upon oath . . . the person knows he cannot be indicted for perjury, because it is only evidence as to a matter of opinion . But that is not all. Expert evidence . . is evidence of persons who sometimes live by [testifying]".

Similar doubts still surface now and then88 but they tend to be unfashionable.

More unfashionable in an age of ubiquitous tertiary certificates and proliferating "disciplines" is any suggestion that an expert's professed science is better described as pseudo-science. However, an English judge recently made so bold as to say:

"In the lush pastures of the common law a number of sacred cows graze. One answers to the name `expert evidence' . . . Properly cared for it could provide good progeny, but some strains are not worth encouraging."89

And an Australian psychologist with long clinical and teaching experience bravely writes90:

"It is time academics admitted that the whole of modern psychology is not so much a coherent discipline as a ramshackle collection of quasi-scientific annexes under constant renovation. It simply does not hang together. . . . Dozens of ingenious laboratory gimmicks do not add up to a single good theory."

But the legal culture is less confident these days; judges sense that hell hath no fury like a "social science" scorned, and they are reluctant to subject debatable claims of expertise to a searching voir dire.91 They are unlikely to change tack here. But surely the new "expert evidence industries" are no less open to temptation or error than the old? On the contrary, the vaguer a purported science, the greater scope, in the heat of litigation, for fallacies conscious or unconscious, misrepresentations well or ill-intentioned.

Yet the law has always prescribed a threshold test before a purported expert is entitled to testify as such: does the suggested science really exist?92 If so, it remains to be seen whether the witness shows sufficient professional detachment to be credible. Even if both requirements are satisfied, the expert evidence is only as good as its factual foundation, if any, in the case at hand.93 In testing expert evidence a cross- examiner often seeks to expose the foundational facts of an opinion and the way in which disputed conclusions were drawn. He needs experts of his "own" to assist him in framing his cross-examination and to give contrary evidence at the appropriate time. The best of advocates cannot produce a magic wand and regularly make bricks without straw. But for reasons soon to appear, access by non-claimants to evidence of their own may be an unattainable luxury in this jurisdiction.

In any event, there are peculiar difficulties in getting to grips with the foundational facts of land rights "experts". A barrister who has frequently attempted to do so says:

"There are very few empirical facts when you're dealing with anthropologists. They repeat what they say someone else has told them. The hearsay of claimants is fed through an anthropologist and emerges as `expert evidence'. The `facts' of an anthropologist are commonly what a client or study-subject told them about his perceived rights or wishes."94

Access to Expert Evidence

The well-established species of expert evidence are (in principle) available to all, have little ideological content and do not suffer the censorship which current patois calls "political correctness". Due to the delicacy of this subject published material is not in over-supply, but with patience a surprising amount is to be found. Some of it is in a form which the law sees as particularly impressive voluntary statements against interest.

Hiley QC records his impression that an anthropologist-witness who fails to support, let alone criticises a "land rights" claim risks the "resentment of, and possible alienation from his peers".95 Elsewhere the same senior counsel observes96:

"To the best of my recollection an expert anthropologist has never been called to give evidence in a land claim except on behalf of the claimants or by counsel assisting the Land Rights Commissioner . . . It seems that parties other than the claimants usually find some difficulty in retaining an anthropologist who has the appropriate experience . . . and who is willing and able to positively testify against the claim . . . During the Jawoyn claim, when counsel assisting did in fact seek to call an anthropologist who had some experience with the Jawoyn people, the attempt to call him was met with repeated and strenuous objections . . . There has been an understandable reluctance by anthropologists to be seen to be advising parties other than Aborigines".

Hiley adds that access to primary materials (that is, what an anthropologist claims to have been told or shown by his clients) is difficult to obtain, and in Northern Territory cases at least, is often strongly resisted. The National Native Title Tribunal may prohibit the disclosure of evidence,97 but presumably natural justice will require disclosure to all parties of anything which is likely to influence its decisions. The same point has already been made about judicial notice of "cultural and customary concerns".98

Another barrister with experience in Northern Territory cases states:

"I was involved in an Aboriginal land claim and I rang round various universities to try and get an expert witness and no one would be in it. They were worried about their promotion. A couple of them said that they would never ever get a permit to go on to any Aboriginal land again to do work, and they would be effectively blackballed in their profession. And that's a real problem that respondents face in these applications."99

A government lawyer in Darwin adds:

"Land Councils have a mortgage on anthropologists, particularly in the areas which they have selected for claims. The government has never produced an anthropologist. They are terrified of bringing their career to an abrupt end".100

Admissions

But what of statements against interest?

In March, 1993 the President of the Australian Anthropological Society was reported as follows: "Most anthropologists are more comfortable working for Aborigines than in some situation where they could be construed as working against their interests".101 In 1991, at the Kakadu inquiry, an anthropologist in the employ of the Northern Land Council declared that the primary duty of his profession is "to represent the people they work with". The inquiry chairman asked him whether he and his colleagues would use their professional position to offer false or incomplete evidence. Obliquely the witness replied that he would lose his job if he questioned causes sponsored by his employers.102 In such circumstances there need not be positive falsehood; embarrassing information may simply be suppressed. The admissions of Mr Peterson and his colleague are in keeping with the Revised Principles of Professional Responsibility of the American Anthropological Association, to which many Australian anthropologists belong:

"Anthropologists' first responsibility is to those whose lives and cultures they study. Should conflicts of interest arise, the interests of these people take precedence over other considerations . . . Anthropologists . . . must consider carefully the social and political implications of the information they disseminate."103

It would be difficult to find a more open confession of the expert witness doing double duty as advocate. Apparently no exception is made for occasions when sworn evidence is required. Scepticism about land claims would not only conflict with these articles of faith; it would also expose the sceptic to prejudice in the public sector upon which social scientists heavily depend for employment universities, government departments, land councils and kindred organisations in which pressures to be "correct" tend to be strong. Any anthropologist who breaks ranks is liable to be denied access to the very people and places he must visit in order to prosper in his calling and to rank as an influential expert witness. Catch-22! It is hardly surprising that "as a rule" anthropologists "do not make their services available to objectors to a claim".104

The writer recalls an American "expert" who was a prospective witness in a land rights case. In conference there was no pretence of professional detachment. The witness candidly identified with the claimant "team", offering unsolicited and highly partisan views on aspects of Australian history.

Consider the likely state of personal injury litigation if the medical profession sent to Coventry any of its members who dared to give evidence on behalf of defendants. Out of court "agreements" would certainly be as common as President French hopes they will be in the NNTT, but would they commonly be free and fair?

There are other statements against interest. Dr Peter Sutton acknowledges that "the closed ranks of anthropologists [are] denying [miners] access to . . . scientific expertise".105 His colleague Professor Maddock is equally candid and more specific:

"The suspicion that anthropologists who give evidence for Aboriginal claimants are hopelessly biased is strengthened by the difficulty objectors to land claims have in getting anthropological advice. The defence lawyers in the Gove case, for example . . . ended up with nothing better than a retired missionary. In the Alligator River claim, the mining company Peko-EZ strongly contested parts of the claim, but the research on which they relied was carried out by a solicitor who apparently had no training in anthropology".106

Maddock frankly and courageously says that bias "arises from the nature of anthropological research"107 and Dr Sutton adds:

"The problem with a sociological diagnosis, as opposed to a medical one, is that in our culture a medical diagnosis has very little to do with a physician's politics, while a sociological diagnosis can have quite a lot to do with an anthropologist's politics".108

These admissions and professional experiences suggest that the comments of a senior journalist should not be dismissed out of hand:

"Most of the people who have undertaken the study of anthropology in relation to Australian Aborigines have been people who . . . tend to believe that their subjects have a grievance and they sympathise with it . . . So when it comes to the giving of evidence on land claims it is going to be difficult to find trained anthropologists . . . who are not strongly biased in favour of the claims. [S]ome individuals with a clear political agenda have been active and influential in these matters for many years. [Likewise] there are historians who believe that any invention is justified in the service of what they see as the aboriginal cause".109

If Few Real Contests, Why Have Courts?

One looks in vain for evidence or argument in answer to these criticisms. The attitude seems to be that the position of Mr Peterson and the American Anthropological Society is so natural and proper that there is no case to answer. The complete absence of self-consciousness may indicate that the present questions have not been raised in the sequestered vale of land rights litigation. If so, that is cause for concern.

Will proof of title, in any but frivolous cases, really be the "arduous process" that one interested historian110 predicts, or will rebuttal be much the harder task? How often will the existence and content of native title be based on ex parte evidence of a claimant's anthropologist? A spokesman for the mining industry predicts that "under the tribunal system . . . [there] will develop a loose interpretation of the Mabo decision and certainly the federal legislation provides room for that . . . if claims are made they will tend to be granted."111 This is consistent with Maddock's survey of Northern Territory cases in the 1980s: "[I]t has been usual for the Commissioner to recommend that most or all of the land claimed be granted".112

It also accords with the experience of a Sydney barrister who handles such cases; he recalls only one claim which was rejected, although a small minority of claims resulted in awards of substantially less than the area claimed.113 (But were these real failures? Presumably there are "ambit claims" even in this jurisdiction.) The high success rate is hardly surprising when one hears of the overwhelmingly ex parte nature of the "traditional" and anthropological evidence. Even the most impartial of tribunals must hesitate before it rejects an uncontradicted "expert".114

Perhaps the best prospects of gaining access to rebuttal evidence will arise when several groups compete for the same area. The Wik claim at Weipa faces competition115 as do some other cases brought in Mabo's name.116 More recently a native title claim has been made over land already granted to Aborigines under State legislation.117 In these instances the experts may not be quite so sure where their "first responsibility" lies and the lay witnesses will not be univocal. But in the end there may simply be a compromise division of spoils rather than absolution for other parties or for the taxpayer.

Governments and claimants have unlimited funds for litigation of this kind, but even governments meet brick walls when it comes to evidence: "Some of the claims are no doubt genuine but there is no way of testing the evidence of the traditional witnesses or the experts",118 a Darwin lawyer complains. Besides, it would be naive to suppose that all governments will rigorously test claims advanced under the NTA. Governments have political agendas and popularity with special-interest groups to consider, and they are better placed than other litigants to make the country pay for their compromises. It deserves to be better known that the Commonwealth was not a zealous guardian of the common weal in Mabo, as Sir Anthony

Mason himself has noted.119 Connolly QC puts it plainly: "The Commonwealth, instead of defending the interests of Australians generally, ran dead".120

Non-claimant parties may have their best prospects when an application turns on an extinguishment issue. Partisan evidence on other issues will not avail a claimant121 if extinguishment occurred before the Racial Discrimination Act arrived in 1975. (Of course extinguishment after that event may call for compensation.) An issue of this kind will let in "harder" and more accessible evidence than "traditional" or anthropological material, and according to Mason CJ claimants bear the onus of proving that extinguishment has not occurred.122

If the wisdom of our rulers requires greater assistance to Aborigines (and not merely fairer or more efficient distribution of present funding), is it necessary to dress a minor part of it up as complex litigation? The Land Fund,123 the 1976 Northern Territory Act and similar State laws will probably produce more "native title" than Mabo or NTA applications ever will.124 If access to evidence in native title cases is nearly so unequal as well-informed critics say, would it not be cheaper, quicker, more honest and conducive to "reconciliation" to dispense with tribunals, "assessors" and so on in favour of a simpler system within the country's capacity to pay? While it may be politically expedient to depict the fruits of the special NNTT Federal Court jurisdiction as rigorously tested "judgments", it seems that many native title actions will be pseudo-litigation producing what are really ex parte orders of a very expensive kind be this due to governmental complaisance, non-access to evidence, or (in the case of private parties) costs and exasperating delays.

A frankly administrative scheme may be better for all concerned tribunalists, expert witnesses and land rights lawyers excepted than a litigious facade to legitimise a fraction of future allocations of public assets.

Endnotes:

1. Australian Journal of Mining, June, 1995, 5.
2. As defined in ss 231 and 232 of the Native Title Act 1993 (Cth) ("NTA").
3. NTA ss 26ff.
4. NTA s 63.
5. NTA s 21.
6. NTA s 51(6).
7. A State body may replace the NNTT but only if the federal authorities approve it: ss 27(1), 43, 251.
8. NTA ss 74, 81.
9. NTA ss 26ff.
10. NTA s 137.
11. Sydney barrister, interview with author, 3 June, 1994.
12. Ibid.
13. Justice French, President of the NNTT, Working With the Native Title Act, Sydney, 16 May, 1994, National Native Title Tribunal, mimeo 41 pages at 19.
14. Introductory Notes for Mediation Conference, 14 May, 1994 (Wiradjuri claim to Wellington Common), NNTT mimeo 9 pp, at 2.
15. Ibid.
16. Ibid at 4.
17. Cf NTA s 21(3). Conceivably the conventional title received in exchange may be more marketable, and more valuable than the original acquisition.

18. Justice French, Working With the Native Title Act, op.cit. at 25.
19. Ibid at 7.
20. The Australian Financial Review, 8 April, 1993 : "Doubts Over Promised Land".
21. Justice French, Introductory Notes for Mediation Conference, op.cit. at 4; Working With the Native Title Act, op.cit. at 5.
22. NTA s 74.
23. NTA s 82.
24. Cf Electoral and Administrative Review Commission (Qld) Report on Review of Appeals from Administrative Decisions, Vol I : Govt Printer Brisbane, August, 1993, where it provides the title of Chapter 7.
25. NTA s 82(1).
26. NTA s 82(2).
27. Holland v Jones (1917) 23 CLR 149, 153; R v Dodd [l985] 2 Qd R 277; Gordon M Jenkins & Associates Pty Ltd v Coleman (1989) 87 ALR 477; Malaysian Airlines System v Wood [1988] WAR 294.
28. Middleton v Freier [1958] St R Qd 351; Kristeff v R (1969) 42 ALJR 233.
29. For a cogent criticism of the procedure in that case see S E K Hulme, QC : Aspects of the High Court's Handling of Mabo in The High Court of Australia in Mabo, AMEC, Leederville, WA 1993 23 at 36-38, 50- 55.
30. On judicial notice and natural justice see Keller v Drainage Tribunal [1980] VR 449; R v Paddington and St Marylebone Rent Tribunal; ex parte Bell London and Provincial Properties Ltd [1949] 1 All ER 720; Angaston & District Hospital v Thamm (1987) 47 SASR 177.
31. Officially of course an assessor is "not to exercise any judicial power of the Court": NTA s 82(3).
32. NTA s 83.
33. NTA s 218, inserting s 37A(4) in the Federal Court Act 1976.
34. NTA s 132.
35. NTA ss 83, 93.
36. NTA s 93(5).
37. The Electoral and Administrative Review Commission (Qld.), adopting a submission by a former President of the Victorian AAT that tribunals be "agenda free", has recently rejected the idea of "representative" tribunals (upon which representatives of sectional interests sit as adjudicators): Report on Review of Appeals From Administrative Decisions, Govt Printer Brisbane, September, 1993, 55. Of "representative tribunals" it was well said: "The result is in practice, as we all know, that a (representative) is a partisan and an advocate rather than a judge . . . It is not easy to imagine a less satisfactory tribunal, viewed as judicial body": In re Skene's Award (1904) 24 NZLR 591, 597-598 per Denniston and Chapman JJ.
38. Australian Mining and Petroleum Law Association, Submission on the Native Title Bill 1993 (1994) 13 AMPLA Bulletin 41 at 48.
39. NTA s 12.
40. Justice French, Working with the Native Title Act, op.cit. at 2.
41. NTA s 56 - 58.
42. The Australian, 11 February, 1993 : "Tribal Guide Through a Legal Maze"; Sunday Mail (Brisbane), March 7, 1993 : "How to Kill the Golden Goose"; Pareroultja & Ors v Tickner (1993) 117 ALR 206.
43. Majar v Northern Land Council (1991) 37 FCR 117.
44. The Australian, 30 August, 1993 : "ATSIC Urges Tighter Control of Funds"; 15 December, 1993 : "Auditor Slams Land Council"; 29 December, 1993 : "Black Agency Collapse Spurs

Inquiry"; 22 April, 1994 : "Staff Squander Black Funds on Luxury Goods"; Courier Mail (Brisbane), 2 December, 1993 : "Millions Wasted: Auditor"; 4 December, 1993 : "Black Leaders Should Tighten Finances: Goss"; 20 April, 1994 : "Shape Up or Be Sacked, Warner Warns Black Councils"; Sun-Herald (Sydney), 20 February, 1994 : "Prosecutions May Follow Investigation"; Sunday Mail (Brisbane), 19 June, 1994 : "Homes Company Crashed After Boss's Property Deals"; The Australian, 9-10 July, 1994 : "Black Councils in Financial Disarray" (report of Qld CJC inquiry).

45. See eg The Australian, 18-19 June, 1994 : "Darwin Sentiment May Yet Pay Off; Courier Mail (Brisbane), 25 May, 1994 : "Fourth World Shame", quoting a woman with "25 years experience in indigenous health care" to the effect that "crumbs (are received) at grass root level" while too much public money is "gobbled up in administration".

46. Coe v The Commonwealth (1993) 68 ALJR 110.

47. Mabo v Queensland (No 2) (1992) 175 CLR 1 at 188-189.

48. Ibid at 99 per Deane and Gaudron JJ.

49. Ibid at 110 per Deane and Gaudron JJ.

50. Ibid at 61 per Brennan J; see also at 70.

51. Ibid at 192 per Toohey J.

52. Ibid.

53. Ibid at 115.

54. Ibid at 51-52 per Brennan J.

55. Ibid at 62 per Brennan J.

56. The Australian, 6-7 November, 1993 : "Chief Justice Attacks Mabo Critics".

57. The Australian, 8 November, 1993 : "It's Time to Rule Legal Fairy Tales Out of Court".

58. As more recently manifested in the Court's abolition of the privilege against self-incrimination with respect to corporations: Environment Protection Authority v Caltex Refining Co Pty Ltd (1994) 68 ALJR 127.

59. "Putting Mabo in Perspective", Australian Lawyer (July 1993) Vol 28 at 23. See also The Australian, 2 July, 1993 : "Chief Justice Defends Ruling as Lawful".

60. Mabo v Queensland (No 2) (1992) 175 CLR 1 at 88 per Deane and Gaudron JJ; see also at 61 per Brennan J.

61. Eg G McIntyre, Proving Native Title, Centre for Commercial and Resources Law, Perth, June, 1994 mimeo 50 pp.

62. Statements as to pedigree and statements as to public or general rights: Simon v R [1985] 2 SCR 387 (Canada SC); Milirrpum v Nabalco Limited (1971) 14 FLR 141 at 154; P Gilles, Law of Evidence in Australia, 2nd edn, 307, 313.

63. Frivolous and vexatious cases can be weeded out by early administrative action, although the decisiveness with which these powers are exercised remains to be seen: NTA s 63(1).

64. Based on the Land Rights (Northern Territory) Act 1976 (Cth).

65. Courier Mail (Brisbane), 14 September, 1993 : "Native Title Decision Bogus".

66. Government lawyer (Darwin) to the writer, 1 June, 1994.

67. G Hiley, Aboriginal Land Claims Litigation (1989) 5 Aust Bar Rev, 187.

68. Ibid at 195.

69. Ibid at 194-195.

70. In the Tribunal cross-examination requires leave: NTA s 156(5).

71. NTA s 86. Another view is that assessors, however pro-claimant they may be, will receive no co- operation if they do not belong to the native tribe or people involved in the litigation: Government lawyer, Darwin, to author, 1 June, 1994.

72. Sydney barrister to author, 3 June, 1994.

73. Emphasis in original.
74. Ejai v The Commonwealth, unreported, Sup Ct of WA (Owen J), 18 March, 1994.
75. The Australian, 15 July, 1994 : "Bridge Probe Did Not Hear Objections".
76. NTA s 13(1)(b).
77. Such as self-serving claims against deceased estates.
78. Mabo v Queensland (No 2) (1992) 175 CLR 1 at 115 per Deane and Gaudron JJ.
79. Findings of Moynihan J of the Queensland Supreme Court delivered 16 November, 1990, entitled Determination Pursuant to a Reference of 27 February, 1986 by the High Court of Australia to the Supreme Court of Queensland to hear and determine all issues of fact raised by the pleadings, Supreme Court Brisbane, Vol I (mimeo 227 pp), 60.
80. Ibid 66. See to the same effect R v Burke (1858) 8 Cox CC 44 at 47 and Filios v Moreland (1963) 63 SR (NSW) 331 at 332-333.
81. Ibid 79.
82. The Australian, 11 February, 1993 : "Tribal Guide Through a Legal Maze" (map by Dr Stephen Davis showing that the tribal lands which can be established do not agree with the boundaries drawn by ATSIC and Land Councils); Courier Mail (Brisbane), 2 April, 1994 : "Government Hits Tribal Map".
83. S L Davis and J R V Prescott, Aboriginal Frontiers and Boundaries in Australia, Melbourne UP 1992, 2.
84. The Australian, 16 February, 1993 : (letter, J R Prescott).
85. "The content of the land rights legislation itself has largely been engineered by anthropologists in concert with lawyers": P Sutton "Anthropology Outside the Universities in Australia", A (American) AS Newsletter, 15 June, 1982, 12, 21.
86. K Maddock, Your Land Is Our Land, Penguin Books Aust, 1983, 153.
87. Lord Abinger v Ashton (1873) LR 17 Eq 358 at 373-374 per Jessel MR.
88. See eg Lynch v Lynch (1966) 8 FLR 433 and R v Turner [1975] QB 834 (psychology/psychiatry) and generally Newark Pty Ltd v Civil & Civic (1987) 75 ALR 350 at 351 per Pincus J. Some guarded scepticism about "social work" and evidence-gathering appears in Taylor v L; ex parte Taylor [1988] 1 Qd R 706.
89. Quoted in V D Plueckhan, "Legal Dilemmas in the Use of Expert Medical Evidence" (1982), 14 Aust Journal of Forensic Science, 40.
90. Ronald Conway, "Integrity Attack Ignores Fruit of Freud's Genius", The Australian, 22 June, 1994. (The writer was formerly a senior lecturer at a Victorian university and claims 30 years' practice at a Melbourne hospital.)
91. A preliminary inquiry to see whether evidence is admissible in a case of purported expert evidence, and inquiry whether the professed "science" really exists as such: Clark v Ryan (1960) 103 CLR 486; Fisher v Brown [1968] SASR 66.
92. Clark v Ryan (1960) 103 CLR 486 at 491.
93. Steffan v Ruban [1966] 2 NSWR 622; English Exporters v Eldonwall Ltd [1971] Ch 415; Crompton v Commissioner of Highways (1973) 5 SASR 301.
94. Sydney barrister to writer, 3 June, 1994.
95. G Hiley, Aboriginal Land Claims Litigation (1989), op.cit. at 191.
96. Graham Hiley, Aboriginal Land Rights in the Northern Territory [1985] AMPLA Yearbook, 491, 505- 506.
97. NTA s 155. Cf Justice French Working With the Native Title Act, op.cit., at 24: "Following acceptance of an application two files will be created, one to be designated an open file . . . There will also be a confidential file . . . at the discretion of the Registrar."
98. NTA s 82(2). See note 30 and preceding text.

99. Sydney barrister to writer, 3 June, 1994, emphasis in original.
100. Government lawyer, Darwin, interview with author, 1 June, 1994.
101. The Australian, 5 March, 1993 : "The Mabo Factor – Learning from the Past", quoting Mr Nic Peterson.
102. Ron Brunton, "Down to Earth", IPA Review, (1992) Vol 45 No 1, 51.
103. American Anthropological Society ("AAS") Newsletter, June, 1990, 44.
104. K Maddock, Your Land Is Our Land, Penguin Books Aust, 1983, 83. Any access which non-claimants do gain to relevant facts, opinions or counter-legends will be expensive. The going rate for consultant anthropologists is said to be about $500 a day, and influential "lay" witnesses with indigenous associations command between $100 and $200 a day: The Australian, 5 March, 1993 : "The Mabo Factor Learning from the Past".
105. P Sutton, "Anthropology Outside the Universities in Australia", AAS Newsletter, 15 June, 1982, 12, 21.
106. K Maddock, Involved Anthropologists in E. Wilmsen (ed), We Are Here, Univ California Press 1989, 155, 167.
107. Ibid, 168.
108. P Sutton, "Anthropology Outside the Universities in Australia", op.cit., 12, 22.
109. The Australian, 8 December, 1992 : P P McGuinness, "Strict Assay is Needed on This Mother Lode".
110. The Australian, 11 October, 1993 : "The Spirit of Mabo in Danger of Extinction".
111. The Australian, 8 February, 1994 : "Mabo's Land" (quoting P Ellery.)
112. K Maddock, Your Land Is Our Land, Penguin Books Aust, 1983, 83. Cf Government lawyer "A", Darwin, to author, 1 June, 1994: "Most applications end in favourable recommendations".
113. Interview with author, 3 June, 1994.
114. Taylor v R (1978) 22 ALR 599; Mahon v Osborne [1939] – 2 KB 14.
115. Courier Mail (Brisbane), 24 August, 1993 : "Tribes in Land Tussle"; Australian Journal of Mining, December, 1993 : "More Land Claims Over Weipa Leases".
116. The Australian, 5 January, 1993 : "Aboriginal Tensions Erupt Over Land Rights"; The Australian, 11 February, 1993 : "Tribal Guide Through a Legal Maze" (some Land Council boundaries disregard tribal areas); Sydney Morning Herald, 5 June, 1993 : "Perkins Hits Out Over Mabo Claims".
117. Over land at Hopevale, Cape York, which became Aboriginal trust land under the Aboriginal Land Act 1991 (Qld): The Australian, 15 July, 1994 : "Land Claim Over Top Island Resort".
118. Government lawyer, Darwin, to author, 1 June, 1994.
119. "Putting Mabo in Perspective", Australian Lawyer (July 1993) Vol 28 at 23.
120. P D Connolly, Should the Courts Determine Social Policy? in The High Court of Australia in Mabo, Assn. of Mining and Exploration Companies Inc. Perth 1993, 1 at 18.
121. Under the NTA at least; of course "reconciliation" may come from the Land Fund.
122. See Coe v The Commonwealth (1993) 68 ALJR 110 at 119 (Mason CJ).
123. National Aboriginal and Torres Strait Islander Land Fund: NTA. ss 17(4), 23(5), 24(2), 25(2), 54 and Part 10.
124. Minister Tickner's guess is that Mabo title will benefit only 5 per cent of the vaguely defined class of beneficiaries: The Australian, 11 May, 1994 : "Dispossessed Aborigines Get 1.4 Billion for Land".

Chapter Three

The High Court

Colin Howard

I should like to start by reading you some passages that I first read a couple of years ago. I have edited them to the extent necessary to conceal the source long enough for me to make a simple point. I shall identify that source in a moment. These are the passages:

"An early flash point with one clan ... illustrates the first stages of the conflagration of oppression and conflict which was, over the following century, to spread across the [land,] to dispossess, degrade and devastate the [people] and leave a national legacy of unutterable shame."

"The acts and events by which that dispossession ... was carried into ... effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices."

"[W]e are conscious of the fact that ... we have used language and expressed conclusions which some may think to be unusually emotive for a judgment in this Court."

Well, yes, some may and some, including myself, certainly do. Those passages were of course from the joint judgment of Justices Deane and Gaudron in Mabo v. Queensland [No.2] (1992) 175 CLR 1 at pp.104, 109 and 120. They were written in support of what their Honours candidly admitted, at p.109, was an exercise in justifying the over-turning of, and I quote again, "fundamental propositions which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than one hundred and fifty years."

It is almost as if in 1900 or so the House of Lords in England had drastically altered the land law of Scotland to atone for the fact that the English victory in the battle of Culloden in 1746 was followed by a merciless policy of driving the native Celtic highland clans from their glens, never to return. For the English judiciary to have done any such thing would have been regarded as totally out of order and, I have no doubt at all, would have been swiftly reversed by legislation. Not, however, in present day Australia.

In recent years the High Court here has taken a number of initiatives, most conspicuously in the Mabo Case, which have been seen in some quarters, including this Society, as raising questions about the proper role and function of the judiciary under our Constitution. Indeed, the Court has been criticised in terms which drew a personal response from the Chief Justice himself, a notable departure from the usual practice whereby judges are expected to suffer in silence in the interests of our legal system as a whole.

The central feature of the criticisms which have been levelled at the Court is the accusation that it is failing to observe the traditional limits of the judicial function in a common law country and is starting to legislate. Associated with this view has been what some have seen as a lapse in technical standards in order to reach conclusions not readily attainable along orthodox lines.

What I want to do today is consider the validity of these complaints. This will take me into such matters as the nature of the judicial function in a common law democracy; the High Court of Australia as a constitutional but also, necessarily, a human institution; and whether the sentiment in some quarters that "something should be done" about the Court is either legitimate or realistic.

I must make two reservations. The first is that it is impossible, within the limits of a conference paper, to deal with such a far-reaching subject matter otherwise than superficially. Secondly, that that subject matter is itself highly subjective. The most that any commentator can hope to do is to present a reasoned case and avoid the position taken by the tycoon who, on having judgment entered against him, announced that the next time he sued anyone it would be in his own court before his own judge.

I should mention also that, although it is frequently convenient to refer to the High Court as if it were a human monolith with but a single mind, this is often unjust. An outstanding recent instance was indeed the Mabo Case. Rightly or wrongly, that decision attracted trenchant criticism in many quarters. The criticism was largely directed at the Court as a whole, rather than at individual judges. This was, and continues to be, most unfair to the sole dissentient, Mr Justice Dawson. His judgment is a model of the very qualities which the Court was charged with neglecting. I shall try to avoid the monolithic approach.

The judicial system which has become so deeply established in the culture of the English speaking nations originated in the gradual extension of royal power throughout England in medieval times, most conspicuously during the reign of Henry II from 1154 to 1189. As an instrument of royal power its most characteristic feature under Henry II became the circuit.

Under the circuit system, which is still with us, the royal judges travelled regularly to all parts of the country to try cases which had accumulated since the previous circuit. This became known as the assizes, which means of course sittings, and developed into a relatively efficient method of standardising the common law. This expression probably came into use as a reference to the law common to all, as opposed to local customary law.

Our heritage from these distant events is vast, amounting indeed to a powerful social philosophy, an entire way of thinking about society. Its continuing vigour at the present day is constantly evidenced by the passion with which people are prone to argue about such things as juries, justice and the judiciary. For the purposes of this conference however I should like you to ponder one of the most enduring legacies of Henry II's system, its role in the centralisation of power.

Although the system was developed by an exceptionally capable monarch (indeed, in my opinion the best one that England ever had) into a formidable instrument of royal power, it must not be forgotten that there is, except perhaps in a sentimental sense, nothing magic about royalty. (That observation, let me hasten to add, is not intended as a contribution to the current superficial and illinformed debate about monarchy versus republic.)

It follows that although our judicial traditions originated in, and developed through, royal appointments, at first to baronial power and later, as a legal profession emerged, to judicial office, no particular significance should be attached to the word "royal". What is significant is that in our system, just as in the days of Henry II and during all the centuries since, the judges remain fundamentally instruments of central power.

Nowadays this is symbolised by the fact that every judge in the country, on assuming office, becomes a member of the public service, paid and employed by a government. She or he is also appointed by that government. Although we are fortunate in having a judiciary which is entirely free of corruption, and strong laws which protect judicial security of tenure, the obvious potential weakness of such a system, at all events theoretically, is also something which comes down to us directly from Henry II.

It is that Presidents and Prime Ministers have a strong tendency to appoint to the higher and more powerful appellate courts people who are believed either to be already favourably disposed to themselves or likely to become so from gratitude. The best publicised instances nowadays occur in America whenever there is a vacancy on the Supreme Court. Probably there has never been an American President who did not do his best to stack the Court if given an opportunity.

The fact that their expectations of partiality or gratitude have almost invariably been disappointed never seems to discourage them.

The potential for abuse of power in this respect in America however is considerably restricted by the openness of the process and the very public Congressional examinations of presidential nominees. There is also a firmly established practice, arising no doubt out of past disasters, of thorough consultation with legal bodies to ascertain the standing of prospective nominees in the profession.

These precautions contrast with the ludicrous secrecy which, in conformity with the British tradition that we have inherited, operates in Australia. In my view it is highly desirable that in the matter of appointments to the High Court our existing practices be discontinued forthwith and replaced by arrangements along the lines of appointments to the Supreme Court of the United States. I do not on this occasion intend to spell out any particular system in detail.

The essentials are that as soon as a potential appointee is decided upon, the identity of the person concerned be made known, and that she or he be then required to undergo a public examination by a committee which then makes a recommendation to each House of the Parliament. Having regard to the highly polarised and mindlessly combative tradition of party politics in this country, it might be a wise move for the examining committee not to be entirely composed of politicians.

I do not wish to be misunderstood. In making this suggestion, I am neither expressing nor implying any opinion about particular appointments to the High Court, present or past, although of course it would be idle for me to pretend that I do not have any. What I am doing is expressing a belief that the secrecy in which the appointment process is shrouded cannot but encourage suspicions of political partiality whenever, as happens in the nature of things from time to time, the Court hands down a judgment which happens to have political overtones.

One can start almost anywhere, but the period since the second World War yields some striking examples. There was the Bank Nationalisation Case in 1948, 76 CLR 1, in which the Court struck down an attempt by the government of the day to nationalise the banks. In 1951 there was the Communist Party Case, 83 CLR 1, in which the Court struck down an attempt at the height of the cold war to outlaw the Australian Communist Party. Then there was the long series of cases in which the Court was widely perceived to be on the side of the big battalions when it came to tax avoidance. Although not a judicial proceeding, and so strictly speaking not a matter involving the Court as such, although widely perceived as doing exactly that, there was the giving of advice in 1975 by the then Chief Justice to the Governor-General before the dismissal of the Whitlam government.

In 1982 there was Koowarta v. Bjelke-Petersen, 153 CLR 168, on the Racial Discrimination Act and in 1983 the Tasmanian Dam Case, 158 CLR 1, about which I hardly need to remind you. Most recently, in 1992, there has been the second Mabo decision and Nationwide News v. Wills and Australian Capital Television v. Commonwealth, 177 CLR 1 and 106 respectively, on implied freedom of speech.

And for a remarkably sustained expansion of Commonwealth power at the expense of the States, one can start in 1920 and cite all kinds of things, including the extraordinary enlargement during the postwar period of the scope of the external affairs power which I have described on a previous occasion. It is little wonder that the High Court virtually throughout its history has been regularly regarded in one quarter or another as being politically biased, or at the very least overmighty.

It is true that similar charges have been regularly levelled at the Supreme Court of the United States, but with the big difference that every Justice had to run the gauntlet of a sometimes gruelling public examination before being confirmed in office. It is not at all fanciful to see this

as conferring a popular legitimacy which enables that court to play a part in public affairs that would strike many in this country as overmighty if adopted by the High Court.

It is the very lack of that kind of legitimacy that has given rise to the latest wave of unease about the High Court. The lack of it becomes particularly acute in such a case as Mabo, if indeed any previous decision of the Court can be regarded as even remotely comparable when it comes to the creation of new law, the setting aside of well established principles, and the tactic of resorting to emotive language. It becomes all the more acute in such a case because the result, and the manner of arriving at it, is indeed difficult to distinguish from a legislative act.

Obviously all kinds of trivial distinctions between the two processes can be drawn. The manner of debate in Mabo was by formalised legal argument rather than by the relatively flexible expression of political positions. The result is recorded in the relatively flexible form of a series of judgments instead of the formal rigidity of a statute. Such matters do not go to the heart of the difficulty.

The real problem is that, although the line between the two cannot be precisely drawn, legislation effects a change in the law as a result of a policy decision by elected representatives of the people, whereas litigation effects a change in the law as a result of formal technical debate among lawyers, none of whom has been elected to do the job.

That of course puts the difference too simply. Once elected, the representatives of most of the people have little influence over anything, owing to party discipline, and the remainder, their leaders, are interested in almost nothing beyond maintaining or recovering power. Equally, almost no case comes before the courts if the issue it raises has been clearly settled already, so in its very nature the judicial process requires constant refashioning of the law.

These things are not important for the present purpose. What is important is that, however difficult it may be to state with precision, a common law parliamentary democracy operates on a fundamental principle that neither judiciary nor legislature exceed the limits of their constitutional function. A legislature offends against this principle if, for example, it pressures judges by withholding funds and facilities, or interferes in the conduct of a case by commenting on it under the protection of parliamentary privilege.

A court offends by, for example, making a change in the law so profound and far-reaching as to require the authority of the legislature. It is no answer to this to say, as has happened with Mabo, that the court is justified retrospectively if the legislature then passes an Act in the same sense. The court may well have made a correct political assessment but that is not what it is appointed to do.

If it falls into such a habit, it is making a yet more fundamental change in the law than the first one, for it is reshaping the entire machinery of government by refashioning its own constitutional function. The situation is also not improved if the original decision goes far beyond the case originally put to the court, overturns principles in accordance with which the community has shaped its conduct for perhaps 200 years and does so in language invoking unutterable national shame.

I have to say that of the instances I cited above of the High Court acting in a manner which excited controversy, only in Mabo am I persuaded that the charge of exceeding its function by in effect legislating is justified, but in that instance I am so persuaded. To repeat the term that I used in reference to the Supreme Court of the United States, the High Court simply does not have the public legitimacy to reshape fundamental institutions in such a fashion.

I turn now to another possible effect of the manner in which the High Court Justices are appointed. I mentioned the invariable optimism with which Presidents and Prime Ministers try to stack courts and the regularity with which the appointees disappoint their hopes. For the latter we can only be thankful, and continue to cherish the independence of mind of which the common

lawyers are justly proud. There is however a more insidious danger to which highest courts of appeal, in their largely unavoidable remoteness, may be vulnerable.

It is inevitable that the highest appellate court in any common law democracy spends a good deal of time in the immediate presence of the other two major institutions of government, which are the legislature and the executive, including the senior public service. No doubt this is largely representational, and in personal terms in court consists almost entirely of appearances by Solicitors-General (in this country) and a relatively small group of regularly briefed barristers, including former Solicitors-General.

The court itself is similarly likely to include a number of members who have direct or indirect experience of the workings of government. Now, this is not necessarily a bad thing. If the highest appellate court is going to have to decide constitutional cases, it can hardly be a handicap for bench and bar to include people who know something about how government actually works, although it is perhaps unwise in the case of the bench to extend this line of thought to include even former Attorneys-General or other legally qualified ex- Ministers.

It is also understandable that Prime Ministers looking for possible judicial allies will think first of people they know. Nevertheless I would not for a moment suggest that mere acquaintance with a Prime Minister should be an automatic disqualification for judicial office, although in some instances it might be a matter suitable for an examining committee to look into.

What a preponderance of appointments to a final court of appeal of persons with direct or close experience of government brings with it, however, is the danger of creating in the Court, through familiarity, a greater receptiveness to the government's point of view than to the concerns of other parties. This danger is not lessened where, as with the High Court of Australia, the Court spends by far the greater part of its working time in the same metropolis as the government, the legislature and the senior public service.

Again I do not wish to be misunderstood. I am not peddling conspiracy theory about Ministers button- holing judges at cocktail parties to tell them how to remain loved and wanted. Neither am I unhappy to see the High Court occupying spacious and handsome accommodation with impressive facilities. What I am not happy about is seeing the Court permanently housed, or indeed housed at all, cheek by jowl with the government in a town which produces almost none of the work of either of them. The ambience is simply wrong and sends the wrong message to the public at large.

The monstrosity of a fortress in which the Parliament now isolates itself from the electorate is surely enough to go on with, without similarly making the High Court seem even more remote than it necessarily has to be. In my view the Court should still be going on regular circuits with principal courts in Melbourne and Sydney. There is no reason of good government, let alone of sensitivity to the wider community, why it should ever sit in Canberra, still less be immured there. At least the politicians do get back to their constituencies now and then. The remoteness syndrome, incidentally, works both ways. I cannot say that I regard the years since 1980, when the Queen officially opened the High Court building, as being the Court's period of greatest glory.

I would have much preferred to see the principle adopted which applies in South Africa, of all surprising places. It is the only country I know of, unless the latest Constitution has changed this, which has three capitals. The executive capital and centre of government is Pretoria, in the Transvaal. The Parliament sits in the legislative capital, which is Cape Town, in Cape Province. The judicial capital is Bloemfontein, in the Orange Free State. This is an excellent arrangement in principle, and I like to think that it may have assisted towards the fine record of the South African senior judiciary over many harrowing decades.

However that may be, my next suggestion for heightening public and professional confidence in the High Court is to take it out of Canberra. No doubt one ground on which this idea is sure to be resisted is expense. Whilst getting the Court out of Canberra might not in itself make a great deal of difference to the inherent danger of the Court's tending to see the government's point of view rather more readily than other people's, I think it would be a useful component of a policy which had as its central plank the examining committee idea that I advocated earlier. The financial cost of the policy would, I am sure, be a good investment in the public interest.

Summing up therefore, I think the present appointment procedures and physical arrangements for the High Court tend to diminish respect for it in entirely unnecessary ways. This in turn means that decisions of the Court on issues that arouse strong feelings in the community, and are hence exploited by governments and others for political advantage, leave the Court vulnerable to questioning of its intellectual integrity.

This is not in the public interest because faith in the rule of law, which includes faith in those who are entrusted with administering it, is of profound importance to our culture. Furthermore, a danger has now clearly appeared that the Court is failing to perceive the limits of what I have called its public legitimacy, meaning the acceptability of the changes it makes to the law and the manner in which it makes them.

I am particularly concerned about what the next preoccupation will be of a Court which has so recently clearly demonstrated insensitivity to the value of restraint in its approach to its constitutional responsibilities. A Court of this temper is hardly likely, for example, to set a limit to continued exploitation by federal governments of the Parliament's power to legislate with respect to external affairs. The morally self-indulgent spirit of the age being what it is, it is far more likely that we shall now have to endure a comparable amplification of the power to enact racially discriminatory laws.

In my view this would be a disaster. Far from being exploited by governments and broadened by courts, it should be recognised that a power to enact racially discriminatory laws ought to have no place in the constitution of any civilised country. Additionally, in Australia the power has been much misunderstood, and so brings with it the potential for creating the very thing it is mistakenly thought to prevent: racial discrimination. This has happened twice already, in the Mabo Case and in the enactment of the Native Title Act 1993. The Racial Discrimination Act 1975, although not dependent on the race power for its validity, displays the same dangerously muddled line of thought.

It would be sad indeed if, on top of Mabo, the High Court became minded to arrive at further decisions of a comparably radical nature in the belief that the passage of the Native Title Act was in some sense confirmation of the propriety of a court, any court, taking upon itself, at the expense of the law of the land, the teaching of an ill- considered lesson in atonement for supposedly inherited guilt.

Yet I know of no rational ground on which such apprehensions can be put aside. The membership of the High Court will of course continue to change. Unless the present total lack of public scrutiny of proposed appointments is remedied, the danger of any particular High Court assuming a role beyond its functions will always be present. It is true that public scrutiny is no more a guarantee of how an incumbent will act in the future than is prime ministerial guesswork. The process can however be revealing, and is likely to make a prospective appointee think more carefully about her or his answers and future role than may always be the case at present.

One last point. It has been suggested from time to time that the High Court's marked centralising tendency could be countered by ensuring in some way that every State should have at least one Justice on the Court. This approach has received a token degree of acceptance in that by s.6 of

the High Court of Australia Act 1979 the Attorney-General of the Commonwealth is required to consult with her or his State counterparts before a proposed appointment is made.

To judge by the appointments that have been made since 1979 and the present makeup of the Court, not to mention the constitutional decisions that have been handed down during that period, this provision has been ineffective. I am not perturbed by that, because I do not think it achieves anything to turn the High Court into a kind of judicial Senate, or seek State opinions which will undoubtedly be ignored if the Prime Minister disagrees with them.

The basic reason why such measures achieve nothing is that the problem of High Court appointments, and there certainly is a problem, is not one of categories but of secrecy. It does not matter where a proposed appointee comes from. What matters is that there be an opportunity for anything in her or his background which throws light on the proposed appointee's attitude to the job to be thoroughly and publicly explored.

At the outset of this address I said that one of the matters to which it would lead me would be a consideration of whether the sentiment in some quarters that "something should be done" about the High Court is either legitimate or realistic. You will have gathered that I think that sentiment is legitimate to the extent that I have outlined. As to realistic, all I can say is that every time concern is expressed on reasonable grounds about the composition, circumstances and performance of our highest judicial institution, changes become that much more realistic.

Chapter Four

An Over-Mighty Court?

Ian Callinan, QC

The title of this paper, which was suggested to me and which I was content to adopt, An Over-Mighty Court?, conveys to me the notion of a powerful, and almost omnipotent institution, different in kind from a mere court.

To what extent, I ask myself, do the High Court and its contemporary judgments conform with the constitutional role that the Founders visualised for the Court? If there is little conformity, the question must be asked whether this is a good or a bad thing, indeed perhaps whether it is even a relevant thing today.

It is presently futile to ask the question whether the departures from the vision that the Founders had for the Court are lawful, for that question has, conclusively, and perhaps for those who live in the real world, not surprisingly been answered affirmatively by the High Court in a case in 1991, Smith Kline and French Laboratories (Aust.) Ltd. v The Commonwealth .

In order to answer the questions that I have posed for myself, I propose first to examine what truly was the vision that the Founders had for the Court. Secondly, I intend to make reference to some of the changes which have been made by both legislative and judicial means, not only to the substantive role, but also to the procedural processes of the Court. Thirdly, I foreshadow a discussion about the consequences that have flowed and will flow from these changes. Next, I will compare some aspects of the workings and decisions of the Court with the United States and the United Kingdom. And finally, I will state some of my own opinions about these matters and answer, I hope, the questions that I have asked.

It cannot be doubted that the constitutional establishment of the Court grew out of both nationalistic aspirations for a "home ground" and a sense of dissatisfaction with the Privy Council as a final Court of Appeal, particularly for constitutional matters. In the first session of the Convention debates at Sydney in 1891, Edmund Barton urged the abolition of the Privy Council as a final Court of Appeal for Australia.

"It was well pointed out by the mover of the resolutions that the endeavour to get rid of the jurisdiction of the Privy Council for the Dominion of Canada was a fruitless one, because the Imperial Government refused to assent to such a transfer of power. Whether they would assent to such a transfer of power now seems very doubtful. By precedent they would not; but I do hope that the mere fact that the action of the Imperial Government has in a previous case been against the granting of any such power will not deter the framers of this Constitution from inserting provisions which will claim the power. It may be refused and, if it is refused, the refusal may be provocative of more or less dissatisfaction; but that it is a power to ask for, and a power which will be beneficial when gained, I have not the remotest doubt. Of course there may be exceptions, as the hon. member, Mr Deakin, has so well pointed out, in cases where imperial interests are concerned, or in cases – but I am more doubtful as regards following his argument in this part of it – in cases where the stability and uniformity of interpretation in matters of common law may be endangered by not resorting to the Privy Council. In the first case there may be an exception, but with regard to all other cases, I trust that this Convention, and the Parliaments to whom its conclusions are to be presented, will use their utmost efforts to secure

the abolition of the jurisdiction of the Privy Council and the transfer of supreme authority to the colonial judiciary, which I am sure will be beneficial to the whole of the colonies. I say this without attempting to derogate from the authority of the Privy Council, but those who have watched the course of its decisions are aware that that tribunal is not always constituted in its best aspect; that there are occasions when that board – because it is a board – is presided over by judges who, whether as regards their past judicial career or, at any rate in some cases, as regards their existing capacity, would not be one whit superior, but – I almost tremble to say it – are not equal to the class of judges to be found in this continent to constitute a federal supreme court."

The same speaker, at Adelaide in 1897, reiterated those sentiments. He there spoke of the savings to litigants "from being dragged thousands and thousands of miles to a distant tribunal."

Whatever else may have been in doubt, the Founders when they discussed the jurisdiction of the Court that they were shaping, contemplated a Court with an extensive dual role which would be fully exercised. The first of these roles was clear enough, as the interpreter of the Constitution, the arbiter of constitutional disputes between the States and between a State or States and the Commonwealth, and secondly, as a final Court of Appeal that would be accessible to all litigants in a broad range of cases, subject only to a limited number of exceptions to be prescribed by the Parliament.

Once again, I turn to a speech of Edmund Barton, this time in Melbourne in 1898. Then he said this, in moving that the words in Section 74 (as it then was) of the Constitution, "with such exceptions and subject to such regulations" be omitted and the words, "subject to such conditions" be substituted.

"Honourable members will see that this provision gives the High Court jurisdiction to hear and determine appeals, `with such exceptions and subject to such regulations as the Parliament may from time to time prescribe.' The difficulty about the clause as it stands is this: that it allows the Parliament to legislate in reference to the jurisdiction of the High Court in regard to appeals in such a way that, little by little, the High Court may become the mere shadow of a Court of Appeal. That position arises because we have placed in a parenthetical part of the clause words which appear to be too strong. For these words I therefore propose to substitute the words mentioned in the amendment. The Parliament will still be able to prescribe regulations for the hearing of these appeals, but it will be unable to take away the appellate power of the court."

But more illuminating I think was an answer by Mr Barton during those debates to a question by Mr Higgins, whether the amendment would mean that a man would be able to appeal even in a case concerning ten shillings. Mr Barton replied that the exclusions ought relate only to minor or trumpery cases. Later he made this statement:

"..... We are afraid that if we say `with such exceptions and subject to such regulations', it will be in the power of Parliament by successive regulations to `cut down' the right of appeal." (My emphasis.)

What emerged out of the debates on this issue was Chapter III of the Constitution, The Judicature. I have never found any indication in the Chapter that it would be for the High Court exclusively to determine for itself what its jurisdiction should be. (The only exception is Section 74, which empowered the Court to restrict appeals from it on inter se questions to the Privy Council.)

Section 71 contemplates the possibility of Federal Courts other than the High Court, but significantly it is the jurisdiction only of the latter that is defined.

Section 73 is worth repeating here:

"73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences -

(i) Of any Justice or Justices exercising the original jurisdiction of the High Court:
(ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:
(iii) Of the Inter-State Commission, but as to questions of law only:
and the judgment of the High Court in all such cases shall
be final and conclusive.
But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.
Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court."
In defining the jurisdiction of the Court it is highly unlikely that the Founders would have imagined that the Court would in its unfettered discretion ever be permitted to pick and choose the cases that it might put aside or hear. These debates to which I have referred assumed that there would be appeals as of right, and the language of Section 73 plainly embraces the notion that such rights of appeal would be at least as ample as those then available to the Privy Council.
Nor could the Founders have been unaware of the desirability of ensuring that the jurisdiction of such a final powerful Court be carefully defined and be exercised as a matter of strict obligation. Some may have been aware, for example, of the seriousness with which the United States Supreme Court had much earlier viewed its obligations to exercise its jurisdiction, so much so that Marshall CJ in delivering an opinion of that Court in 1821 in Cohens v Virginia, had said this:
"It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."
It is easy to see how, with the passage of time, it may become prudent for Parliament to prescribe different or new exceptions as to the cases that the Court should hear. It is an altogether different thing to say that all rights of appeal are abolished, and that only certain exceptional cases to be determined by the Court itself will be heard by the Court. But that is precisely what Section 35A of the Judiciary Act introduced in 1984 does in fact provide.
What may be regarded as a case sufficiently exceptional to attract the interest, and therefore the jurisdiction of the Court is stated in the broadest, most imprecise, indeed woolly terms imaginable:
"35A In considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to -

(a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law -
(i) that is of public importance, whether because of its general application or otherwise; or
(ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
(b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates."

By the time of the passage of this legislation, the exercise of a similar discretionary jurisdiction had already become a matter of some controversy in the United States. In an article in the February part of the 1985 volume of the American Bar Journal, David O Stewart wrote:

"As each term of the Supreme Court begins, many lawyers look over the Court's schedule of arguments and ask, `Why did they grant cert to so many dogs?' That sometimes prompts a follow-up question. Why did the justices refuse to hear other cases of at least equal importance?

"Because the Supreme Court largely controls how many and what kinds of cases it hears, its certiorari decisions are undeniably significant.

"As Hugo Black Jr wrote about his father, who served as a justice for 34 years, `My father recognised the process of selecting cases as the heart of a Justice's job, for he believed that whoever has the power to decide what cases will be heard has the power of the Court.'"

Not unexpectedly, a number of practitioners shared the view that Section 35A of the Judiciary Act was unconstitutional. In a paper which I gave to the Australian Bar Conference at Alice Springs in 1986, I questioned the legality of the Section. I said then:

"It seems to me that it might be argued that Section 35A of the Judiciary Act is in fact an exception prescribed by the Parliament and preventing the High Court from hearing and determining appeals from the Supreme Courts of the States in matters in respect of which an appeal did lie to the Privy Council at the establishment of the Commonwealth. Indeed, I would suggest that a provision of the kind which appears in Section 35A of the Judiciary Act and other sections of the Act bearing upon appeals to the High Court do not even amount to exceptions: the overall scheme is to prohibit all appeals unless the Court, in its virtually unfettered discretion, considers that such appeals may be brought.

"There is a further question, and that is, whether, in any event, to confer upon the High Court such a virtually unfettered power, is to delegate to the Court something that the Parliament is not empowered to delegate, that is the prescription of the relevant exceptions. I would argue that the words of Gibbs J. as he then was, in Racecourse Co-Operative Sugar Association Limited and Others v Attorney-General of the State of Queensland (1979) 142 CLR 460 at Page 481, might appropriately be applied to a construction of Section 73 of the Constitution."

These and other formidable arguments were marshalled and put by a former Solicitor-General, Mr Ellicott QC, and summarily rejected by the High Court in Smith Kline & French Laboratories (Australia) Ltd and Others v The Commonwealth of Australia and Others [supra] which thought so little of them that none of the eight Counsel representing the respondents was even called upon to present arguments to the Court.

Another consequence has been that there has been introduced into the legal system an even greater element of uncertainty than had previously existed. "Will this case or that case be granted special leave, and if so why?" For example, in Brisbane, in two special leave sittings of the High Court before last, one only of thirteen or so applications was deemed worthy of a grant of special leave by the Court.

I am no mathematician, but the statistical validity of such a result seems to me to be improbable.

Practically any point of law may attract the curiosity of one out of three judges – the "special leave Court" usually being so constituted. However, for my own part I would not have thought that the interesting point decided, for example, in Baltic Shipping Co. v Dillon, a case relevantly involving about $6,500, more interesting or more important than many others which have been refused special leave by the Court.

The Court has adopted a practice of giving reasons for the refusal of special leave, but the reasons are usually as inscrutable as the statutory discretionary grounds which may attract special leave. Formulae, they are little more than those, in broad terms, are often pronounced:

"The decision of the Court below is not attended with sufficient doubt to warrant the grant of special leave."

or:

"The Court does not regard this case as an appropriate vehicle for a determination of the point of law said by the applicant to arise."

or:

"The Court would prefer to have the advantage of the decision of an intermediate Court before deciding whether to grant special leave."

More depressing still for the litigant is the addendum that the Court sometimes attaches to its reasons, namely:

"The refusal of a grant of special leave in this case does not mean that the Court is affirming the correctness of the decision of the Court below."

There have been other legislative provisions. Tribunals not constituted by judges exercising judicial power have been amenable to prerogative writs issued pursuant to the Constitution, by the High Court. This, many would think a highly important jurisdiction, and one of significance to the country as a whole. However, by virtue of the Industrial Relations Reform Act 1993, an important aspect of this jurisdiction has now effectively been conferred upon the recently created Industrial Relations Court of Australia. Section 412 of that Act prescribes the original jurisdiction of the Industrial Relations Court, and includes in Subsection 2 those matters remitted to it by the High Court pursuant to Section 44 of the Judiciary Act 1903, "in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth holding office under this act or the Coal Industry Act 1946"; which, for the specific purposes of the Industrial Relations sector, is a mirroring of the constitutional jurisdiction of the High Court. Of most importance however is the reality stemming from the High Court direction on this issue, which makes clear that matters without "constitutional significance" will, in practice, be remitted directly to the Industrial Relations Court. This is an interesting concept, because the jurisdiction derives wholly from the Constitution itself. The Constitution has spoken, and in so doing expressly states these matters to be constitutional matters.

It may be hoped that the new Court will examine very carefully, in these times, when Courts claim to look to the substance rather than form, whether purportedly interstate industrial disputes triggered by the formal delivery of fabulously unreal claims are truly of an interstate kind. Perhaps the new Court will treat the artificial doctrine of "an interstate paper dispute", long accepted by the High Court, as exactly what it usually is, a dispute that is artificial, and on paper only.

Such a formal, paper, dispute might even come to attract the same sort of language as Deane J used to criticise previous Section 92 decisions in Street v Queensland Bar Association, as "a triumph of form over substance."

In the United States, as I have said, by the time of the enactment of Section 35A of the Judiciary Act, the way in which the United States Supreme Court granted or withheld the United States

equivalent of special leave (certiorari) had become a source of considerable dissatisfaction. There, commentators had criticised the idiosyncratic tendencies of various judges in exercising the jurisdiction. Stories abounded, unable to be confirmed, of judges acting the role of advocates to urge the hearing of cases raising issues which, in truth, particular judges had prejudged, and upon which they wished the settlement or resolution of the law in terms of that prejudgment. Although the popular book The Brethren, which claimed to reveal some of those mysteries, has been heavily criticised, there is much of it that has the ring of truth.

We are all familiar with the Senatorial process of approval of justices of that Court, in the course of which they are invited to take their stand on issues of the day such as abortion, the death penalty, free speech and the nature of conflicts, as to whether they should be regarded as wars or not. At least one commentator has written that Reagan's nominee Bork was rejected by the United States Senate precisely because he held, and was interrogated on, his strong views on constitutional and related issues. Indeed, in the last fortnight there, the Senate Judiciary Committee has been holding confirmation hearings in respect of President Clinton's nominee Judge Bryer. It was interesting to note the wide ranging nature of the "friendly" – by comparison with that endured by Bork – interrogation to which he was subjected, including his view of the Korean War, "police action", or "war". (cf. Sir John Latham CJ in the Communist Party Case, infra.)

Do we want that, or would we prefer that judges decide those sorts of burning issues after hearing, and on, the legal arguments? The current Chief Justice has certainly no affection for such a system.

When the changes to the Judiciary Act were first mooted, some predicted that they would become a rod for the Court's own back: that the impossibility of stating clear and universal criteria would introduce a great deal of uncertainty into the legal system and would encourage, rather than deter, the making of applications, with the result that instead of hearing appeals, the work of the Court would consist in large part of dealing with applications for special leave. There were also some who thought that this inevitable consequence would ultimately push the High Court towards the cessation of oral hearings and their replacement with written applications, a process long in operation in the United States Supreme Court, but even there a source of debate and perplexed criticism.

It was not surprising therefore to hear the Honourable Sir Anthony Mason, the Chief Justice of the High Court, say at the last legal convention, in a speech reproduced in the Australian Law Journal, that applications for special leave in the current year would be likely to exceed by a significant number 250. His Honour questioned the reasons for this increase, but I believe that these were identified, in the ways in which I have suggested, at the time of the changes to the Judiciary Act. Time limits upon these applications will be imposed, and his Honour foreshadowed at the Convention the replacement of any form of oral hearing by written applications, courses now adopted in England and Canada, as well as the United States. It is to be hoped that such written applications and the determination of them, not in an open forum, will not engender the same concern and criticism as in the United States, where the roles of the Justices' clerks and researchers are ambiguous and concealed.

There is another passage from an earlier interview with the Chief Justice that I find a little worrying (if his Honour is correctly reported), and which I set out below:

"So the application which has the best prospect of success is one distinctly raising an important point of principle, which is strongly arguable and is a suitable vehicle for the ventilation of that question; in other words, it's not encumbered with issues of fact or other complications."

This, it seems to me with respect, goes too far. Assume two cases, each raising an equally important point of law. In one, the facts are simple. In the other, there are issues of fact or "other

complications", whatever they may be. I cannot accept with equanimity that the former will be granted, and the latter denied, a hearing by the Court.

No informed person, of course, doubts for one moment the integrity and conscientious application by the Court to the performance of its duties, including the disposition of special leave applications. It is the necessity to make them, and the great uncertainty attached to their fate, that are the matters of complaint.

Judges are now coming out of the "judicial closet", speaking openly about their appreciation of their roles. The Chief Justice of Australia has given interviews, and has expressed an intention to make the members of the Court personally somewhat more accessible.

The theme that the role of the Court will henceforth be an active one was again stated by the Chief Justice in an article entitled Changing the Law in a Changing Society, published in the 67th Volume of The Australian Law Journal. Among other things his Honour then said this about statutory interpretation:

"No one would suggest nowadays that statutory interpretation is merely an exercise in ascertaining the literal meaning of words. Statutory interpretation calls for reference not only to the context, scope and purpose of the statute but also to antecedent history and policy as well as community values."

This forthright acknowledgment that the Court regards itself as free, indeed obliged to look to and adopt its own view of contemporary community perceptions and values assumes of course that the Court is uniquely well placed to do this – a proposition which some might challenge – and also stands in stark contrast with, for example, the generally accepted and in my view valid criticism that was made of an earlier Chief Justice, Sir John Latham, when, in stating his dissenting opinion in the Communist Party Case, he appealed to his personal understanding of contemporary geopolitics. His Honour wrote this:

"Actual fighting in the Second World War ended in 1945, but only few peace treaties have been made. The Court may, I think, allow itself to be sufficiently informed of affairs to be aware that any peace which now exists is uneasy and is considered by many informed people to be very precarious, and that many of the nations of the world (whether rightly or wrongly) are highly apprehensive. To say that the present condition of the world is one of `peace' may not unfairly be described as unreal application of what has become an outmoded category. The phrases now used are `incidents', `affairs', `police action', `cold war'."

The criticism, it must be conceded, was not all one way. In Essays on the Australian Constitution, Derham pointed out that the dissent of Latham CJ could be grounded upon the inferior position of the Court so far as awareness of the pertinent facts was concerned. The author said this:

"The potentially acute problem which is raised by the difference between the majority judgments and the judgment of Latham CJ is, in a situation short of actual war, how the Court can estimate the urgency of any emergency, particularly if it is confined to matters of which it can take judicial notice. The Government may have information which cannot be disclosed and the validity of legislative action taken upon that information would then have to be determined on the footing that there was no situation such as the Government's information disclosed. For instance, if the Government in a time of ostensible peace were to base its action on reliable but `top secret' information that some other power planned to start war at some particular future time, the application of the principles adopted by the High Court in the Communist Party Case would, in the case of a challenge to the validity of the Government's measures, be likely to result in the invalidity of measures which the situation would unquestionably demand."

The passage is instructive in that it points up the dilemma in which any Court choosing judicial activism will place itself. In reaching decisions based upon the Court's perception of the

changing world rather than the proved facts and the existing law, its members can never be sure that their perception is either accurate or complete. Ironically then, and in a curious way in reaching a conclusion much, and I believe rightly, criticised in the Communist Party Case, Latham CJ affirmed well the distinction between the roles of the executive and legislature, and the Courts.

In a speech recently given by the Chief Justice, his Honour spoke again of the activist role of the Court by reference to the expanding role of the judge:

"Just as the judge is becoming more of a manager of the litigation, so the judge is also likely to become more of a constructive interpreter of legislation. That will happen as the so-called `plain English' reforms in legislative drafting find their way into the statute book. The movement away from detailed regulation, which reached its apogee in the Income Tax Assessment Act and the Corporations Law, to the broader statements of principle characteristic of United States legislation and, to a lesser extent, of United Kingdom legislation, will leave the courts with more to do. The judges will be called upon to spell out the interstices of the legislative provisions. In doing so, they must resolve questions of interpretation by reference to the policies and purposes which are reflected in the legislation.

"What I have just said may not be welcome news to those who believe that the Courts do no more than apply precedents and look up dictionaries to ascertain what the words used in a statute mean. No doubt to those who believe in fairy tales that is a comforting belief. But it is a belief that is contradicted by the long history of the common law. That history is one of judicial law-making which shows no signs of unaccountably coming to an end. However, a distinction must be made between appellate judges and primary or trial judges who, generally speaking, are confined to applying settled principles of law to the facts as they are found.

"Changes in the principles of substantive law attract criticism in varying degrees. But, interpretations of the Constitution apart, although it is always open to the legislature to repeal or amend the common law as the courts declare it or the interpretation which the courts give to a statute, legislative overruling or amendment of a judicial ruling is a relatively rare occurrence.

"Sometimes judicial initiative is inevitable. That was the case when the High Court decided two years ago that the common law did not entitle a husband to sexual intercourse with his wife against her will despite old authorities which suggested otherwise. It is no longer feasible for courts to decide cases by reference to obsolete or unsound rules which result in injustice and await future reform at the hands of the legislature. There is a growing expectation that courts will apply rules that are just, equitable and soundly based except in so far as the courts are constrained by statute to act otherwise. Nothing is more likely to bring about an erosion of public confidence in the administration of justice than the continued adherence by the courts to rules and doctrines which are unsound and lead to unjust outcomes."

Whilst it is unlikely that even the most conservative would complain about a Court that condemned the use of force against an unwilling wife notwithstanding judicial precedent to the contrary, it is not possible to be confident that the disposition to change the law in other cases will always be so socially and broadly acceptable.

It is difficult to avoid the impression that this is a Court which is anxious to make its mark as an innovator. What I have quoted from the current Chief Justice's own words conveys this. This anxiety can also however be readily discerned from some recent decisions of the Court itself which display, among other things, a disconcerting tendency towards finding an implied "Bill of Rights" in the Constitution.

There can be no doubt that, being well aware of those express provisions in the First Amendment to the United States Constitution, which had been in force for more than a century before the

adoption of the Australian Constitution, the draftsmen of the latter must have made a definite decision against a Bill of Rights for this country.

What, it may fairly be asked, has changed? Even accepting, for present purposes, that the High Court might be entitled to "mould the law" to make it accord with the Court's awareness of the existing extra-curial world, it is difficult to find circumstances that have arisen in 1994 that justify a de facto, indeed de jure (if the Court has its way) Bill of Rights which were not either present or foreseen in 1900.

Whilst such cases as the Commonwealth v Tasmania and Mabo v Queensland [No.2] have attracted wide interest, and both approbation and criticism in the legal and lay worlds, the implications of two other cases have not been fully appreciated. These, Nationwide News Pty Ltd v Wills and Australian Capital Television Pty Ltd v Commonwealth, are cases in which, unnecessarily for their decisions in my view, the Court held that there existed in Australia an implied constitutional freedom of speech. In the former the Court had to decide whether a Section of the Industrial Relations Act which defined contempt of the Commission in very wide terms was valid. The Court held that, because of the excessive nature of the protection sought to be conferred upon the Commission, the provision was not a law reasonably incidental to the industrial power bestowed by placitum 51 (xxxx) of the Constitution. That, I would submit, would have been sufficient to dispose of the case.

But the Chief Justice referred to the materiality of the consideration whether the adverse consequences [of the legislation] resulted in any infringement of fundamental values protected by the common law such as freedom of speech. After some other references to cases in Australia and the United Kingdom, his Honour quoted a passage from a United States case extolling the virtues of free speech.

Free speech has so often been used as an excuse for the sensational, the uninformed, and the prejudiced. In the United States, the Founders there deemed it necessary to give it statutory, indeed entrenched constitutional recognition. The common law has never, so far as I am aware, accorded absolute leave to free speech. It has always been hedged around by statutory and common law constraints designed to ensure that that freedom does not invade others, such as a right to live as one sees fit in private, or a right to resist malicious or unfair criticism.

I fear that an enlarged "constitutional" right of freedom of speech has the potential simply to produce an oppressive, even more powerful media, unlikely to lead to the sort of better informed society that the High Court may be contemplating.

The concept which was conceived in Wills was delivered in Australian Capital Television Pty Ltd [supra]. This was one of the cases which angered the Federal Parliament, because the High Court held that so much of the Broadcasting Act as restricted or prohibited political advertising during periods before elections was invalid: the provisions severely impaired the freedom of debate, of speech about political affairs, a freedom embodied in a constitutional implication to that effect. Once again, the same result in the case may have been reached on another ground, but the Court was seemingly determined to give voice to the recently discovered constitutional implication, which had apparently been either overlooked or not required to be invoked in the last ninety years.

Objectively viewed, the provisions struck down in the latter case are not I think unreasonable ones. But if they were, they seem hardly worthy of the attraction of this new doctrine. What will happen of course is that the High Court will now be plagued by a multitude of lobbies and causes seeking the protection of this new amorphous constitutional right. I say amorphous because in the end, just as the Court has "found" the right, it will now have to define and shape it in a variety of situations. What about tobacco and alcohol advertisements? What about flag burners?

Will the proscription of the advertising of these be invalidated or not? How far will the Court go? What the Court decides will be entirely judge–made law.

The prospect that, for example, the Court might, like the United States Supreme Court, invent a public figure defence I find very worrying. Contrary to the self-interested protestations of the media, the defamation laws in this country operate reasonably satisfactorily. The High Court has criticised juries for awarding large sums of money in damages, but this may be one of those instances in which the High Court's perception of community values is in fact at odds with the values and perceptions of the community. Certainly the assessment by a second jury in Carson's Case of damages of $1.3 million, after the High Court had held $600,000 to be excessive, would suggest this.

Whether the Court likes them or not, the verdicts must be regarded as some indication of the views of the community. The strident criticism of both verdicts came, predictably, principally from the media, who of course had an enormous self-interest in attacking them. Lewis, in his book in defence of New York Times v Sullivan and its progeny, accepted that the public holds a considerable distrust for the media:

"Television is even more of an oracle. Its pervasive reach has made national eminences of the network anchor men and women and the top reporters. To the public, that looks like power – and power sometimes exercised in an unaccountable, even arrogant way. The networks, big newspapers and magazines ask questions and demand answers, but when anyone wants to know about their business, they wrap themselves in the First Amendment and refuse to answer. So it often appears to the public."

Not only have the various product lobbies and advertisers been heartened by the decision in Wills and Capital Television [supra] but so too have the media. Naturally they are anxious to avail themselves of this new freedom. There are two cases now reserved in the High Court in which the media have sought to do so. It is to be hoped that the High Court does not adopt the doctrine expressed by the United States Supreme Court in Sullivan [supra], which has produced four remarkable, and I think deplorable consequences: that "public figures" may only recover damages for defamation if the defendant be guilty of actual malice; that if, whether intentionally or by accident, people have found themselves in some way in the public domain, they automatically become public figures; and, unlike other people, public figures are not to enjoy the presumption available to others, that damage as a result of defamation has been sustained; and, they are required to prove their cases according to a somewhat higher standard of proof than the orthodox civil standard. The unsatisfactory rationale for much of this is said to be that inaccuracy will both be commonplace and inevitable in a discussion of the conduct of public figures.

I am however not alone in holding the opinion that the discovery in the Constitution, some ninety years or so after its adoption, of this new right or freedom is another instance of injection into the law of an unnecessary uncertainty. Both the common and statutory laws of contempt and defamation in this country are the product of hundreds of years of careful development and reflection. I venture to suggest that there has never been in history since the invention of the printing press such a concentration of power and influence in the hands of so few of the purveyors of the news. I respectfully suggest that it is naive in those circumstances to do anything that might have the effect of making this fourth estate less accountable. Moreover, it will take decades of litigation (as Sullivan's Case in the United States has shown) to draw, or expand the perimeter of this right. One article I read in the course of this paper stated the extraordinary statistic that 71 per cent of the decisions of juries in "actual malice cases" are overturned by appellate courts in the United States. If that does not demonstrate a different community perception from that of the Courts, or perhaps that the Courts have fashioned a doctrine not readily capable of application by juries, it is hard to understand what other

explanation there might be. Indeed, some might even suggest that, if anything, the law both statutory and otherwise, of qualified privilege (except perhaps for New South Wales where, to coin a phrase, not unreasonably the statute requires a defaming defendant to act reasonably) should perhaps be re- examined to impose some discipline upon a rampant press and electronic media.

I will mention at this stage another case recently decided by the High Court, Burnie Port Authority v General Jones Pty Ltd. In that case five of the justices abolished the rule in Rylands v Fletcher, which as you know stated the law regarding damage caused as a result of the conduct of dangerous activities or the accumulation of dangerous substances on land. There is of course much to be said for the view of the majority that the principle or rule should be abolished, as events of the kind covered by the rule may adequately be dealt with within the existing framework of the law of negligence. But the dissenting views of Brennan and McHugh JJ sound an important caution to which the majority were not attracted. Brennan J expressed concern that to depart from the rule would be to reduce the duty imposed on occupiers of land and correspondingly to diminish the security that the rule conferred on neighbours. McHugh J held that to depart now would be a far reaching step, going even beyond the process of development of the common law by the Court: it is a fixed rule of law, his Honour said, applied for more than a hundred years. Its abolition now could well abolish existing and potential rights.

In Capital Duplicators Pty Ltd and Another v Australian Capital Territory and Another (No 2), the High Court decided not to overrule previous decisions of the Court holding franchise charges on alcohol, tobacco and petrol imposed by the States to be valid. This was of course a matter of great relief to the States, and perhaps a rare victory for them. However, the particular interest in the decision lies in the judicial conservatism of the majority's pronouncement in these terms:

"In refusing to reconsider the franchise decisions relating to liquor and tobacco, the Court has recognised the fact that the States (and the Territories) have relied upon the decisions in imposing licence fees upon vendors of liquor and tobacco in order to finance the operations of government. Financial arrangements of great importance to the governments of the States have been made for a long time on the faith of these decisions. If the decisions were to be overruled, the States and the Territories would be confronted with claims by the vendors of liquor and tobacco for the recoupment of licence fees already paid. That would certainly be the case if the Court were to hold that such licence fees could not properly be characterised as no more than the imposition of a licence fee for the privilege of engaging in the relevant activity. Hence, considerations of certainty and the ability of legislatures and governments to make arrangements on the faith of the Court's interpretation of the Constitution are formidable arguments against a reconsideration of Dennis Hotels and Dickenson's Arcade."

The States and others had of course made settled arrangements on the basis of a common understanding of the law of real property. The States exercised, they believed, domain over all land within their boundaries. The fact that the Court's decision in Mabo [supra] would cause the States (and others) to be confronted with claims for land still to be, and in some cases already, alienated, and that settled arrangements would be disturbed, did not inhibit the Court in the same way in reaching the decision that it did in Mabo.

In this paper I have looked at a variety of decisions of the Court in recent times, decisions in areas other than the Constitution. It is, I believe, appropriate to do so because it is sometimes overlooked that the final and awesome powers of the Court are frequently exercised in non–constitutional cases with a very real potential to affect a large number of the people in the community. Let me take as an example Carson's Case [supra]. The decision in that case you might think of little significance except to the parties to it. But such a decision has a real impact in two respects. It must encourage media defendants to be bolder and to take their chances in

defamation litigation. However, more subtly, the decision provides the media with, I think, a one– sided argument in favour of changes (for the benefit of the media) in the defamation laws. The statements of some members of the Court, taken with the statements in Wills and Capital Television [supra] will be exploited by the media to achieve their desired changes. So too the decisions may have a large impact on State powers. I venture to suggest that no one in the last decade of the last century, or indeed anyone other than the ingenious lawyers and their clients in the last mentioned two cases, ever imagined that the Constitution might be a source of power to strike down State defamation laws.

The High Court takes pride in the way in which many of its recent cases have been decided, and takes comfort in the fact that, as the Chief Justice put it [supra], although it is always open to the legislature to repeal or amend the Crown laws as the Courts declare it, legislation overruling an amendment of a judicial ruling is a relatively rare occurrence. With respect, this is not a satisfactory answer, because the judicial activism to which I have referred is equally a relatively recent occurrence. In practical and political terms it will never be an easy matter for any government of the day to repeal by legislation decisions of such an august body as the High Court. And of course no legislature has the power to legislate away the Holy Writ of the decisions of the Court on constitutional matters, whether they arise out of the express language of that document or some implication to be found in it.

Are we going down the American path of critical and searching examination of the views and philosophies of any potential candidate for appointment to the Court?

For myself I doubt very much whether these sorts of processes further the interests of justice. Instead of learning from gentle post-mortem vignettes of the judges, of their foibles such as, for example, an excessive sensitivity on the part of Griffith CJ to slights; or that Rich J would seek to avoid his obligations to travel with the Court because he had to steer his "boy", a final year law student, through his supplementary examination in conflict on laws; or that Starke J would urge Latham CJ to impose the burden of travel upon the "Sydney men" (Evatt and McTiernan JJ), we may well bring down upon ourselves the unedifying spectacle of blatant politicisation of the Court. One commentator in the United States describes what has happened in this way:

"Appointments to the U.S. Supreme Court (and to the lower federal courts as well) have become increasingly driven by ideology. There are many reasons for this. First, there is no doubt that the U.S. Supreme Court is a policy making court, and that the justices make law. Second, the Supreme Court increasingly deals with extremely sensitive issues which arouse many groups of Americans – abortion, minority and women's rights, personal political freedom and civil liberties, the death penalty and rights of criminal defendants, environmental protection, and many, many more. There are now many more interest groups – liberal and conservative alike – which have become alerted to the crucial role of the federal courts in making civil rights, civil liberties, and other policies.

"Third, and perhaps most important, the U.S. Supreme Court recently has undergone a major partisan and ideological shift that has generated intense political conflict. With the exception of the single term of President Jimmy Carter – who had no Supreme Court vacancies to fill – conservative Republican Presidents have been elected since 1968, and President Richard Nixon, but especially Presidents Ronald Reagan and George Bush, have appointed new conservatives to replace retiring liberals."

One modern casualty of the United States system has written a book about the process which defeated his appointment. The author, Robert Bork there defined "judicial politics" as "the Court's assertion of its own values to declare legislation unconstitutional when the Constitution has not spoken."

We do not, I think, want a situation in the future about which people may legitimately make the same claims of the High Court, no matter how attractive, at the time, a piece of judicial activism may appear.

In addition to saying something about the final appellate system here, and in the United States, I undertook to say something about that in the United Kingdom. There has in recent times been complaint within all branches of the profession, judicial, academic, and practitioners on both sides, of the multiplicity of reasons for judgment in some cases. It has been contended that the Court should strive for unanimity more, and that two opinions only, a majority and a dissenting one, should generally be given. The response is often made that each Justice has a constitutional obligation to express his view of a case and to decide it according to his legal convictions. Excessive zeal and industry can produce disadvantage; and I think they have, in that they have led the High Court to a proliferation of reasons, producing difficulty in ascertaining a clear ratio in some cases.

It is interesting that, in the United Kingdom, notwithstanding that the House of Lords has not the same rigid structure as the High Court, because it may be constituted not only from the Law Lords in Ordinary, but also from the Lord Chancellor and other members of the House with substantial legal experience, there is a greater degree of uniformity and caution in the reasoning of that Court. In answer to suggestions that the Court should perhaps be enlarged in order to hear more appeals, and that in any event fewer lengthy reasons should be written, apologists for the Court answer by saying that separate and extensive reasons reaching the same conclusion are often necessary, and that an increase in the numbers of the High Court so that it might sit in separate divisions to hear more appeals, would create uncertainty and intellectual division in the Court. It is a matter for the reader to assess the validity of these propositions, particularly the latter, in light of the multiplicity and length of reasons for decisions published by the Court.

It seems a long time now since the Chief Justice was quoted as saying on his appointment to that office that the Constitution was framed with a close eye to the doctrine of parliamentary supremacy, and that the High Court did not have to contend with the litigation created by a constitutionally entrenched Bill of Rights that came before the United States Supreme Court.

What if anything has changed since 1987 when the Chief Justice said those words?

I will now bring together some of the disparate threads that have run through this paper. There is some basis, I believe, for describing today the High Court as a "Mighty High Court". Some of the decisions to which I have referred lend some support to this conclusion. The Chief Justice, Sir Anthony Mason's own words, in describing the role of the Court in enforcing and indeed finding fundamental new rights, in a sense would place the Court above Parliament unless and until the latter acts. But of course it is only the Court who can act decisively in constitutional matters.

The Court is a mighty court in the sense that it sets its own agenda. If war is too important to be left to the generals, should the definition of a Court's jurisdiction be left effectively exclusively to the Court? I would have thought not.

If the Court is not yet an "Over Mighty Court", and if progression to that position is, as I think it to be, undesirable, is it too late to ring the appropriate changes to prevent that result? One measure that I would introduce is the restoration, as the Founders envisaged, of rights of appeal. After all, the Court no longer exercises any diversity, or, henceforth, industrial, or other original jurisdiction. It no longer undertakes the slow and burdensome journeys of the past. Special leave should be still available, but only rarely granted. The Court would thereby be enabled, particularly if there be a willingness to co-operate in more single decisions and sets of reasons, to hear more appeals instead of sorting through 200 or so special leave applications with which it has been pressed in each of the years since 1987. One might well question the relative costs and

benefits of 38 appeals heard to 232 applications for special leave (1988) or 39 appeals to 226 such applications (1991). The restoration of those rights of appeal would probably obviate the need for hearings on the papers of special leave applications, as foreshadowed by the Chief Justice, because the number of these would be much reduced. It has been suggested that there are problems in defining the criterion for rights of appeal. I do not accept this. There is no perfect criterion, but the financial one was satisfactory for decades and is the jurisdictional criterion for very many Courts in Australia anyway. It is not hard to define other criteria such as, for example, in criminal cases, ones attracting certain severe penalties. It would always be open for the Court to take hold of other important or exceptional cases not meeting the criteria, as it did for more than seventy years. By these means the Parliament and not the Court will set the Court's agenda.
Only Brennan and McHugh JJ seem to have given close attention (in Burnie Port Authority Ltd, supra) to the consequences of the fiction, that, because courts only declare and not make the law, a new and radical decision has the capacity to affect, and will affect, vested rights retrospectively. At least legislators almost always formulate appropriate transitional provisions.
The Courts will also avoid much of the controversy and criticism to which the United States Supreme Court has been subjected in relation to its selection of cases. Moreover any suspicion, however unjustified, that the intramural selection of cases might in truth be the selection of the associates and researchers would be dispelled. Anything involving clear criteria would, in my view, be better than the lottery which I, and I know others, at the Bar believe to be a not inapt description of the present system of grants of special leave.
It is probably too late for a complete retreat from judicial activism, although there are cycles in most forms of human endeavour. But it is not too late for Parliament to regain some of its authority in the ways that I have suggested. I am sceptical about whether this will occur. My theory is that governments, indeed most politicians of all colours, have consistently underestimated the power and importance in all senses, legally, socially, and now, critically, politically, of the High Court. The people, the Parliament, I would somewhat optimistically propose, ought to regain power by legislating for the Court's jurisdiction in express terms.
A Court that reserves the right to pick and choose upon wholly unpredictable bases those settled arrangements which it would, and others that it would not disturb, to treat some matters as acceptable matters of form and reject others, to define its own jurisdiction exclusively, to intervene because in its assessment Parliament should but has failed to do so, and a Court that says it knows best how the community perceives issues is, on any view, a body of enormous, indeed unparalleled power in society.
Endnotes:

Chapter Five

International Tribunals and the Attack on Australian Democracy

Senator Rod Kemp

In 1986 the Australia Act, which severed appeals to the Privy Council, was passed with the support of all parties. It took the Labor Governments five years to overturn the philosophy of this Act.

Arguing against appeals to the Privy Council, Gough Whitlam said:

". . . the High Court of Australia [must be] the final court of appeal for Australia in all matters . . . 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."

In 1991 the Hawke Government ratified the First Optional Protocol to the UN International Covenant on Civil and Political Rights (ICCPR), which allowed individual Australians to take complaints to the UN Human Rights Committee.

In February, 1993 the Keating Government further opened the doors for Australians to "litigate their differences" before the UN by recognising the competence of two other UN committees the Committee on the Elimination of Racial Discrimination and the Committee Against Torture to consider complaints from individual Australians.

These decisions were apparently taken without any Cabinet consideration. There was very little public debate. The Liberal State and Territory Governments objected to the decisions.

This paper focuses on the role of UN human rights committees in relation to our legal and constitutional system.

However, the activities of the International Labour Organisation and its plethora of committees such as the Committee on the Freedom of Association, are also relevant to this paper, particularly in view of the heavy reliance of the Keating Government on ILO conventions for recent industrial relations legislation.

This paper argues that, as a result of the Government's decision to involve UN committees in our domestic disputes:

Australia's independence has been compromised; and

our democratic institutions are being undermined.

The paper also contends that the UN committees themselves are ill-suited to taking any role in a sophisticated legal system.

Barely a week goes by where a UN or ILO Committee does not form the basis of a newspaper story. In the last three weeks, the following reports have appeared:

The Attorney-General, Mr Lavarch, has recently announced that he will be bringing in legislation to override Tasmanian laws on homosexuality following the finding by the UN Human Rights Committee that these laws were in breach of an international covenant.

UNESCO's World Heritage Bureau, according to a report in The Australian (5 July, 1994), is going to hear concerns that the Tasmania World Heritage area created in 1989 is in danger. The report said that this may help Senator Faulkner, the Minister for the Environment, stop wilderness logging.

The Australian Chamber of Commerce and Industry announced (The Australian, 14 July, 1994) that it will challenge the Government's industrial relations laws before the ILO Committee on Freedom of Association.

The former Labor Finance Minister, Peter Walsh, summed up the situation in an article earlier this month entitled Free men who bow to the UN. He argued:

"I am not and never have been a monarchist, but find it ironic that so many contemporary Australians determined to protect us from the non-existent threat of English tyranny, fall over each other in a scramble to surrender Australian sovereignty to a ragtag and bobtail of unrepresentative United Nations committees accountable to nobody."

In his first major speech on becoming Leader of the Opposition, Alexander Downer identified the role that the UN was playing in the Australian Constitution and legal system as an important issue.

"We believe that the protection of Australia's national interests is most effectively upheld by Australians throughout our Parliaments, our courts and other bodies, and not through UN or other international committees that are ill-suited to playing any direct role in the Australian legal system and many of which are themselves widely recognised as being in need of reform."

And further:

"Labor will continue to make Australian law accountable to foreign tribunals, we will ensure that Australian law is made in [Australia] and by Australians."

Under the Hawke and Keating Governments, UN conventions often provide the constitutional head of power for the law, the UN committee or bureau monitors performance, and in some cases a UN committee or ILO committee can adjudicate disputes.

There are great ironies in relation to these important legal and constitutional developments.

First, Australia's No.1 republican, Paul Keating has led the way in ceding Australia's independence and sovereignty to United Nations committees.

Second, our politicians who speak most about human rights, such as Senator Evans, have ignored a basic human right of the Australian people by omitting to check whether they want United Nations committees to become actively involved in Australian domestic disputes.

The decisions to involve UN human rights committees in Australian domestic disputes did not require an act of Parliament. As with all treaties, this decision was simply a matter for Executive Government.

Australians know virtually nothing about the procedures of these committees, the quality of the members who will be making rulings on Australian disputes, or the impact their decisions are likely to have on Australian law.

These developments stand in sharp contradiction with the view that in a democracy, the people should be subject to laws enacted by their parliaments and interpreted by their judges.

National Sovereignty

Until recently there was no argument that there has been a "tendency for the United Nations to limit national sovereignty".

As the Joint Parliamentary Committee on Foreign Affairs, then chaired by ALP Senator Chris Schacht, pointed out:

"This evolution, therefore, increasingly demands a reconsideration of the principle of national sovereignty. United Nations conventions, now covering a wide range of activities, inevitably change the character of domestic institutions, affect domestic legislation and extend accountability beyond the usual domestic constituency." [emphasis added]

(Senator Schacht, ironically, moved the resolution at the ALP Hobart Conference in 1991 calling for Australia to become an "independent republic".)

The late Justice Murphy, one of the Labor Party icons and mentor of Senator Evans, had no doubt that foreign tribunals compromised Australian sovereignty and independence.

In 1973 the Queensland Government passed legislation to allow appeals to the Privy Council from the State Supreme Courts. When the matter reached the High Court in 1975 Justice Murphy ruled:

"The establishment by an Australian State of a relationship with another country under which a governmental organ (judicial or otherwise) of that country is to advise the State on the questions and matters referred to in the Act, is quite inconsistent with the integrity of Australia as an independent sovereign nation in the world community. It is not within the legislative competence of the Parliament of any State to compromise or attempt to compromise Australian sovereignty and independence."

Why Involve the UN Committees?

The republican debate, however, has made it very difficult for the Labor Government to concede that UN conventions and the involvement of UN human rights committees limit sovereignty.

Internationalism almost inevitably involves the idea that increasing power must be given to international bodies at the expense of sovereign states.

Most people would not object to a moderate internationalism where national interests are clearly advanced in a tangible way through binding international agreements. Each country trades off its freedom of action to ensure the greater good for its own citizens. The GATT round is an obvious example.

But the internationalism that is espoused by Senator Evans seems to be based more on the belief that Australia should trade off our national sovereignty, our capacity for independent decision making, in the expectation that this will contribute towards building a new world order.

According to Senator Evans, a key aspect of "The New Internationalist Agenda" has been:

"[to] encourage adherence to existing human rights instruments; to ensure the effective operation of monitoring machinery; and to expand the body of human rights treaties in specific areas."

However, he has recognised that this can lead to legal consequences for Australia, saying:

". . . if you are going to have credibility in advancing those universal themes, you have to be prepared to accept the jurisdictional consequences of their application to you."

Justifying the decision to involve UN committees in Australian domestic activities, Senator Evans said:

"Australia's accession to the First Optional Protocol underlines the importance accorded by the Government to the protection of human rights, and our conviction that the human rights performance of Australian governments at all levels should be fully open to international scrutiny."

In other words, we should allow the UN to become involved in our domestic activities, to make rulings on our domestic disputes and to abide by those rulings; all in the hope that other countries will be ultimately prepared to follow our example.

This new internationalist agenda of Senator Evans seems to be based more on faith than a realistic assessment of international relations.

However, lest there is the assumption that Senator Evans has become irretrievably utopian, there is a high degree of political self-interest involved.

By ceding sovereignty to international organisations, the Labor Government has been able to acquire powers over the States.

This is a far quicker way to alter the Constitution than by referendum.

A referendum, of course, requires the involvement of the Australian people in a decision to alter the balance of powers in our federation. A multilateral treaty is simply an executive decision: it doesn't even have to be approved by the Parliament, and often not even approved by Cabinet.

A case study: Avoiding Democracy via Geneva

One dramatic example of how democracy can be avoided by taking the road to Geneva can be seen in the ratification of ILO convention No.158.

The Commonwealth Government on six separate occasions through referenda has tried to acquire wider powers over employment, industrial relations and wage fixing. On all six occasions the Australian public have refused these additional powers.

However, the use of ILO conventions, relying on the High Court's current wide reading of the external affairs power, has provided the Labor Government with powers that the Australian people have rejected.

This has caused a huge shift in the balance of powers between the State and the Federal Governments in the area of industrial relations.

Just prior to the last election, the Keating Government was facing a major challenge to the industrial relations system with the election of the Kennett Government in Victoria. In order to protect the power and privilege of the trade unions in the Victorian industrial relations system, the Federal Government decided it would legislate.

Using the Kennett industrial relations reforms as a pretext, the Keating Government went beyond providing an escape route for unions in the Victorian system, further ratified ILO Conventions and legislated to impose minimum standards on all workplaces.

In one area, termination of employment, the Commonwealth did not at the time have the support of an ILO convention. It therefore proceeded to ratify ILO convention No. 158 on the termination of employment in the hope that it would provide partial support for the wide ranging legislation that it had in mind.

This convention, it should be noted, was entered into for the purpose of empowering the Commonwealth to make domestic laws. It may, therefore, amount to a non bona fides exercise of the external affairs power.

The significance of ILO convention No. 158 is that it allowed the Commonwealth Government for the first time to prescribe conditions relating to the termination of employment of all Australian workers and not only those covered by Federal awards. As a result, workers covered by State awards, and workers outside the award systems, are now covered by Federal industrial laws.

(ILO convention 158 has been ratified only by some seventeen other countries. Of the major industrial countries, only France and Sweden have ratified this convention. The countries that Australia has followed include Cameroon, Cyprus, Gabon, Malawi, Niger, Slovenia, Uganda, Venezuela, the Yemen Republic, Yugoslavia, Zaire and Zambia.)

In the past, normal practice had been for State and Federal Governments to bring the laws into line with the convention before it was ratified. The Commonwealth Government was then able to assure the ILO that domestic law and practice was consistent with the convention.

Rather than the convention being a reflection of current legal practice, the Commonwealth Government was determined to use ILO convention No. 158 as a constitutional battering ram.

In itself, this abuse of the ILO system is bad enough. The secretive and undemocratic way in which these significant changes were effected is equally worrying.

In December, 1992 the Government decided it was going to ratify this convention. On February 8, 1993, hours before the dissolution of the House of Representatives, the Governor-General approved its ratification. No media release was issued. This was done in a way calculated to minimise public debate. Why inform the people of this controversial decision, particularly while an election was underway?

Ratification of ILO convention No. 158 was opposed by most States (including apparently the Labor State of Queensland) and the Northern Territory. Only South Australia and the ACT

supported the Commonwealth position. The Australian Chamber of Commerce and Industry also opposed ratification.

In a sense, Labor placed its union mates in a "no lose" position. If Hewson had won the election, this ILO convention could have formed the basis of complaints to the ILO against aspects of Hewson's industrial relations legislation.

On the other hand, a re-elected federal Labor Government would use this ILO Convention to help sideline the industrial relations policies of the Kennett Government. This is precisely what happened.

Last year Laurie Brereton introduced radical industrial relations legislation which used this ILO convention, along with a number of other treaties, to radically change our industrial relations system.

But the story doesn't end there. The section of the 1993 Industrial Relations Reform Bill dealing with the retrenchment of workers (based on the ILO convention No. 158) caused massive employer resistance. A new bill was brought in in May, 1994 which made some changes on the retrenchment provisions. The Government claimed that this bill, despite some major changes to the 1993 Act, was also consistent with the ILO convention No. 158.

Or was it?

A complaint to an ILO Committee could be lodged on behalf of an individual.

Where successful, such a complaint to that foreign committee based in Geneva could require the Government to intervene either directly in the dispute or pass amending legislation.

As J T Ludeke (formerly Deputy President of the Australian Conciliation and Arbitration Commission) has pointed out:

"The present Government has been highly innovative, and important elements of industrial law are now based directly on ILO conventions and recommendations. In these circumstances there is little doubt that in accepting these obligations, this Government has also accepted the obligation `to secure . . . the effective observance' of the conventions on which it relies and the other conventions which Australia has ratified.

"And that means accepting the rulings of the appropriate ILO agency established for the purpose of adjudicating on complaints about the way governments give effect to Conventions."

Impact of UN human rights committees

Although J T Ludeke was referring to an ILO committee, his arguments apply with equal force to UN committees and their role in the Australian legal system.

In recent months Senator Evans and Michael Lavarch have strenuously attempted to play down the significance of UN human rights committees in the Australian legal system. They recognise that most Australians, if given a chance, would not share the Labor Government's enthusiasm for foreign tribunals.

They have argued that the findings of these UN committees are only advisory and have no legal impact. Further, they state that UN treaties and the findings of the committees can be put into effect only by legislative action of the Parliament.

Michael Lavarch has argued that there is a great difference between the impact of Privy Council decisions and the findings of UN human rights committees:

". . . understand that the decision which is made by the UN committee absolutely has no impact on Australian law and of course that is the great difference between the Privy Council decision which did impact on Australia law and the decision of this body which has no impact on Australian law."

One of Michael Lavarch's predecessors as Attorney-General, the late Lionel Murphy, did not give the same importance to this distinction. In the case referred to above (where the Queensland Parliament passed legislation to allow further appeals to the Privy Council from the State

Supreme Courts), the Queensland Government argued that the Privy Council was not a court and its decisions were advisory, rather than judicial. Justice Murphy responded to this argument by saying:

"Even if it were not strictly a court, the system of reference is potentially embarrassing to the courts of Australia and use of it would tend to undermine the judicial structures provided for in the Judicature Chapter [of the Constitution]."

The arguments of Senator Evans and Michael Lavarch can be regarded as dissembling on a grand scale.

The Government wants us to believe it was very important to take these decisions to allow UN committees to become involved in Australian disputes. But at the same time we shouldn't worry too much because they have no impact.

In fact, the decision to enable Australians to take complaints to UN committees has significant legal and constitutional effects.

First, it provides an alternative plane of law to which individuals can turn to support claims which may be untenable under domestic law. In other words, individuals can now challenge, in an international forum, legislation they could not have been able to challenge under domestic law.

This is precisely the action that Mr Toonen took in relation to the homosexual laws in Tasmania. It is also the basis of the action by the Australian Chamber of Commerce to appeal to the ILO Committee of Freedom of Association over the Government's new industrial relations changes.

Second, these conventions can impact on the Australian legal system without any legislation. The fact that courts know that their judgments can be criticised by UN committees provides a powerful incentive to make judgments which they believe meet the terms of those conventions.

Justice Brennan, recognising the significant influence of the First Optional Protocol to the ICCPR in Mabo v Queensland, stated:

"The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law."

Justice Kirby, the President of the NSW Court of Appeal, has stated:

"Several of the trailblazing decisions [of the High Court in 1992] were influenced by the fact that what Australian courts decide can now be scrutinised (and criticised) by the UN body [the United Nations Human Rights Committee]."

The recent Teoh case is another example of how UN conventions can be imported into Australia through judicial decisions. In this case the deportation order against a Malaysian national was overturned because it did not take into account Australia's obligation under the International Convention on the Rights of the Child.

Third, legislatures will be pressured to take into account treaty obligations in passing laws, or face criticism of UN committees and international embarrassment if they act contrary to treaty obligations.

Previously, the only way State laws could be challenged on the basis of a treaty would be under the implementing legislation in Australian courts.

However, the ratification of the Optional Protocol to the ICCPR requires the State Parliament to look to the international covenant and its jurisprudence. State legislation can now be challenged in an international forum as inconsistent with international obligations.

Fourth, rulings of UN committees can have constitutional significance. A finding could constitute a matter relating to external affairs under section 51 (xxix) of the Constitution.

For example, the finding by the UN Human Rights Committee in the Toonen case is providing legislative justification for Commonwealth action. The Attorney-General has given notice of a bill which will invalidate legislation dealing with sexual conduct which places Australia in breach of its international obligations under article 17 (arbitrary interference with privacy) of the ICCPR.

Hence there is no doubt that these UN and ILO committees now have a significant constitutional impact in our legal system.

In view of the comments by Michael Lavarch on the Privy Council, it is instructive to assess the relative impact on our legal and constitutional system of the Privy Council and UN and ILO committees. The following thoughts may be of some relevance in this assessment.

The Privy Council pre-1986 and the UN Human Rights Committee post-1991 do have different roles in our legal system. But it does not follow from this that UN committees will have a lesser impact on our system.

The Privy Council was concerned with the implementation of Australian domestic law legislative and common law. UN human rights committees are concerned with the implementation of international conventions in Australia many of these conventions of course have never been incorporated into Australian legislation.

Access to the UN human rights committees is less restricted than access to the Privy Council, where the case must already have been heard by an Australian court and special leave given by the Privy Council for an appeal. The access to the UN Human Rights Committee is open to all individuals who have exhausted domestic remedies. In the Toonen case there was no prior court action involved.

The National Action Plan (on the observance of human rights) tabled by Senator Evans in Geneva in February, 1994 indicates that the Government will seek to inform all Australian citizens regarding the availability and nature of the complaint mechanisms to the United Nations.

A ruling by a UN human rights committee, based on a complaint from an individual, about an alleged breach of a treaty which has never been passed by the Australian parliament, can have significant constitutional effects. This is demonstrated by the fact that Attorney-General Lavarch is now taking action in the federal Parliament to overturn a State criminal law.

The fact that UN committees are not required to follow judicial procedures or judicial reasoning gives further weight to the argument that these decisions may well have a more detrimental impact on our system than the Privy Council ever had.

The argument is sometimes put that the decisions by UN committees are only advisory.

Michael Lavarch tried to have it both ways in a TV debate. I quote from the Lateline transcript:

"Michael Lavarch: Well, at the end of the day, all of these decisions are advisory decisions and it's up to Australian governments and Australian parliaments to make a decision about Australian law.

Kerry O'Brien: But you can't pick and choose, surely.

Michael Lavarch: No, we can't pick and choose and we'll act consistently, obviously."

But as Senator Evans stated categorically, "Once we subscribe to a treaty, we abide by its requirements in every detail." And as I mentioned earlier, Senator Evans said "we have to be prepared to accept the jurisdictional consequences".

An adverse finding by a committee shows that Australia is in breach of its legal international obligations. The domestic and international pressures make it very difficult to ignore these findings.

Mr Keating can hardly argue that the first ruling of a committee was so important that it is now necessary to override State criminal law, but any subsequent ruling of the committee is so unimportant that it can be ignored.

Indeed, the Government now has to face some major dilemmas as a result of Mr Keating's and Senator Evans' new internationalist agenda.

The decision by the Federal Government to involve UN committees in Australian domestic disputes will inevitably over time undermine our own legal institutions. Acceptance of a UN decision, which is critical of a High Court judgment or against an Australian Government, inevitably diminishes the importance of our own system.

On the other hand, an individual or group who win their case before a UN committee are hardly going to let the issue rest if the Government attempts to ignore the committee's view. Justice Murphy saw this danger in relation to the 1973 attempt by Queensland to allow the Privy Council to give advisory opinions:

"The existence of two ultimate courts of appeal on any question would be not only incongruous but mischievous. Any difference of opinion between the Privy Council and the High Court on non-inter se questions would naturally be exploited by litigants."

UN Human Rights Committees

We can be reasonably sure that in taking the decision to allow UN committees to sit in judgment on domestic human rights issues, Messrs Keating, Hawke and Senator Evans did not inform the Labor Caucus about the procedures and composition of these committees.

These committees are unsuited to playing any role in a sophisticated legal system like Australia's.

Indeed, the UN human rights committees do not meet the standards of judicial process and independence required for a small claims tribunal, let alone bodies whose views may affect constitutional arrangements in Australia.

Justice Evatt, who is a member of the UN Human Rights Committee, and I have had a continuing debate over the last year on the activities of these committees. We have had a frank exchange of submissions on this matter to the Joint Standing Committee on Foreign Affairs, Defence and Trade.

A book published as recently as 1990 made this observation on the UN Human Rights Committee:

"Inevitably, however, independence is relative and varies with the backgrounds of the members and the practices of their governments. It is not unique to this body that some experts seem to have been in closer contact with the authorities of their own countries than other members, if they have not acted directly under instructions; others have at the same time as their Committee membership been serving their governments in an official capacity."

Another study observed:

"The Committee is composed of independent experts but, as in other bodies of international experts, some are not independent but in fact subject to substantial control by their governments."

As with the UN Human Rights Committee, attention has been drawn to issues of impartiality and independence in relation to the UN Racial Discrimination Committee.

"Because a Committee member serves on a part-time, honorary basis, usually he must simultaneously maintain a separate profession. Only rarely do these dual roles create conflicts; judges, university professors, retired diplomats, or diplomats dealing only with bilateral relations are unlikely to receive directives from their authorities with respect to their work on the Committee. However, for a minority of members, primarily those belonging to the permanent missions of States Parties at New York or Geneva, such conflicts can be significant. They may find themselves in the awkward position of having to disregard their superiors' directives while at the Committee table. Clearly, it is incompatible with the Member's solemn oath of impartiality

if his attitude is dictated by a member of his country's permanent mission. Nevertheless, it seems that not all States Parties attach the same importance to these proprieties."

Justice Evatt concedes that "in the past some members of the committees from the eastern bloc were not permitted to act freely and independently of their governments".

Justice Evatt says that she would:

". . . personally prefer that members of the foreign service not be nominated to these committees, because of the potential for a conflict of interest to arise. But I do not think this has been a significant obstacle to the work of the committees."

In fact, nearly half of the 46 members of these three UN human rights committees to which Australians can take complaints have been former ambassadors and diplomats.

These committees are pre-eminently a UN old boys club. There are only five women out of the 46 members of the committees. The average age of members of the committees is about 60.

It is also worth noting that many members of these committees are nominated by governments which have very poor human rights records. Some 19 out of the 46 members of the three committees come from countries that are classified by Freedom House as either being not free or only partly free.

Another feature of these committees is that some of the members who will be making rulings on Australian human rights disputes are nominated by governments which do not allow complaints from their own citizens to go to these committees (see Appendix A).

For example, one of the members of the UN Committee on the Elimination of Racial Discrimination is Mr Carlos Hevia, who was nominated by the Government of Cuba. Castro has not allowed complaints from Cubans to go to this committee although Mr Hevia can rule on Australian disputes.

Carlos Hevia has been a member of the Cuban diplomatic corps, foreign affairs bureaucrat and general apparatchik since the Revolution. He was "Political Director for Africa and Asia" in the Ministry of Foreign Affairs, "took part in official special missions in Asia, Africa, Latin America and the Middle East" (where, in at least two of these regions, Cuba has interfered politically and militarily for years) and has served as the Cuban Ambassador to the UN.

It is not clear what particular human rights expertise Senator Evans or Mr Keating thinks that Carlos Hevia can bring to human rights disputes in Australia. Indeed, I have asked Senator Evans this question on a number of occasions and I have never received a satisfactory answer.

Judicial Process

The committees do not meet Australian standards of judicial process. The proceedings are not in public and there is no cross examination of witnesses.

And further, there is no automatic right of appearance for a defendant where a Government whose laws are under question is a State government.

The Tasmanian Government had to rely on the Commonwealth Government (which was supporting the complainant) to put their case to the Committee.

"Although the Commonwealth included some representations of Tasmanian views in its general submission, the Commonwealth submission substantially accepted Mr Toonen's complaint, leaving the Committee to make a decision on the basis of the views of one side only, while the Tasmanian Government, whose laws were the subject of the complaint, had no standing to represent its case. This procedure, although consistent with the fact that international law only recognises sovereign nations, does not seem to accord with Australian notions of natural justice."

One of the criticisms which has been made of the UN Human Rights Committee is that because it is not a court of law, it does not give reasoned legal opinions.

As Anne Twomey, constitutional lawyer with the Parliamentary Research Service, has pointed out:

"The Committee's view on the Toonen complaint is a good example. The Committee stated its view that `sex' includes `sexual orientation' without giving any reason. It is extremely difficult for countries to interpret a treaty, if they are not aware of the reasoning by which a conclusion is reached. The reasoning, if revealed, may be relevant to the interpretation of other terms and provisions in the treaty, but unless it is made clear by the Committee, the Committee's reasons can only be a matter of speculation."
Senator Evans has conceded that determinations of the UN committees are "perhaps less meticulously argued than we might think ideal".
It is of concern that our High Court pays close attention to the findings of a committee whose procedures are simply not up to Australian legal standards.

Universal Standards

One of the main justifications for the establishment of the UN human rights committees is to promote universal standards of human rights.
However, one of the features of the Toonen case is that the committee appeared to adopt a "cultural relativity attitude" to the rights contained in the covenant.
The decision seems to relate only to Australia and Australian circumstances:
"In its consideration of the Australian complaint, the Human Rights Committee took into account the fact that homosexual acts are not criminal offences in other Australian States or Territories, and that there was a lack of consensus on the matter in Tasmania itself.
"If a similar complaint was brought to the Committee from a country which had strong religious and cultural beliefs about homosexuality, and where laws prohibiting homosexual acts were enforced throughout the country and were generally accepted and approved of by the population, it is possible that the Committee would consider laws criminalising homosexual acts to be `reasonable' in the circumstances."

Obligations to Report to Committees

These committees have an important role in monitoring the human rights performance of member countries.
Australia is required to report periodically to the UN human rights bodies. These reports provide an opportunity for committee members to question countries about domestic human rights developments.
The "development of reporting systems lies at the very heart of the international system for the promotion and protection of respect for human rights". It "enhances international accountability" and provides "states parties with a valuable opportunity to review policies and programs".
Last year Australia tabled its Ninth Periodic Report of the Government of Australia Under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination.
Australia was questioned on the absence of anti-discrimination legislation in the Northern Territory and Tasmania, the "deplorable" land rights situation of indigenous people, and police activities in Redfern.
"Committee members expressed regret that reports had not frankly admitted difficulties encountered in securing compliance of the various Australian States with the convention on the elimination of racial discrimination".
Presumably Carlos Hevia of Cuba was one of those expressing concern about Australia's alleged lack of conformity with the convention.
Other members of the committee such as Songu Shuhua of China, Yuri Rechetov of the Russian Federation and Ion Diaconu of Romania must have been pleased that they did not live in such a

country as Australia which, according to the Report filed by our own Government, suffers from "entrenched and institutional racism and discrimination".

The Crisis with the UN Committee system

Just as Australia has become actively involved with UN human rights committees, the whole system itself has been described as in a "crisis situation".

Professor Philip Alston of the Australian National University, in a study prepared for the United Nations on ways to enhance the effective operations of bodies established under UN human rights instruments, points out that "there appears to be a consistent recognition of the need for sustained reform".

Among other things, Alston points out that the reporting duties of member states have become too onerous, there is inadequate personnel and financial resources and lack of co-ordination between the various UN committees.

Problems are emerging of various UN human rights committees ruling on similar issues. This can produce conflicting interpretations of what the various articles may mean.

"In the longer term, it seems inevitable that instances of normative inconsistency will multiply and significant problems will result. Among the possible worst case consequences, mention may be made of the emergence of significant confusion as to the `correct' interpretation of a given right . . .."

Australians may find UN committees giving differing interpretations on what the actual UN conventions and covenants mean. This also has potential for constitutional problems, given the fact that a UN committee ruling may provide in effect a head of power for further Commonwealth intrusion into State activities.

Last month I asked Senator Evans this question:

"Do you think you could look once again at the procedures of these committees, the method of appointment of people to these committees, and the processes by which they conduct their hearings, and see whether there is, in your view, any room for reform?"

Senator Evans replied:

"I have already looked at these procedural questions and my judgment at the moment, for better or worse, whether you like it or not, is that it is working perfectly well in terms of priorities for reform of different organs within the UN system and it is not likely to rank high on my agenda for the foreseeable future given priorities elsewhere within that system."

Despite the strong arguments for reforming the UN committee system, they are not a priority for Senator Evans.

Conclusion

There is some indication that UN conventions have greater significance in countries such as Australia in which the rule of law is deeply embedded and there is a tradition of seeking to abide by international obligations.

An article in the American current affairs journal, Commentary, looked at the issue of how international agreements such as UN human rights conventions can impact on national sovereignty. It argued that international commitments can have a very different significance for the United States than for other countries.

"A recent study reports that after the EC adopted a general directive on comparable-worth regulation, only Britain felt obliged to implement it in a systematic way, even though the substance of the policy was more distasteful to Prime Minister Thatcher's government than to any other involved. France, Italy and many other countries are notoriously adept at manoeuvring around legal commitments they deem inconvenient. The United States will find it even harder than Britain to do so. For we have a system that is most ill- suited for evading or containing

awkward policy commitments which come with some momentum of prestige such as `law', or even `international law'."

The same argument applies to Australia. Other countries may be able to sign UN convention after convention without significant domestic impact. This paper has argued that foreign tribunals and foreign treaties are having a major impact on Australian democracy and our federation.

Yet the constitutional problem Mr Keating continues to raise is the need for Australia to become a republic and the alleged problems the constitutional monarchy may have for Australia.

Australia's major constitutional problem lies elsewhere the expansive use of the external affairs power, the ruthless use of ILO and UN treaties to override States, and the ceding of sovereignty to foreign committees.

To use an Australian metaphor, Mr Keating is asking us to worry whether the chop might burn on the barbecue, while the house behind is being consumed in flames.

Mr Keating and Senator Evans have led the charge at scoffing at the affection our forebears held towards Britain. But there is no doubt the Australians of yesteryear would find great amusement at the assumption by Mr Keating, Senator Evans and others that our laws are sometimes better made and adjudicated at the UN.

The current generation of Australians do not want their laws made in London or at the UN.

Appendix A

UN Human Rights Committee

(The Hawke Government decided that Australians could take complaints to this Committee in September, 1991.)

Kurt Herndl Austria
Elizabeth Evatt Australia
Julio P Vallejo Ecuador
F J Aguillor Urbina Costa Rica
Omran El Shafei *Egypt* *
Anreaas Mavrommatis Cyprus
Christine Chanet France
Tamas Ban Hungary
Nisuke Ando Japan *
Fausto Pocar Italy
Waleed Sadi *Jordan* *
Laurel Francis Jamaica
Birame N'Diaye *Senegal*
Rajsoomer Lallah Mauritius
Bertil Wennergren Sweden
Rosalyn Higgins UK *
Vojin Dimitrijevic *Yugoslavia* *
Marco Tulio Bruni Celli *Venezuela*

* Countries that have not signed and ratified the First Optional Protocol, which allows their citizens to take complaints to the UN Human Rights Committee.
Italics: countries designated by Freedom House as either not free or only partly free.
Members of the Committee on Human Rights are elected by secret ballot from a list of persons nominated by Governments which have ratified the International Convention on Civil and Political Rights.

Appendix B

UN Committee on the Elimination of Racial Discrimination

(The Keating Government decided Australians could take complaints to this Committee in February, 1993.)
M J Yutzis Argentina *
Hamzat Ahmadu *Nigeria* *
Ivan Garvalov Bulgaria
Andrew Chigovera *Zimbabwe* *
Songu Shuhua *China* *
Mahmoud Aboul-Nasr *Egypt* *
Valencia Rodriguez Ecuador
Michael P Banton UK *
Shanti Sadiq Ali *India* *
Carlos L Hevia *Cuba* *
T Van Boven Netherlands
Agha Shahi *Pakistan* *
E Ferrero Costa *Peru*
Ion Diaconu *Romania* *
Michael E Sherifis Cyprus
Regis de Gouttes France
Yuri A Rechetov *Russian Fed.*
Rudiger Wolfram Germany *

* Countries that have not ratified Article 14 allowing complaints from their own citizens to the Committee.
Italics: countries designated by Freedom House as either not free or only partly free.
Members of the CERD Committee are elected by secret ballot from a list of persons nominated by countries which have ratified the International Convention on the Elimination of All Forms of Racial Discrimination.

UN Committee Against Torture

(The Keating Government decided Australians could take complaints to this Committee in February, 1993.)
Alexis D Mouelle *Cameroon* *
Julia Iliopoulos-Strangas Greece
Mukunda Regmi Nepal *
Bent Sorensen Denmark
Alexander M Yakovlev *Russian Fed*
Ricardo G Laverdra Argentina

Peter T Burns Canada
Fawzi El Ibrashi *Egypt* *
Hassib Ben Ammar *Tunisia*
Hugo Lorenzo Uruguay

* Countries that have not ratified Article 22 allowing complaints from their own citizens to the Committee.

Italics: countries designated by Freedom House as either not free or only partly free.
Members of the Committee Against Torture are elected by countries which have ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Each country may nominate one person from among its own nationals.

Chapter Six

The Basel Convention: Why National Sovereignty is Important

Ray Evans

The Basel Convention is an international treaty which requires the governments and citizens of signatory nations (Convention Parties) to do certain things, or to refrain from doing things, with respect to the export and import of commodities and materials which are listed in the Convention as "hazardous wastes". 1

In summary, the Convention will bring about the end of a well established sector of international trade, and do so solely upon the geo-political alignment of the countries in which the private trading partners are domiciled. This prohibition will include, amongst other things, the movement of virtually all secondary and recyclable materials (eg lead scrap) from OECD countries to non-OECD countries. Australian exporters of computer scrap to the Philippines, for example, will no longer be able to carry on their business and the Philippines workers who have been sorting this scrap for re-export will lose their livelihood. Trade in listed materials between OECD members will be burdened by onerous transaction costs of regulation and supervision.

(Greenpeace's success, earlier this year, in stopping the shipment of computer scrap from Brisbane to the Philippines, brings to mind a comment by Finn Lynge, a Greenlander who has written a book entitled Arctic Wars. Lynge notes that when the Greenpeace campaign to ban sealing on the St Laurence Gulf proved successful, the income of the Canadian Inuit hunters fell from US $2,000 pa to US$400 pa. At the same time, contrariwise, the incomes of top Greenpeace executives were raised to more than US$100,000 pa.)

The federal Government, as part of the Basel process, but well before signing the Convention, persuaded the federal Parliament to pass the Hazardous Waste (Regulation of Exports and Imports) Bill 1989. The Coalition, represented by Senator Chris Puplick in the Upper House and Mr Warwick Smith in the Lower House was, I regret to say, fulsome in its support for the measure.

It is now entertaining to observe that the federal Government's 1989 idea of "hazardous waste", as defined in its 1989 Act, differs significantly from the Basel Convention. Our government naively assumed that scrap material (eg old batteries) used as feedstock for industrial processes would not be regarded as "hazardous waste". Such Australian innocence is rather charming, but it indicates that our national interests are in the hands of people who are exceedingly naive.

The Basel Convention is a ludicrous piece of nonsense, but there can be no doubt that it is extremely hazardous nonsense. It illustrates with great clarity the forces at work which are combining to destroy the political institution we know as the nation-state, and create a world governed by a class of international, tax- exempt, officious (in the derogatory sense of that word), do-gooding bureaucrats, who are politically driven by antinomian zealots from Non-Government Organisations (NGOs).

In the first part of my paper I will briefly describe the history of Basel and its consequences. In the second I will argue that it is now very important to defend, very vigorously, the nation-state, against its contemporary opponents, particularly when these opponents bear titles such as Prime Minister, Minister for Foreign Affairs, Minister for Industrial Relations, etc, and especially when such luminaries sanctimoniously intone the words "international obligations".

The Aetiology of the Basel Convention

At first sight the creation of an international treaty which defines "hazardous waste", and then prohibits or regulates the trade in the materials so defined, seems to be as curious an ambition in life as could be imagined. But it is instructive to look at the origins of the Convention, since this story tells us much about the politics of green imperialism, and about the competition for market share between green organisations in North America and Western Europe.

The Basel Convention, like the 1986 international treaty which banned commercial whaling was, from the first, a Greenpeace initiative. Greenpeace, like every environmentalist group, needs donations from the public, and at least the appearance of mass support, to finance its activities and uphold its claims to legitimacy. Saving the whales was one of Greenpeace's most effective public campaigns. But just as an exploration geologist, having found a substantial and profitable orebody, has to set out immediately in search of the next one, Greenpeace strategists, having "saved the whales" in 1986, had to find new issues as funding vehicles, and keep on finding them, if the organisation was to sustain its income and prestige.

In Europe the word "toxic" and the word "waste" have acquired almost demonic powers, for reasons which probably only anthropologists can explain, and when these words are combined, we are faced with very potent magic indeed. Greenpeace saw an opportunity, therefore, when illegal dumping of hazardous waste materials took place in developing countries. According to Peter Lawrence, a member of the Environment Law and Aid Unit of the Department of Foreign Affairs and Trade (DFAT):

"Arguably the worst (case of illegal dumping) was the dumping of 3,800 tons of hazardous waste in Nigeria. An Italian businessman resident in Nigeria had forged documents and permits to import drums of waste PCBs and radioactive materials. The drums were stored at a site at Koko and the owner did not know the contents of the drums but had rented his land to the importer for over five years. Many drums were damaged and leaking. Labourers packing the drums into containers for movement back to Italy suffered very bad chemical burns. Some were hospitalised and one man was paralysed. While the waste was eventually removed there were grave concerns about surface and groundwater contamination.

"Incidents such as this led to the negotiation of the Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal, 1989. Australia was active in the negotiation of this agreement, which is the first multilateral treaty imposing legal obligations on states in relation to the transboundary movement of hazardous wastes." 2

Africa has many problems, the complete breakdown of civil society (as Hobbes described it) and the nightly appearance on TV of the four horsemen of the apocalypse, being the most heart-rending. One does not, of course, wish to appear indifferent to the plight of people who suffered burns or worse as a result of the criminally negligent behaviour described by Lawrence. Nevertheless, the time and money spent on putting together the Basel Convention, let alone the economic damage which will result from that Convention, seem far removed from the particular damage and injury which have inspired this diplomatic activity.

But there can be no argument that Greenpeace struck a rich orebody with its campaign against international trade in hazardous wastes. The high point of Greenpeace success was the Pope's October, 1993 address to a Workshop on Chemical Hazards in Developing Countries, organised by the Pontifical Academy of Sciences in conjunction with the Royal Swedish Academy of Sciences with the support of the Swedish Wenner-Grun Foundation.

In the course of his remarks the Pope said:

"It is a serious abuse and an offence against human solidarity when industrial enterprises in the richer countries profit from the economic and legislative weaknesses of poorer countries to

locate production plants or accumulate waste which will have a degrading effect on the environment and on people's health . . .

"It would be difficult to overstate the weight of the moral duty incumbent upon developed countries to assist the developing countries in their efforts to solve their chemical pollution and health hazard problems." 3

Greenpeace seized on this statement and subsequently placed an advertisement in the London Spectator (16 March, 1994) which depicted a self-satisfied, dark-suited businessman, in the confessional, seeking absolution from the Pope for dumping hazardous waste, at great profit, in a developing country.

As it stands the Pope's statement, however reluctant one is to take issue with one of our truly great contemporaries, is not beyond criticism. (For example, I would argue that it is only individuals, not "developed countries" who can discharge "moral duties"). But in the context of the run-up to the 21-25 March, 1994 Conference of the Parties to the Basel Convention, Greenpeace's advertisement was brilliantly timed. Published months after the Pope's speech but a few days before the Basel meeting, it is a good example of Greenpeace flair. I do hope that some of the Vatican bureaucrats took note.

The purpose of the 1994 Basel Conference of Parties was to turn Convention proposals into cast-iron obligations. Greenpeace was a very active player at the Conference, with speakers, displays, and a helicopter landing outside the venue carrying one tonne of alleged plastic toxic waste, supposedly flown in from Indonesia. Greenpeace kept a public scoreboard of "good" and "bad" countries. Australia ended up in a minority of three "baddies" against 63 "goodies", Japan and Canada, in spite of explicit Greenpeace threats, sticking with Australia to the end. However Australia then accepted the legitimacy of a majority vote.

Appendix I comprises a report from a US environmental counsel, John Bullock of Handy & Harman, who was briefed by the ICC, BIAC and USCIB to observe the proceedings and report back. I quote directly his final paragraph:

"Finally, it might be noted that the chief Greenpeace representative stated at a press conference on the final day that, having achieved the trade ban, he looked forward to the primary purpose of the Basel Convention the control of industrial production within parties to the Convention, so as to eliminate the generation of waste. He asked the President of the Convention if that would in fact be the next major activity. The response was carefully evasive. Nevertheless, it was a fair warning."

The Australian Government is now in a difficult position. It has helped, enthusiastically, to create a monster which is now understood to be capable of causing very serious economic damage to Australia. It also contains within it the seeds of such loss of sovereignty that Australia could no longer pretend to be a self-governing nation. The unconsidered but deeply condescending internationalism, which has so far guided government thinking and behaviour in this matter of treaties, is now looking, at least intellectually, pretty threadbare.

The Nation-State and its Virtues

What is the nation-state? At one level it is that political institution which issues passports and visas, and which requires the international traveller to fill out customs declaration forms. A very important aspect of sovereignty is the capacity to successfully determine who cannot enter into the nation's territory and who can and, having entered, on what terms they may stay.

A nation-state possesses two essential attributes. First, it must successfully claim territorial jurisdiction, and have that claim recognised internationally; and second, it must impose and enforce its legal system, be it just or unjust, racially discriminatory or racially blind, over that territory.

These two attributes, territory, law and the exercise of police authority to uphold the law, are crucial in this discussion.

The nation-state shares with the family this characteristic, that we become (at least in the first instance) members of the institution in an involuntary way. We are born into our families with no say in the matter and, similarly, we are born, willy nilly, Australians or New Zealanders or whatever.

Despite the involuntary nature of the situation, both of these institutions entail a sense of allegiance or obligation upon individuals. The role of brother, son, father, husband; sister, daughter, mother, wife; always entails obligations. Likewise the role of citizen brings with it the duties of political allegiance which, especially in time of war, can require great sacrifice.

The nation-state is today under heavy attack, from the libertarian right as well as from the old left. These attacks are mounted for very different reasons.

One of the most eminent critics from the libertarian right is Norman Macrae, former deputy editor of The Economist, and successful forecaster of the demise of the Soviet Union. In a paper which Mr Macrae gave to a North American Trade Conference in Mexico City (May 20, 1992) he develops an argument which contains the following elements: 4

First, that increasing progress in computers and telecommunications will enable very many people not only to work from their homes, but also from a home located anywhere in the world.

Second, that increasing competition between owners or sovereigns of desirable locations for domestic residency, will enable buyers of residency status a great deal of choice in the matter of where they live. Once such a market develops, the choice of domicile will be based on issues such as law and order, sovereign risk, educational, recreational and cultural facilities, climate and so on. Proximity to markets or population centres will not be an issue.

Third, that this increase in quasi-statelessness for a rapidly growing number of relatively well paid people will lead to the contraction, if not the demise, of the nation-state with which we have grown up.

Macrae, in setting out his prognosis for a C21 world, is appealing to the disenchantment which many people of a liberal-conservative disposition now have for the nation-state. This disenchantment, he argues (I believe correctly), is closely related to the very high levels of taxation to which they have been subjected during the last thirty years or more.

Macrae summarises his argument with the claim that:

"Countries that choose to have too high taxes or fussy regulations will be residually inhabited mainly by dummies."

(He was not referring to those objects seen in shop windows with clothes on them.)

The issue of taxation is one which has dominated the relationship between the sovereign and the subject, or the state and the citizen, from time immemorial. Today it is commonplace for citizens who are in the top 40 per cent of income earners to find that they are paying substantially more than half of their real income to the state in taxation of one form or another. This degree of taxation is necessary when the state, in all its manifestations, consumes approximately 40 per cent of the national output. Such levels of taxation are entirely without precedent.

Machiavelli in The Prince advises the putative sovereign:

"Above all things, abstain from taking people's property, for men will sooner forget the death of their fathers than the loss of their patrimony,"

and it is not surprising that, in many instances, the natural affection which people have for the country of their birth has been undermined by this relentless expropriation of their earnings and assets. We should not forget that Mrs Bronwyn Bishop first achieved national political prominence by criticising the then Commissioner of Taxation, Mr Trevor Boucher. Mr Boucher symbolised, for very many Australians, the nation-state as expropriator.

Norman Macrae's vision of a world made up of very many small principalities, some of them run by insurance companies, is a very attractive one. It is reminiscent of C18 Germany, the world of Johann Sebastian Bach, which was a society characterised by many competing princes and independent cities which, whilst sharing the same language and culture, often differed in religion. Many of the rulers in these principalities spent at least part of their revenues in striving to obtain better orchestras and composers than their rivals, a form of sovereign competition which seems to me highly laudable.

There are, of course, a number of such small principalities extant today. Monaco, Luxembourg, the Bahamas, Andorra, and closer to home, Singapore and Hong Kong are useful examples. Hong Kong will lose its independence in 1997 but, following the Soviet collapse, Estonia, Lithuania and Latvia have recently regained their sovereignty.

There can be no doubt that the transaction costs involved in organising the political life of a small city state like Singapore are, in proportionate terms, much, much lower than the transaction costs taken up in the political life of a very large nation such as the USA, for example.

Transaction costs here include not just the cost of running a democratic state with elections, professional politicians, law-making assemblies, government bureaucracies, judges, professors, courts, lawyers, etc; but also the costs of political and judicial mistakes. Major mistakes are much more likely to occur in very large states than in small ones, because of the distance (both geographic and emotional) between what is actually happening and where decisions are made.

Norman Macrae's arguments about the future of the nation-state have become more significant after the fall of the Soviet Empire. When the Western World, under US leadership, was locked in a do-or-die struggle with the "evil empire", the economic power and military might of the US was the sine qua non of long term victory over Marxism-Leninism and the militarily powerful State which had adopted that body of doctrine as its state religion.

Small states enjoyed continuing peace and sovereignty during the Cold War period only because the United States, a very large and wealthy nation, was able to successfully organise and lead an alliance of non- Communist states for forty years. Now that the Soviet Empire is no more, it becomes easier to assume that long-term peace will ensue, at least in most parts of the world.

In his paper Macrae specifically predicts a very substantial decline in defence spending, from 5 per cent of gross world product in 1984 to 0.01 per cent in 2024. He envisages that "the nearest thing left to an army or navy or airforce anywhere is an anti-emergency force paid on performance contract by some very much reformed United Nations."

Despite Macrae's optimism, it remains true that small states are much more vulnerable than large ones to invasion or occupation by hostile powers. And the problem, therefore, of Norman Macrae's world of a multiplicity of small principalities is the assumption that out of such a world, no powerful leader, with the resources of a rich, large, politically cohesive nation to command, will arise to create a new menace to world- wide peace and quietude.

So much, then, for the attack on the nation-state from the Libertarian Right.

Far more ominous and significant is the attack on the nation-state from the Old Left. This attack has been mounted under the rubric of international citizenship and international obligation, and the mechanism by which sovereignty has been, and is increasingly being, subverted is the international treaty, convention, or declaration. The Basel Convention is a useful example of such treaty-making because it is so obviously nonsensical, and Australia's interests, both immediate and long-term, are so clearly endangered by it.

Some of the arguments against national sovereignty employed by the Old Left are, briefly, as follows:5

National sovereignty is outmoded, outdated, anachronistic.

Nation-states are incapable of keeping out influences coming in from outside.

Nation-states, of themselves, are a cause of war.

These ideas, usually never explicit, are widely diffused through the chattering classes of the English- speaking world. Taken as a whole they comprise a belief structure which Kenneth Minogue has called "internationalism". Let me quote him directly:

"Internationalism is the belief that problems can no longer be solved and the world no longer governed by sovereign states, and that increasing power must be given to international bodies. In part, internationalism is a moral doctrine, holding that the decisions of nation states tend to be selfish, while those of international organisations are consonant with the interests of humanity. Internationalism is thus a project for the transfer of power from one set of people to another." 6

The power of internationalism as a political force is clearly evident when we see, all too frequently, our own Ministers of State implicitly denigrating the capacity of Australia, as a nation-state, to govern itself.

The defence which Government ministers, notably Senator Evans, have mounted in response to criticisms of Australia's signing of Basel now becomes extremely important. These Ministers have now admitted that the Basel Treaty is something less than perfect; that Australia's position on key issues was over-ruled by a large majority; but that, nonetheless, Australia was obliged to accept being over-ruled despite the fact that Australian interests, both in a direct commercial sense, and more generally in internationally accepted and endorsed restraints on trade, will be adversely affected.

The defence of this decision was made explicit by Senator McMullan in the Senate Estimates Committee on June 21 last. In response to questions from Senator Rod Kemp he said:

"Let me make it clear that the outcome at this stage with regard to Basel is not Australia's preferred outcome, but when you negotiate with a large number of countries nobody gets everything. Although we think the outcome from GATT (the Uruguay Round) was a very good result for Australia, we did not get everything we wanted, and we never will. We have not concluded our attempts to make agreements such as that more in accordance with what we think to be Australia's interests and our obligation to try to make it in the best interests of the international economy and the environment as well."

The reference to GATT is an important sign that the Minister is in trouble. The implicit logic in his argument is this. The GATT has been very beneficial in its consequences. The GATT is an international treaty. Basel is also an international treaty. Therefore we have to sign it, under duress of majority vote, regardless of the economic consequences because, being an international treaty, it must be beneficial in its consequences.

More important than such muddled thinking is the unquestioned assumption by the Minister that the same processes which operate in the ALP Caucus room the wheeling and dealing and the negotiating of compromises which all the factions can wear are to be carried out in international forums such as the Basel negotiations. This is the most dangerous delusion of all.

These arguments make it clear that we now urgently need some criteria which enable us to decide whether Australia, as a sovereign nation-state, should give up sovereignty by committing to a particular treaty or not. (I exclude defence agreements from this survey. A defence treaty such as ANZUS is clearly the action of a sovereign power seeking to secure its future independence through military alliances which will only last for a finite period.)

The present government position appears to be that if an international treaty can be found, anywhere, then Australia will sign it, particularly if such signing results in a transfer of power from the States to the Commonwealth.

The defence of the nation-state as a successful and beneficial political institution can be made in several ways. In this paper I wish to offer a utilitarian defence. The nation-state, through its legal system, defines property rights over the territory which it controls. Sometimes it defines those

property rights effectively, as in England and Scotland; sometimes so badly that chronic impoverishment ensues, as in the late and unlamented Soviet Union. Nevertheless, when property rights are badly defined or not defined at all, the option still remains for the sovereign to remedy the problem. This process is now taking place with extraordinary speed and spectacular success in Peru.

It is the institution of property and its ownership which provides for, and encourages, not only economic progress, a greater abundance of life for the people, but also for effective environmental stewardship. John Hewson got into trouble a while ago when he referred to the fact that it is the rented house, not the owner-occupied house, with the unmown lawn. But the disposition of men and women to take much greater care of what belongs to them than what belongs to others, seems to be a universal phenomenon. Property owners are great friends of environmental amenities and values, particularly when they are prosperous.

As a general rule we can argue, convincingly, that environmental problems will almost always be solved without government intrusion, provided property rights are allocated and upheld according to a rule of law which encompasses our common law notions of tort and contract. Where environmental problems become intractable is in situations where property rights either are not, or cannot be, defined and enforced.

There is now a substantial literature on what is called "the tragedy of the commons". The village commons of mediaeval times was over-grazed, and over-exploited. Since no-one owned the commons, everyone who had access to it sought to maximise their short term returns from it, and in this way the commons was ruined, everywhere.

International treaties therefore become legitimate instruments of sovereign power when they solve the problems of the commons in other words, when they act to define and uphold property rights in situations where the sovereign state, acting on its own initiative, cannot do so.

Thus a good example of a legitimate international treaty was the treaty to regulate (1946) and ultimately (in 1986) to ban whale hunting. (One can disagree with banning as opposed to quotas but the principle is the same). Whales are an excellent example of the commons. No-one owns them and nobody had any incentive other than to maximise their short-run returns from hunting them. If however some technique for allocating and enforcing property rights to whales could be devised, then the argument for an international treaty would vanish. Whale farming would then ensure the multiplication of the species.

The treaty which is often used, particularly by ministers in difficulties as the justification for all international treaties, is the GATT.

The GATT is a curious treaty. It has, without question, been one of the foundation stones of post-war economic growth around the world and is regarded very highly in consequence.

But the fact remains that the GATT is a treaty in which the signatories undertake to stop inflicting serious wounds to themselves, provided other countries do likewise. I'll stop mutilating my left arm but only if you will stop stabbing yourself in the right leg. This is the logic of the GATT.

The architects of the GATT were the Americans Dean Acheson, George Marshall and their colleagues, who were well aware of the damage which Smoot Hawley had done not only to the US and to the world economy after 1931, but also to trading relations and therefore international relations generally. They therefore deliberately sought to construct a mechanism which would enable US politicians particularly, but politicians generally, to say to importunate rent-seekers:

"I would love to help you with this tariff or that import restriction, but the GATT means that my hands are tied."

The GATT was seen by its architects as a fortress in which politicians could safely shelter from the political pressures of rent-seekers. There is no doubt that in signing the GATT, nations

surrendered sovereignty over the matter of tariffs and other forms of protection. Likewise Prime Minister Margaret Thatcher agreed to the 1986 Single European Act, and gave up sovereignty in its most crucial form (the acceptance of a majority vote), in the mistaken belief that it would merely guarantee free trade within the European Community. I suspect that decision is the one she now most keenly regrets.

In the same way, NAFTA was seen by the present Mexican Government as an instrument which will constrain future administrations and maintain the processes of economic reform. And the prospect of losing that particular fortress, in Mexico, was sufficiently serious to turn the Clinton Administration from a group of NAFTA sceptics into energetic, indeed spendthrift, NAFTA champions.

NAFTA was strenuously opposed by some free-trade groups within the US 7 on the grounds that the Treaty gave international standing and jurisdictional authority to NAFTA panels whose members would be nominated by environmentalist NGOs within the US. This came about because the Clinton Administration sought to mollify some environmentalist groups, who were generally strongly opposed to NAFTA.

In recent weeks appointments have been made which suggest that these fears may prove to have been well founded. But there can be no doubt that hard-core environmentalists see the GATT as a major impediment to their imperialist ambitions and that the Greening of GATT is very high on the environmentalist agenda. It would be a terrible tragedy if the GATT, having played such an important role, for nearly 50 years, in the development of a more prosperous and a more free world, should end up as an instrument of green imperialism.

Let us come back to the fundamental question of propriety in international treaties. I have argued that where a treaty is necessary to establish property rights or quasi-property rights in international commons, then treaties are justified. The treaties concerning whales are, therefore, quite legitimate. But what about green-house gases (GHGs)? The atmosphere is indubitably a commons. If the emission of anthropogenic GHGs were really a problem, then an international treaty to tackle it would meet the criterion I have set down.

But we now come to the intermeshing of science and politics. It now seems completely clear, as a consequence of satellite temperature observations for nearly fifteen years, that there is no observable global temperature increase. Further, the more we study the temperature records of the past, the more difficult it is to believe that the increase in atmospheric CO2, which has indubitably taken place since the Industrial Revolution, has had any observable impact on world climate.

Despite this growing body of evidence, the investment that has taken place in promoting greenhouse gas catastrophe is so great, and so many political and, alas, scientific reputations are now caught up in the certainty of catastrophe, that it is difficult for political leaders who have signed on to CO2 reduction commitments to back away from those commitments.

Very similar remarks apply to the Toronto agreement on CFCs.

None of the other environmental treaties which the Australian government has signed contributes to the solution of a problem involving a global commons. A future Australian government should devise a procedure for withdrawing from all of them, and it should do so as a considered assertion, carried out after wide ranging public debate, of national sovereignty.

It is now very clear, as a consequence of the debates which Senator Rod Kemp has initiated on Australia's treaty making proclivities, that we no longer understand the benefits which sovereignty brings. We have lost pride in the ideal of self-government, and we have been prepared to abandon our sovereignty on the whim of a few political leaders, meeting as the Executive Council, behind closed doors, in Canberra.

The Basel Convention, because it is so manifestly ridiculous; because it has been so blatantly driven by an organisation, Greenpeace, which cannot retain credibility under any careful scrutiny, does provide us with an important opportunity to go on the counter-offensive.
The ideal of self-government, then, and of its historical forebear national sovereignty, has to be refurbished. This Society is well placed to undertake the task.

Appendix 1

COPY
Handy & Harman
John C Bullock, Environmental Counsel
US Mail PO Box 120 Waterbury CT 06720
TO: Denise O'Brien, ICC
Marc Patten, BIAC
Norine Kennedy, USCIB
c.c. Walter Blum, Preussag AG
Date: March 27, 1994
RE: Basel Convention
Conference of the Parties, Second Meeting, 21-25 March, 1994, Geneva
Dear Colleagues:
The Basel Convention has decided to ban a segment of international trade, solely upon the geopolitical alignment of the countries in which the private trading partners are located. The ban, on its face, will prohibit the movement of virtually all secondary and recyclable materials from countries which are members of the Organisation for Economic Cooperation and Development (OECD) to countries which are not. The operative sections of the decision are:
1. Decides to prohibit immediately all transboundary movements of hazardous wastes which are destined for final disposal from OECD to non-OECD States;
2. Decides also to phase out by 31 December 1997, and prohibit as of that date, all transboundary movement of hazardous wastes which are destined for recycling or recovery operations from OECD to non- OECD States.
The first paragraph was unopposed. Efforts by the European Union and a number of industrialized countries to add to the second paragraph an evaluation of trade for its actual environmental impact were repeatedly and adamantly rebuffed by proponents of the trade ban. The only criteria permitted, in absolute and no uncertain terms, are the geopolitical alignments of the countries of import and export.
This extraordinary action, taken by consensus on the last day of the meeting, poses an immediate threat to the large international trade in secondary and recyclable materials, notwithstanding the phase-in until the end of 1997, for reasons discussed below. It also places other international development in question, insofar as such development involves the generation and management of waste or recyclable materials. The decision establishes a precedent in which both trade and environmental interests are determined without specific reference to either, but instead are conclusively determined in accordance with political alignments. And the decision has left significant dissatisfaction with the Basel Convention.
Rationale for the Decision
Proponents of the trade ban asserted that a movement of any material defined as hazardous waste from an OECD country to a non-OECD country does "not constitute environmentally sound

management", without regard to the actual circumstances. This language was ultimately modified to state that such a movement presents "a high risk of not constituting an environmentally sound management", and that conclusory assertion was adopted as the basis for the trade ban. Movements of hazardous waste from non- OECD countries, or to OECD countries, are not pre-determined with regard to their environmental soundness, and have not been included within the trade ban.

The actual basis for concern was difficult to ascertain. Greenpeace compiled and distributed an inventory of hazardous waste exports from OECD to non-OECD countries from 1989 to March, 1994, but the data it provides is limited and no environmental evaluation is included. Some international transactions of which Greenpeace complains have been fully approved by the competent environmental authorities of the concerned countries. There are reports of some actual dumping, in the normal sense in which we would use that term, but they are limited. There are some reported transactions involving recycling activities of little or no value in developing countries, but it is not easy to tell the underlying environmental specifics and determine if dumping was the motive. Some recycling is done in developing countries because the cost of necessary manual labour is lower, although this too is considered by proponents of the trade ban to be exploitation. The much more common problem appears to be low national environmental standards or enforcement in developing countries, and there are some descriptions of recycling activities in developing countries which receive some of their feedstock materials from OECD countries, and which are clearly harmful to human health and the environment.

It is also clear that the proponents of the ban are concerned with more than actual movement of hazardous waste imported from industrialized countries. The delegate from El Salvador made a very logical point that his country was not equipped to evaluate complex waste management proposals received from companies in developed countries, and that the full resources of his agency were needed to develop a waste management strategy applicable to national problems. Greenpeace lists such proposed transactions as a major part of its inventory of the toxic waste trade, even if the proposals were open to the concerned governments and were rejected, and asserts that such proposals are inherently coercive. Some delegates have said that their countries have had no actual imports of hazardous waste, but that they are concerned for other countries, particularly that they may succumb to financial inducements.

It is apparent through the extensive discussion that some countries are not capable of processing recyclable and secondary materials, because they do not have facilities, or sufficient infrastructures and competent authorities, or both. A ban applicable to such countries seems to be logical and well founded on environmental grounds. However the Basel Convention provides that a country which wishes to prohibit the import of hazardous waste may do so, and requires other countries to support that decision (Article 4). It was not explained why that authority, which is more extensive in scope than the trade ban because it applies to imports from all countries, and which remains in the control of the importing country if conditions change, was considered insufficient.

Political Basis for the Decision

While the underlying reasons for the trade ban are not certain, the process of decision-making was clear. The trade ban was the result of a very well-organized political campaign by some of the G77 countries and by Greenpeace. G77 was led by Sri Lanka, with considerable support on this issue from Senegal, which had sought a ban in 1992 in Uruguay, and from Malaysia.

International trade in hazardous waste was consistently described as a tool of the rich to oppress and victimize the poor, and it was clear that a part of the emotion expressed on this issue was from a resentment that developing countries were receiving only scraps from the tables of the rich, as much as resentment of environmental consequences. Greenpeace has also convinced

many G77 delegations that there will soon be technology capable of industrial production without waste, and the G77 countries openly expressed a desire that such technology be provided to them, instead of hazardous waste.

The internal political power of G77 was sufficient to hold to a consensus position a number of emerging countries in Asia and eastern Europe with clearly contrary interests in a trade ban. Several of these countries, knowing the importance of recyclable materials to their national economies, were opposed to the trade ban, and were not reluctant to say so in private. Nevertheless they would not express this position in the Convention in the face of a G77 floor position seeking a total ban. G77 does not vote, and asserts all positions to be the result of consensus. A suggestion of a vote on one issue was met with outcry from the floor, and one delegate stated emphatically that G77 never voted on anything. It is therefore impossible to know the level of actual support for its position on a trade ban.

It was in any case sufficient to prevail over the opposition to the trade ban. The position of most of the developed OECD countries was that each country should have the right to decide for itself whether it wished to receive secondary and recyclable materials under the conditions of the Basel Convention. It was based upon the knowledge that many developing countries require secondary materials, and that their economies will be adversely affected by the trade ban. This position, proposed in two variations by the European Union and Canada, was attacked by Greenpeace as a front for industrial interests intent upon dumping. It was weakened by the support for a trade ban by Denmark, Finland, Iceland, Norway and Sweden. Over the course of the week, after having been openly threatened by Greenpeace with a call for a vote, the industrialized countries conceded and permitted the G77 position to be adopted by consensus.

Impact of the Ban, and the Definition of Basel Hazardous Waste

The trade ban was decided in a state of open confusion regarding how it would actually affect existing trade. The impact of a ban upon trade in "hazardous waste intended for recovery operations" depends upon what is hazardous waste, and no one knows. This state of confusion was a strong undercurrent, because it was well understood that some non-OECD countries rely heavily upon import of secondary and recyclable materials from OECD countries, particularly for ferrous and nonferrous metal industries, and there was debate over their fate.

The definition of waste under the Basel Convention is very broad. It encompasses materials intended for resource recovery, recycling, reclamation, direct re-use or alternative uses (Annex IV,B). A waste is then classified as hazardous if it meets any of a number of equally broad standards. A waste is hazardous if it is the result of a listed industrial operation (e.g. surface treatment of metals and plastics (Annex Y17)), or contains any listed constituents (e.g. zinc compounds (Annex I, Y23)), or exhibits a listed hazardous characteristic (e.g. ecotoxic, Annex III, H12)). How this classification system will be interpreted and applied is unknown, but a literal application is promoted by some parties, and this would encompass an extremely broad spectrum of secondary and recyclable materials.

This is because there are no minimum concentrations or thresholds set forth in the Basel Convention's classification system for hazardous waste. In the United States, the absence of thresholds or concentrations has been interpreted in superfund enforcement and collection actions to mean that no thresholds or concentrations are intended, and that the presence of a single molecule of a listed hazardous substance is sufficient to make the law applicable to any material. This has been the consistent position of the United States Environmental Protection Agency (USEPA) and Department of Justice, and it has been upheld by United States courts.

Some countries have asserted that the Basel Convention will not be applied literally, and that the ban will not affect the majority of trade in secondary and recyclable materials. Greenpeace strongly supported this belief, pointing, for example, to the absence of iron and copper as

hazardous constituents (Annex I), and asserting that the very large global trade in scrap steel and scrap copper would therefore not be affected. Reference to the fact that neither scrap steel nor scrap copper is ever "pure", and contain such listed hazardous constituents as lead or zinc compounds, was dismissed by Greenpeace as a scare tactic. Greenpeace asserted that "common sense" would prevail, and that trade would continue because countries would simply define any materials they wanted to be outside of the scope of the Basel definition of hazardous waste.

It is difficult for the business community to derive comfort from such assurances, even from national delegations, much less from Greenpeace. The United States position that its national definition of hazardous waste prevails over the Basel definition is not supported by the language of the Convention, and is contrary to the opinion of people involved in the implementation of the Convention. And while Greenpeace asserted prior to the decision that countries could merely define themselves out of the trade ban, Greenpeace also asserted that the United States' national exemption of scrap metal from regulation as hazardous waste would not be acceptable for Basel compliance. Thus the prospect of a "common sense" Basel Convention in the near future is not likely.

More importantly, the risk for business of being wrong is significant. A movement of material thought to be outside of the ban and later determined to be covered by it would be deemed to be illegal traffic. The Basel Convention defines such traffic to be criminal (Article 4), and countries are advised and directed to incorporate criminal penalties into their national law to punish such traffic (Article 4 and Model National Legislation). Financial liability for the environmental consequences of illegal traffic is proposed to be unlimited in amount and time (Proposed Liability and Compensation Protocol). Such issues may be determined in the courts of the country where the claimants reside. The prospect of conducting business under such conditions is not attractive.

Even before the ban takes effect, there will be increasing pressure upon transactions involving secondary and recyclable materials. The decision provides that during the phase-out period:

"Any non-OECD State, not possessing a national hazardous wastes import ban and which allows the import from OECD States of hazardous wastes for recycling or recovery operations until 31 December, 1997, should inform the Secretariat of the Basel Convention that it would allow the import from the OECD State of hazardous wastes for recycling or recovery operations by specifying the categories of hazardous wastes which are acceptable for import; the quantities to be imported; the specific recycling/recovery process to be used; and the final destination/disposal of the residues which are derived from recycling/recovery operations." (Paragraph 3)

Compliance with this requirement may itself preclude the completion of transactions in accordance with prevailing market terms and conditions. In addition, the requirement invites interference and delay. At a news conference immediately following adoption of the decision, Elizabeth Dowdswell, Executive Director of UNEP, stated that this requirement would make any transaction "highly visible" and draw it to the attention of the public. Public involvement in environmental issues, whatever benefit it may be from a political or policy perspective, is incompatible with the timely execution of commercial transactions normally considered necessary in, for example, secondary metal markets.

Whatever the ultimate resolution of definitional issues, it is probable that the international markets in secondary and recyclable materials will be affected immediately, and certainly by the end of 1997. Even the leadership of G77 agreed that some industries in non-OECD countries would be damaged. If the trade ban operates as intended by its proponents, industries in non-OECD countries will be unable to purchase at least some secondary and recyclable materials. They will presumably resort to primary resources, if the resources are available and can be economically and efficiently used. The removal of market demand in non-OECD countries

should depress prices, to the detriment of suppliers of such materials within OECD countries, and to the benefit of purchasers. In general, it seems reasonable to predict that the curtailment of international trade will be a negative effect upon the global economy, particularly in non-OECD countries.

Legality of the Decision

The decision is of questionable legality, an issue raised by several parties concerned with such issues. It is a significant departure from the original intent and wording of the Basel Convention, which has heretofore required a very particular evaluation of every proposed international transaction in hazardous waste. The new trade ban states that such evaluation is not relevant if the country of export is within the OECD. A number of parties expressed the concern and objection that a change of such magnitude requires an amendment to the Convention, rather than a decision. The procedures for amendment of the Convention (Article 17) were not followed, and there was no attempt to incorporate the trade ban in an amendment.

The trade ban, by deeming the actual environmental circumstances of a proposed transaction to be irrelevant, infringes upon the GATT requirement that trade barriers be actually related to protection of the environment, and not unnecessarily restrictive. In addition, by discriminating against identical transactions based only upon their point of origin, the trade ban does not fall within any GATT exception to a ban upon national discrimination. A proposal by the European Union to make the trade ban applicable to all countries, without national discrimination, was expressly rejected. Thus the trade ban should be considered in violation of GATT as well.

Of course, the availability of a challenge within the Basel Convention, which might be taken up at the Third Meeting of the Conference of the Parties in 199x, or of a GATT challenge, is hardly a desirable outcome.

Final Observation and Conclusions

From a business point of view, the Basel Convention is not working in the interests of sustainable development. The parties continue to be represented by environmental ministries with little or no knowledge, and often less interest, in how business works. They thus make decisions which make no sense.

Basel has become a convention of the blind, led by those who will not see. The decision-making process at this meeting was dominated by Greenpeace, leading G77, overwhelming developed countries. The dissatisfaction among several developed countries was palpable. These is no apparent reason to believe that the circumstances will change. It is conceivable that businesses directly affected by the trade ban, particularly in non-OECD countries but also in developed countries, will now seek to persuade their governments that sustainable development includes "resource recovery, recycling, reclamation, direct re-use or alternative uses", and that these activities need to be promoted rather than suppressed. The phase-in period was subtly intended to permit re-evaluation, before the window closes at the end of 1997, and it is possible that some countries will change their positions before that time. However the Basel Convention does not appear likely to accept an about-face. Greenpeace will continue to preach the demonology of hazardous waste and the heavenly reward of clean production, notwithstanding the needs of many countries for intermediate measures. The diplomatic concern for consensus, and the consequent need for compromise of every contested issue, however unsatisfactory, will obstruct progress even among willing participants. What was once an economically and environmentally significant international trade in secondary and recyclable materials will, at best, become so managed that it will sink under the weight.

Finally, it might be noted that the chief Greenpeace representative stated at a press conference on the final day that, having achieved the trade ban, he looked forward to the primary purpose of the Basel Convention – the control of industrial production within parties to the Convention, so as to

eliminate the generation of waste. He asked the President of the Convention if that would in fact be the next major activity. The response was carefully evasive. Nevertheless, it was a fair warning.

As always, please call if you have any questions.

Very truly yours,

(Sgn) JC Bullock

John C Bullock

Endnotes:

1. N R Evans, The Basel Convention, IPA Backgrounder, 12 April, 1994.
2. Peter Lawrence, DFAT Backgrounder, Vol.3 No.6, 10 April, 1992.
3. L'Osservatore Romano, 3 November, 1993.
4. Cato Policy Report, July/August, 1992, Cato Institute, Washington DC.
5. These observations are due to Kenneth Minogue. I am greatly indebted to him for on-going discussions on this issue.
6. Kenneth Minogue, Internationalism as an Emerging Ideology, Unpublished MS, October, 1992.
7. Notably the Competitive Enterprise Institute, based in Washington, DC.

Chapter Seven

White Anting the Constitution : The Constitutional Centenary Foundation

John Stone

When I came to finalize for printing the program for this Conference, I asked myself whether I should retain the title given to this paper when issuing preliminary Conference details, or whether I should amend it in one small, but important, particular.

Rather than the title White-Anting the Constitution : The Constitutional Centenary Foundation, I asked myself whether its first portion should read White-Anting the Constitution?, with the question mark signifying that, so to speak, the jury was still out.

In its very nature, of course, the evidence in the matter can only be circumstantial, and on the basis of it different jurors may possibly arrive at different conclusions.

Moreover, it is almost certainly the case that the motivations of some of those involved with the Foundation differ from those of others, so that any verdict is unlikely to apply to all of them, and will also apply in differing degrees even among those who might be placed in one camp or the other.

In these circumstances, all that can be done is to marshall the evidence (or as much of it as is publicly available), do one's level best to assess it objectively, and arrive at as balanced a conclusion as possible.

I can only say that, after having undertaken that process, I have decided to leave the preliminary title unchanged.

There is an American saying to the effect that "if it looks like a duck, waddles like a duck, and quacks like a duck", then it's almost certainly a duck.

Similarly, if the essence of the Constitutional Centenary Foundation is that it bears the appearance of a constitutional termite; proceeds like a constitutional termite; and above all, lends its voice to the kinds of activity which one would associate with a constitutional termite, it almost certainly is such a termite at any rate, to the extent of not meriting that possible interrogation point with which, as I say, I toyed a few weeks ago.

With those preliminary remarks, therefore, let me now outline the structure of this paper.

First, I propose to say something about the processes leading to the establishment of the Foundation, to the extent (which is by no means as extensive as one might have hoped) that they are on the public record. This may, I hope, shed light on the appearance of this farmyard fowl.

Secondly, I examine the Foundation's mode of governance, including the source of its finances and, again to the extent that it is possible to do so from publicly available information, the nature of its decision- making processes. If this examination should suggest that the mode of the Foundation's progress entails a certain propensity to waddle, that may also be helpful in its ornithological identification.

Finally, I shall try to examine whatever light may be shed by the chosen activities of the Foundation on the true nature of its "agenda". Does the sound of its opinions bear a strong resemblance to quacking? We shall see.

The Establishment of the Foundation

Before coming to the establishment of the Foundation itself in 1991, we may perhaps first note the earlier establishment of the Centre for Comparative Constitutional Studies. The Director of that Centre is Professor Cheryl Saunders, a constitutional scholar of unquestioned ability who, as is well known, has since played what I think may be fairly described as the leading role in the activities of the Foundation.1

The year 1988 had seen the crushing defeat of the four major referendum proposals put to the Australian people by the Hawke Government. These, in turn, were the culmination of the elaborate processes commencing in 1985 with the establishment by the then Attorney-General of the so-called Constitutional Commission.

As my original "invitation letter" announcing this Society's formation in 1992 said, the Constitutional Commission was "a body clearly intended to pave the way for a major process of constitutional change directed, in particular, to centralising power in Canberra even further". My letter went on:

"The work of that body was, happily, aborted by Mr Bowen himself when in 1988 he set in train four national referenda on specific topics arising from its then almost concluded report. The overwhelming defeat of those referenda in every case, and in every State of the Commonwealth, put an end (temporarily) to those endeavours; but I believe that we would be wrong, as well as over-complacent, if we were to assume that the same forces then backing those 1985-1988 developments have abandoned their objectives".

It is, no doubt, entirely coincidental that, shortly after these referendum proposals went down in flames, and the ambitions of the Constitutional Commission termites (temporarily) with them, the Centre for Comparative Constitutional Studies should have been established in December, 1988 within Melbourne University's Law School.

In saying that, I of course in no way seek to impugn the motives of the University in assenting to a proposal for what, on the face of it, was (and is) an entirely reputable Centre for legal academic pursuits.

According to the Centre's 1992 Prospectus, "the work of the Centre is organised under four broad programs", namely:

(1) Constitutional Systems of Australia and New Zealand:

Among the reasons cited for this program are "the dissatisfaction traditionally expressed with the Australian constitutional system". One might ask, by whom? The only "traditional" source of expression of dissatisfaction with the Australian constitutional system has been the Australian Labor Party.

Under this program it is also said that "current Canadian proposals for constitutional change parallel the changes proposed to the operation of federal economic union in Australia in important respects". Again one might ask, proposed by whom? These are, of course, the same "Canadian proposals for constitutional change" which were roundly defeated in Canada's constitutional referendum in October, 1992 once the Canadian people, as distinct from academic lawyers and bien-pensant Canadian federal politicians (of almost all parties), were allowed to express a view about them.2

(2) Intergovernmental Relations:

"The Victorian Government contributes $30,000 each year towards the Intergovernmental Relations Program".

(3) Regional Constitutional Systems.3

(4) Supra-National Arrangements:

"Supra-national arrangements [such as those now developing in the European Community] offer useful comparative material for the Australian constitutional system. Most obviously, they

represent very recent thinking about what is necessary for economic union . . . Any proposals for change to the Australian economic union, devised almost 100 years ago, must draw on the experience of these arrangements."

Really? Perhaps the kindest comment that could be made on these vapourings is that they represent a not uncharacteristic example of lawyers essaying to discuss economic issues.

To take but the most obvious example, "what is necessary for economic union" namely, a common currency, a common Customs tariff, and common regulations governing the movement into or out of the Union of both capital and labour (i.e. exchange controls, if any, and immigration laws) was "devised almost 100 years ago" in Australia, at a time when the various States now making up the European Community were otherwise occupied in devising better ways of squabbling among themselves.

One of the more notable of the "current activities" under this program in 1992 was the so-called "Network for the First Optional Protocol". As the 1992 Prospectus says:

"In 1991, Australia acceded to the First Optional Protocol to the International Covenant on Civil and Political Rights. A national network of persons concerned with the Optional Protocol has been formed under the auspices of the Centre, . . . The functions of the network are . . . to identify a group of people prepared to offer advice to those wishing to communicate with the Human Rights Committee [of the United Nations] under the Optional Protocol."4

One can only wonder whether, and if so to what extent, the "group of people" thus assembled may have had a hand in "offering advice" to the group of Tasmanian homosexuals whose recent actions have now led to the Commonwealth Attorney-General's threat to enact legislation (relying on the external affairs power of the Constitution) purporting to over-ride Tasmanian law in that area.

So much, then, for the Centre for Comparative Constitutional Studies. Let us turn now to the Constitutional Centenary Foundation itself.5

On 2 April, 1991 some 85 people assembled in Sydney for a four-day Conference on constitutional questions. The Convenors of this assembly were, respectively, Professor Saunders and Professor James Crawford, at that time Dean of Law at Sydney University and a specialist in international law.6

The Conference had been timed to occur on the centenary of the first Constitutional Convention leading up to Federation, and its theme was struck from the outset. In a press release preceding it, Sir Ninian Stephen, who had been approached and had consented to chair it, said:

"The Conference of 1891 itself provides a rough model [of what this Conference is designed to do] . . . Sir Henry Parkes opened these proceedings with a series of general resolutions proposing principles and institutions for an Australian system of government. This Conference will also open with general resolutions, drafted with a view to the needs of Australia in the 21st Century."7

It would be wrong of me, no doubt, to discern an element of presumption in thus comparing a design, put together by a small cabal of self-appointed, non-elected people, with the truly great design initiated in April, 1891 by a body of elected statesmen from the then Australian colonies.

For one thing, those statesmen were embarking on the truly creative task of devising a means to weld together into one federal union six separately functioning polities, each of which, it is fair to say, probably then had closer links with what most of them still called "the mother country" (Britain), than with each other.

What possible comparison could be drawn, by other than people living in the dark unreality of such haunts as the Sydney University Law School or the Melbourne Centre for Comparative Constitutional Studies, between that enterprise of 1891 and this 1991 proposal to review our present constitutional arrangements "with a view to the needs of Australia in the 21st Century"?

As to the significance of that millenarian reference, members of this Society will certainly recall the gentle fun which, at our first Conference two years ago, Mr S E K Hulme, QC had with some later remarks attributed to Sir Ninian Stephen on the same theme. 8

According to the article by Mr Peter Charlton already quoted above, the Federal Government had already indicated that "it supports the Conference and the processes of review which follow".

This and other such pieces of evidence might suggest that those convening the Conference, and providing its appropriately named Steering Committee, may not have been leaving its outcomes entirely to chance. Charlton also mentions (in advance, I repeat, of the Conference occurring) that "four major areas of possible change [in our constitutional arrangements] have been chosen for the Conference : the democratic process; the Australian federal union, including relations with New Zealand; the Aboriginal people and the Australian constitutional system; and the judicial system."

It is notable that when, twelve months later, Sir Ninian Stephen officially launched the Constitutional Centenary Foundation at a gathering in Queen's Hall, Parliament House, Melbourne generously hosted by Mrs Kirner's Government, he said inter alia that:

"Of those 12 issues [identified a year earlier by the Sydney Conference "to be pursued over this decade"], three have been selected on which initially to concentrate as deserving special priority: . . . economic union. . . ., the role of Parliament . . . [and] the position of Aboriginals and Torres Strait Islanders, . . ." 9

In other words, of the "four major issues of possible change" identified in Peter Charlton's article prior to the 1991 Sydney Conference, three were being highlighted a year later by the Chairman of the Constitutional Centenary Foundation as having "been selected . . . as deserving special priority".

Viewers of "Yes, Minister" or "Yes, Prime Minister" may note some similarities with the bureaucratic manipulative processes so vividly enshrined in those programs.

This particular insight does not stop there. For, even as Sir Ninian was addressing this gathering in Queen's Hall, a News Release entitled "Review of Constitution a Priority" was being issued by the Constitutional Centenary Foundation.10

After some passing reference to Sir Ninian's remarks, the authors of this News Release went on to refer to the "general issues identified by the [Sydney] Conference", which, they said, "fell into the following four categories" namely, the same four categories precisely as those "identified" in Charlton's article even before that Conference had taken place.

If by this time, ladies and gentlemen, you are beginning to discern a duck, then I can only say, be patient: there is much more to come.

I have however in these last remarks run a little ahead of myself : let me now return to the 1991 Sydney Conference.

The "Concluding Statement" issued from that Conference on 5 April, 1991 listed, by way of an Attachment, the names of its 85 participants. These are reproduced in Appendix A to this paper, together with the descriptions of their positions or other qualifications as given in that Attachment. Some 20 of these comprised the Steering Committee.

Not every name in this list is personally known to me, but an overwhelming majority of them is. On the basis both of that knowledge and, in some cases, the description of their position or other qualifications, I have divided the 81 Australians (there were also 4 New Zealanders) into the following categories:

Sir Ninian Stephen (Chair).

20 Labor Party groupies.

5 Judges.

4 Professors of Law n.e.i.

3 Solicitors-General n.e.i.
12 Other Officials n.e.i.
10 Other Academics n.e.i.
4 Other Ethnics n.e.i.
2 Other Lawyers.
9 Business Community representatives.
7 Journalists.
3 Non-Labor Politicians.
1 Local Government representative.

Now let me say straight away that by its very nature this categorisation can only be subjective. Partly for that reason, and partly because it would in any case be invidious to do so, I do not propose to indicate by name those participants whom I have placed in each category, although in many cases they will no doubt be obvious. Bear in mind also that some of those whom I have allocated to the category of "Labor Party groupies" would otherwise fall into one of the other categories, e.g. "other academics n.e.i.", which is why a number of those categories carry that latter annotation (not elsewhere included).

My categorization is thus not to be portrayed as a hard and fast one by its very nature it cannot be. It is merely advanced as a rough and ready way of beginning to assess the broad nature of the group which the Steering Committee had assembled. Those of you with both the knowledge and the diligence to do so might wish to amuse yourselves by drawing up your own categorization, and seeking thereby to arrive at your own independent conclusions.

The fact that my list includes only (sic) 20 people in the "Labor Party groupies" category is not meant to imply that only 20 of the participants leaned (to a greater or less degree) in that political direction. If we set aside Sir Ninian, the 5 Judges and the 3 non-Labor politicians, then of the remaining 52 Australians listed in other categories, a significant proportion quite clearly would do so. For example, a number of the journalists, the "other officials n.e.i.", the "other academics n.e.i." and the "other ethnics n.e.i." would, in my judgment, lean clearly to the Left, but not so far (at any rate, on a charitable assessment) as to categorize them as "Labor Party groupies". The same would be true, though probably less so, of other categories also.

Within this total of 85 participants, the Attachment to the Concluding Statement (and Appendix A to this paper) indicates some 20 members of the Steering Committee. Since it was this body which had the major role in putting together the Conference (and from whose members, for the most part, the Board of the Constitutional Centenary Foundation was subsequently drawn), its composition may be worth a little extra study.

In terms of professional or other background, the 19 Australians involved (there was also one New Zealander) can be listed as follows:

Sir Ninian Stephen (Chair)
2 Judges
4 Professors of Law
2 Labor Party Politicians
2 Liberal Party Politicians
3 Other Academics
3 Senior Officials
1 Lawyer n.e.i.
1 Business Community representative.

Even this listing is, I fear, somewhat misleading. For example, at first glance the presence of two politicians from each side might be seen as "balanced", and no doubt those responsible for structuring the group had very much in mind the need to create that appearance.

On closer examination, however, one finds that the two Labor Party representatives are heavyweights the Hon. Michael Duffy (then Attorney-General), and Senator (now also the Hon.) Bob McMullan, previously Federal Secretary of the Labor Party. The Liberal side, by contrast, was represented by the Hon. John Dowd and Senator Kay Patterson. Mr Dowd is an able man, but throughout his career his views have often seemed to place him out of the Liberal mainstream.11 As for Senator Patterson, whose views on anything are hardly well known, the kindest thing that can be said is that she was not fighting at her own weight.12

Of these 19 Australians, let us put aside Sir Ninian, the two Judges, and the two Liberal Party politicians. Of the remaining 14, my judgment would be that at least 10 could be categorised as "Left leaning" (at least). Again, I invite you to compile your own categorisation.

So much, then, for the "look" of this particular feathered Conference creature. What, when it met in Sydney on 2 April, 1991, did it do?

Remarkably, one might think, we do not really know. Even those "general resolutions, drafted with a view to the needs of Australia in the 21st Century", which Sir Ninian Stephen was promising prior to the Conference, have not seen the light of public day. Were they in fact put forward? If so, with what result? If not, why not?

The reason for this lacuna in our public knowledge is that, in stark contrast to the 1891 Conference on which the organizers of this latter-day event so assiduously claimed to be modelling themselves, virtually the whole of the proceedings were conducted in camera. Except for the opening session on 2 April, and the concluding session three days later, the Conference was conducted entirely behind closed doors. Reports at the time indicated that the transcript of proceedings would not be publicly available until (at least) 1995.

Apart from any other aspects of this Star Chamber approach to the matters under discussion (with the Constitution, of course, in the role of the accused), what I find most interesting was the almost complete lack of protest from the media about it. With one honourable exception (Mr PP McGuinness of The Australian)13, I cannot find any other journalistic voice raised in protest.14

It is not, after all, as though the matters under discussion were in the category of, say, "commercial in confidence". It may, however, have something to do with the fact that, as noted earlier, some 7 journalists were themselves numbered among the Conference participants. These included such figures as Mr David Solomon, then of The Australian, who had served as Press Secretary to Mr Whitlam in 1975 and who was appointed in 1992 by the Goss Labor Government to head Queensland's Electoral and Administrative Reform Committee15; Mr Gerard Noonan, then the Editor of The Australian Financial Review, and a long-standing member of this country's Industrial Relations Club; and Mr Paul Kelly, then National Affairs Editor of The Australian, during whose present tenure as its Editor-in-Chief that newspaper has been moving steadily into support of the Keating Government.16

May there not be something just a touch redolent of that phrase "conflict of interest" in a situation where journalists, whose professional code of ethics enjoins them to assess public policy processes from a detached and disinterested standpoint, allow themselves to become players in those processes?17

However that may be, let us consider the consequences of the Conference decision to meet (for the most part) in camera. As one who has attended, for his sins, a great many conferences, both international and domestic, I am well aware that the essential question in most cases is: who is in charge of drafting the communiqu,? I am also well aware that those who are will always find it easier to draft an "agreed" document if the proceedings which that "agreement" purports to represent are not open to the independent scrutiny of external observers.

This was not the only respect in which the Conference outcome appears to have been rather expertly "managed". Thus, a closed session of the Conference on the morning of its final day, 5

April, was attended by the then Prime Minister (Mr Hawke), the then Leader of the Federal Opposition (Dr Hewson),18 the Premiers of all States other than Tasmania, and the Chief Ministers of the Northern Territory and the A.C.T. For the benefit of the television cameras, an open concluding session later that day was also attended by these worthies, who appear to have dutifully gone through the paces so thoughtfully laid out for them by those in charge of the proceedings.

As to the outcome, there was first the decision, clearly premeditated, to establish the Constitutional Centenary Foundation. In the words of the Concluding Statement:

"The Conference encourages its Chair, Sir Ninian Stephen, to accept appointment as the Head of the Foundation . . . The Conference Steering Committee should be authorized to establish the Foundation".

Secondly, the Concluding Statement laid out what it modestly termed "An Agenda for the Decade". It identified some 12 matters "as key issues to be pursued over the course of this constitutional decade". The full text of that "Agenda" is set out in Appendix B to this paper.

Of the 12 "key issues" involved, two might be said to have been generally unexceptionable : The Effectiveness of Parliaments (issue 4), and Accountability for Taxing and Spending (issue 6). Two others might also be placed in that category : Responsible Government and its Alternatives (issue 3), and Judicial Independence (issue 11), although in each case some of the supporting text gives rise to questions. Issue 12 (Trial by Jury) might also perhaps have been placed in this category, but for the clear defeat less than three years earlier of the 1988 referendum question on that issue.

Of the remaining seven "key issues", there is one (issue 7 : Voter or State Initiative for Referenda) which appears to be out of keeping with the rest that is, it heads in a "decentralist" rather than a "centralist" direction, and would, if successfully pursued, lead to some increase in the power of State governments and/or citizens generally at the expense of the Commonwealth government.19

With this exception, however, all the remaining "key issues" read as though they had been drafted by the Federal Executive of the Labor Party. Briefly, they are (numbering them as in the "Agenda for the Decade"):

(1) The Head of State : "Provisions should be made . . . to define the powers of, and to consider the appropriate method of selection of, the Head of State". Note that this clearly implies the need for change; you do not need to consider the "appropriate method of selection of" the Head of State under our present system; nor do you need "to define the powers of" the holder of that position (the "reserve powers"). Thus, a year before Mr Keating, by then Prime Minister, launched his divisive Republican push, its "agenda" was already being set.

(2) Guarantees of Basic Rights : Less than three years after the massive defeat of the 1988 referendum proposals on such matters, this Conference was said to be voicing "strong support for a guarantee of basic rights in some form". This essentially centralist measure (because it would place legitimately in the hands of the High Court a whole range of matters on which only its illegitimate interpretation of the external affairs power has thus far allowed it to interfere) is a classic example of the contempt which the chattering classes essentially hold for the views of the people.

(5) Four Year Terms for the House of Representatives : This is a long-standing item on the Labor Party's constitutional wish-list not so much for the measure itself, but (on every occasion on which it has so far been advanced) for the implications which it invariably tends to have for the role, and the powers, of the Senate.20 21

(8) Federalism and Economic Union: ". . . internationalisation of economic activity requires an effective Australian economic union". This, on the face of it, "motherhood" statement carries of

course the implications that, first, we presently do not have "an effective economic union" and, secondly, that to achieve one we shall need to diminish the federalist aspects of our Constitution and enhance the centralist ones.22

We are also told that "the Constitutional implications of closer economic relations with New Zealand and with other countries need to be explored". This appears to be a classic example of lawyers talking about economics; or perhaps more accurately, seeking to invoke economic arguments in order to pursue preconceived legal ends. In truth, our C.E.R. arrangements with New Zealand are no different in principle from those of any other "free trade area" arrangements in the world that is, they connote no "constitutional implications" whatsoever. Thus, while at some future date New Zealanders and Australians (note that order) may well wish to enter into closer constitutional relations, and the clear success of the current C.E.R. arrangements may well play some part in bringing about the attitudinal evolution which needs to be a precursor to that, that will have nothing to do with any "constitutional implications" necessarily flowing from C.E.R. itself.

(9) Legislative Powers: "Considerable support was expressed for an examination of the distribution of legislative powers between the Commonwealth and the States . . ." Yes, indeed; but note how it goes on : "Particular areas which were raised . . . included natural resources and environmental effects extending beyond any one State, and industrial relations."

Are we to regard it as a mere coincidence that all three of these "particular areas" would, if pursued, lead to greater powers for Canberra (even than those purported to have been accorded to it already by the High Court's perversion of the external affairs power)? Did no-one raise the question of restoring to the States effective control in "particular areas" such as health, education, and many of the social services, where their powers have been effectively filched from them and, more importantly, great harm done to the quality of the services in those areas now being delivered to the people by the Commonwealth during the past 30 years or so?

(10) The Aboriginal and Torres Strait Islander Peoples and the Australian Constitutional System: Perhaps more than any other item in the "Agenda for the Decade", the alleged "agreement" by the Conference on this item gives rise to questioning as to the impartiality of the rapporteurs (or should that be rapporteuse?)23. Thus, we are asked to believe that there was (at least) a "consensus" by the Conference that:

"(1) There should be a process of reconciliation between the Aboriginal and Torres Strait Islander peoples . . . and the wider Australian community, . . .

"(2) This process . . . should . . . seek to identify what rights the Aboriginal and Torres Strait Islander peoples have, and should have, as the indigenous peoples of Australia, and how best to secure those rights, including through constitutional changes.

"(3) . . . the Constitution should recognise the Aboriginal and Torres Strait Islander peoples as the indigenous peoples of Australia."

The questions are obvious : for example, why do we need "a process of reconciliation" with our fellow Australians, for whom almost everyone bears nothing but goodwill, and from whom most of us feel in no sense estranged? Since Aboriginal and Torres Strait Islander peoples already have, clearly, the same rights as all other Australians, the "rights" referred to in (2) can, by definition, only be additional rights, to render them more than our equals : did nobody protest at such a possible outcome? As to (3), why should we risk the likely judicial consequences of tampering with our Constitution in order to state the obvious?

In truth, issue (10) comes from the heartland of our radical Left, who for decades have seen this issue as a means of diminishing the force of that foundation principle of the Australian federation, "one Continent for one people". If ever one descried a duck in motion, it is in this item.

So much for the "key issues" said to have been identified by the 1991 Conference. But, as in the Sherlock Holmes story, at least as much significance is to be attached to "the dog(s) that didn't bark".

Bearing in mind the claim, since repeated almost ad nauseam, that the Constitutional Centenary Foundation was to be established as an "impartial" body one dedicated merely to "a public process of education" what are we to make of an "agenda for the decade" which (to name only the more glaring omissions):

is absolutely silent on what is almost certainly the greatest flaw in our Constitution as it has evolved today, namely the inadequacy of the words "external affairs" occurring in section 51 (xxix), and the overwhelming need to rectify that inadequacy;24

is equally silent on the matter of the High Court, the persistent (and now utterly gross) centralist tendencies in which have, ever since the Engineers' Case in 1920, moved steadily to undermine the federal structure of our Constitution;

makes no mention of the manner in which, over the years, a string of silly interpretations of the excise power (section 90) have helped to render the States financially impotent in the face of Commonwealth financial power; and so on?

In their own way, these sins of omission by the framers of the "agenda for the decade" provide even more compelling evidence of the constitutional philosophy of those worthies than their sins of commission already cited.

So much, then, for the 1991 Conference. On 17 March, 1992 Sir Ninian Stephen wrote to various companies inviting them to become Sponsors of the, by then established, Constitutional Centenary Foundation. He assured them that the Foundation "approaches its tasks with no preconceived views" and that "it does not intend to be a protagonist in the coming debate . . ." The Foundation, he said, "intends to attract support from many sources", in the belief "that this will ensure our independence".

The proposed Rules of the Foundation (which formed an Attachment to Sir Ninian's letter), provided for three categories of members public members (annual subscription $25), Supporting members ($1,000 annually) and Sponsors (at least $10,000 per annum for 3 years).

Governance of the Foundation rests principally in the hands of a Board, comprising 12 members, of whom 5 might be termed "core" members : the Chairman (Sir Ninian Stephen), the Deputy Chairman (Professor Saunders), the Commonwealth Attorney-General, the Shadow Attorney-General and the Secretary of the Commonwealth Department of the Prime Minister and Cabinet. In addition, Rule 8.2.1 (e) provides for "two persons nominated by the Board" [and, "in the first instance . . . selected by a majority of" the core members] "subject to their approval by a majority of the Premiers and Chief Ministers of the States and Territories". Finally, there are "up to five additional persons" selected "in the first instance . . . by a majority of" the core members and thereafter, upon the expiration of their respective terms, "elected by the Council". (Rule 8.2.1 (f)). The names and designations of the initial Board members are given in Attachment C.25

The other organ of governance of the Foundation is its Council. However, it seems fair to say that this body, which meets only twice a year, is chiefly honorific in nature: its powers are effectively nugatory, 26 and its composition such as to be largely determined by the Board (all of whose members are, ex officio, also members of the Council). Rule 7.2.3 provides that "the initial General Councillors are to be chosen by the Board" and "will include the persons listed in Annex A [to the Rules]".27

I have spent a little time on these matters of governance in order to show that the Foundation is tightly structured, and that prosecution of the "Agenda for the Decade" is unlikely, as a consequence, to fall into unworthy hands that is to say, hands judged to be unworthy by the very small group of people responsible for setting that "agenda" in the first place.

Having said that, let me say immediately that I see nothing untoward in an educational Foundation, or indeed a Society such as this one devoted to constitutional discussion, so structuring its affairs that control of it cannot, without some difficulty, be wrested from the grasp of those responsible for its establishment. My preceding comments on the Foundation's governance, therefore, would carry no critical corollaries whatsoever but for the existence, in its case, of two factors which are not generally present in the case of such bodies (and are certainly not present in the case of this Society).

The first factor has to do with the avowed objectives of the body's "charter"; the second has to do with its funding.

As to the first factor, let us take, by way of obvious comparison, the Statement of Purpose of this Society. Nobody, I believe, after having read that "charter", and particularly if they have also dipped into any of the first three volumes of our Proceedings, could be in any doubt as to what, broadly, we stand for : we are a federalist Society, dedicated not only to opposing the further growth of power in Canberra but also, to the extent possible, to reducing the degree of power now concentrated there.

Foundation representatives would say, no doubt, that their objectives and modus operandi are equally transparent. The so-called Mission Statement, set out in the Foundation's first Annual Report, contains the following claims:

"The Foundation aims to promote and facilitate an informed public discussion on the Australian system of government . . . It is independent, firmly non-partisan and has no pre-determined views either on the need for change or the form which any changes might take". 28 (Emphasis added).

As to the matter of independence and non-partisanship, my own views on those claims will, perhaps, already be clear from the material already presented in this paper. That same material (and much more that might be advanced) also bears on that claim of the Foundation having "no pre-determined views . . . on the need for change . . ."

I shall address those latter aspects further, but here I wish only to make one simple point. If the Foundation is truly "independent", how does it come about that it seems on so many issues to be carrying Canberra's constitutional ball for it? on the Republic, on the general Aboriginal issue, on the powers of the Senate, and so on. If it is so "firmly non-partisan", how does it come about that such a high proportion of its Conferences, commissioned papers, and above all statements by those speaking on its behalf, should give rise to a clear perception to the contrary? If the Foundation genuinely has "no pre-determined views . . . on the need for change", how does it come about that it so invariably seems to be advocating change across a very wide constitutional spectrum?

When the Foundation was first established, it may have been possible to argue that initial impressions along these lines were simply a "luck of the draw" result, and that the passage of time would, by producing a more representative sample of evidence on all of them, assuage the doubts in question. The truth is that, so far from that having been the case, things have if anything gone from bad to worse.

In short, my point is that a body which stakes out for itself all of these claims to the high moral ground should be clearly seen, through its activities and the views to which it gives currency, to be occupying that ground. Just as there can be no mistaking where this Society stands, so there should be no mistaking where the Constitutional Centenary Foundation stands. In my view, there is no mistake on the latter; but unfortunately, it is not where it claims to stand, and that is the problem.

Before elaborating on those matters, let me now briefly address the second factor mentioned above as distinguishing the Foundation from most other bodies of the type which it claims to be namely, the nature of its finances.

The Foundation has never been financially independent, not even prior to its inception. In launching it formally on 14 April, 1992 its Chairman rightly acknowledged that the 1991 Sydney Conference had been "generously funded by the Commonwealth". 29 Similar appropriate expressions of gratitude to the Labor Government in Canberra occur in other public statements on behalf of the Federation.

There are some other tell-tale signs of over-easy access to the public purse. The first Annual Report, covering the period from the Foundation's establishment in October, 1991 to 31 December, 1992 is an extremely handsome document, and in that sense, if in no other, a tribute to those responsible for it. Printed on heavy, and highly glossy paper, between heavy cream parchment-like covers (the front one bearing an attractive multi-coloured design), it would bear comparison with the Annual Reports of even our wealthiest public companies. But then, after all, only (or almost only) government money would have been involved in its production.30

How much government money? The accounts for the period ended 30 June, 1992 show that Receipts from Government up till that time totalled $234,000; receipts from Members (including, up till that time, two Sponsor members paying at least $20,000 between them) totalled $27,568.

More significant perhaps, since these accounts naturally covered only the first eight months or so of the Foundation's existence, were the Report's remarks regarding the Foundation's budget envisaged in 1992- 93. The total income envisaged of about $545,000 was made up as follows:

$

Commonwealth Government grants 250,000

State and Territory Government grants 31 250,000

Sponsors' contributions 32 30,000

Members' subscriptions 33 6,000

Interest and miscellaneous income 8,000

As they say, our taxes at work.34

Again, let me be clear. The fact that an institution derives its funding as to 42 per cent from the Commonwealth Government, and as to another 42 per cent from State and Territory Governments almost all of which, at the time of its inception, were in the hands of the Labor Party, 35 is not necessarily incompatible with impartiality.36 Nevertheless, and even if we acknowledge the fact that the Foundation was originally set up under the financial and other auspices of the Hawke Labor Government, are there still those among us so naive as to assume that the funding then established would have been continued under his successor's administration had the Foundation's activities not been, for the most part, broadly supportive of Mr Keating's centralist ambitions? 37

The final word on this aspect is perhaps best uttered by an independent observer. Mr John Nethercote, now on the staff of the Senate, and whom I recently described as "one of that now diminishing breed of proper public servants in Canberra", 38 recently reviewed a Discussion Paper issued last year by the Foundation entitled Representing the People : the Role of Parliament in Australian Democracy. In concluding that the paper "lacks conviction, commitment, direction or purpose", Mr Nethercote observes:

"This will be a recurrent problem for the Foundation with its heavy dependence on governments for funding".39

It is time, finally, to turn in more detail to the line of advocacy which, in my view, clearly emerges from the activities of the Foundation since its inception. The evidence for the view that it is "advocacy", and not merely a disinterested and impartial surveying of the constitutional

scene, is abundant, and no paper, even of this already undue length, can hope to encompass a tithe of it. I can therefore only deal with a few examples, choosing perhaps those where the public record is not only clearest but also most readily available.

One of the first projects to be embarked upon by the Foundation was the Discussion Paper just previously referred to, Representing the People : the Role of Parliament in Australian Democracy, which was referred to by Sir Ninian Stephen in his address officially launching the Foundation on 14 April, 1992.40

According to the Foreword to that paper, also attributed to Sir Ninian Stephen, "the paper was prepared for the Foundation by Professor Cheryl Saunders", and "particular thanks and appreciation go to Mr David Solomon and Professor Paul Finn, who conceived the project and provided valuable guidance and support throughout."41.

Reference has already been made to Mr Solomon's credentials to undertake this non-partisan exercise in leading the debate in a neutral fashion. Professor Finn is perhaps best, though not I think favourably, known in the present context for his contribution towards the drafting of Part 2 of the Report of the Royal Commission into W.A. Incorporated.42

According to one closely associated Western Australian observer, that extraordinarily disappointing Part of that Report, which may fairly be said to have failed to attribute blame to any individual Minister of the Burke, Dowding or Lawrence administrations, and which thereby largely absolved Dr Lawrence's Government (and those of her predecessors) from the more notable parliamentary and constitutional improprieties of W.A. Inc., was essentially drafted by two men, one of whom was Professor Finn. 43 Of course, neither Professor Finn nor his colleague can, in the final analysis, be blamed for this outcome. The Royal Commissioners themselves (who by this stage of their deliberations were, admittedly, facing an impossible deadline) must take final responsibility for their own failure. Nevertheless, it seems fair to say that this background hardly inspires confidence.

So much for the principal authors of the Foundation's Discussion Paper; what of its substance? In his recent review of it, mentioned earlier, Mr John Nethercote describes it as "a document whose underlying philosophy of Parliament seems to be the de facto unicameralism of the [United Kingdom] 1911 Parliament Act". 44

Mr Nethercote's criticisms do not stop there, 45 but his overall judgment is best portrayed in his comment that the paper is "a tract in search of a cause, advocacy in search of an audience". 46

Next let us look at another of the Foundation's products, or at any rate a product of its activities. I refer to the booklet entitled The Position of Indigenous People in National Constitutions, being the Report of a Conference organized in Canberra on 4-5 June, 1993 jointly by the Council for Aboriginal Reconciliation and the Constitutional Centenary Foundation.47

I should say that the precise authorship of this booklet is not, on its face, entirely clear, and there is, I understand, some suggestion that, despite the presence on its front cover of the name of the Foundation, the latter was not in fact involved in its preparation and publication. If so, that is decidedly unfortunate.

Let us however put aside the booklet's inflammatory material about Aboriginal self-government, "sovereignty as a people", asking "the indigenous peoples if they consider themselves Australians, and if so, on what terms", and other such North American-inspired rubbish, and look solely at the report of the closing remarks by Professor Cheryl Saunders herself.48 While her remarks were doubtless, in their very nature, in a sense ex tempore, they may perhaps be taken as, if only for that reason, more revealing than a speech which had been more carefully edited. For example:

". . . we need to distinguish between issues of substance, things that we know we want to achieve or think we want to achieve and the question as to how that might be done . . .

"Frank Brennan made the point . . . that . . . we need to move from a focus on land management to self- determination, from a focus on land rights to constitutional rights which will include rights to self- determination. That is very much the basis upon which this conference has been conducted". 49

Lest it be thought that I am placing too much emphasis on these words of Professor Saunders uttered in the course of a "summing up" statement, let me point out that, two months later, in a paper delivered to a two- day Conference in Townsville to celebrate the International Year for the World's Indigenous People, Professor Saunders was quite explicit:

"There is a developing consensus on what needs to be changed . . . I think that the Constitution should recognise the prior possession of this land by the Aboriginal people . . . There is broad agreement that . . . the rights of the indigenous people should be identified and inserted into the Constitution, including the right to self-determination. . . . We need to go much further down the path in giving precise definition to the concept of self-determination and self-government, and we also need to work out in much more detail how, constitutionally, all of this should be achieved."50 (Emphasis added).

The truth is that, the more one examines what the antiquarians would call Professor Saunders' provenance, the more clearly she is found to be in the camp of what I have called, in the Program's title for this session, the constitutional "push". 51

While still a Lecturer in Law at Melbourne University, Dr Saunders (as she then was) contributed a joint paper to a seminar at that University in August, 1976 convened to consider the actions of the then Governor- General, the late Sir John Kerr, in dismissing the Whitlam Government in November, 1975. In his pot-boiler of January, 1979 (The Truth of the Matter), which was rushed out in response to Sir John Kerr's measured account of those events (Matters for Judgment) published two months earlier, the Hon. Gough Whitlam quoted with great approval from this paper which, he noted, was subsequently published in Labor and the Constitution, edited by Mr (now Senator) Gareth Evans.52

To move to more recent times, the Foundation had barely been formally launched before, in moving the Toast to the Town at a Melbourne University Town and Gown Dinner, Professor Saunders expressed a number of views which hardly seem compatible with the claim that the Foundation's chief spokeswoman "had no predetermined views" of her own on "the need for change" in our Constitution. For example:

"One [characteristically local factor] is an unusual level of apparent dissatisfaction with . . . the Australian constitutional system".53

And again:

"The Australian experience of constitutional review has been discouraging in the past".54

And finally:

"As the centenary approaches, there will be irresistible pressure for change".55

Later that year, in an interview on ABC Radio 3LO with Mr Ranald McDonald, Professor Saunders delivered herself of the view that:

". . . the State Constitutions are much more antiquated and boring and generally out of date than even the Commonwealth one . . ."56

Professor Saunders may well be right about the State Constitutions, or some of them at least; the real interest of this statement for our present purposes lies, however, in what it reveals about her views on our "antiquated and boring and generally out of date" Constitution of the Commonwealth.

Professor Saunders' lack of any "predetermined views" on "the need for change" sits oddly, too, with her comment earlier this year about "the 1988 referendums, when four very minor proposals were rejected by a suspicious electorate . . . ."57 Minor proposals? That hardly seemed to be the

view of the Australian people at the time, particularly insofar as one of those "minor proposals" had significant implications for the powers of the Senate.

On that matter, however, as noted earlier, the embers of the 1975 conflagration can still be found glowing in Professor Saunders' writings. For example:

". . . it may be that, from an examination of what we want our parliaments to do and how, we would decide to remove the power to reject Supply from the Senate, . . ."58

Just eight days ago The Australian newspaper reported an address by Professor Saunders to a 2020 Vision forum in this city. According to that report, she said that, as Australia moved "inexorably" to a republic:

". . . the Senate's power to reject Supply should be abolished, and Parliament should elect a Head of State.

". . .all taxation [should] be imposed by the federal Parliament, with proceeds allocated between levels of government according to procedures set down in the Constitution.

". . . while her proposals may cause [a] furore, they were `evolutionary rather than revolutionary'. . .

". . . an Australian Head of State to have a largely formal ceremonial role.

"The status of indigenous people in Australia [should] be recognised, with a flexible framework provided for their self-government."59

It is, however, past time to conclude this recitation and to attempt to sum up.

So far as the Foundation is concerned, I regard the evidence as overwhelming. It is a body brought into being with a purpose to gnaw away at our constitutional foundations in the hope that, one day, the structure erected nearly 100 years ago will crumble away and a new construct, more centralist, more unicameral, and of course republican, can be put in its place. As termites go, it has not perhaps been as conspicuously successful as its founders no doubt hoped, but then, that is the way of termites. For a long time, you may hardly know that they are there, but one day a major load-bearing beam is found to have been eaten away from within, and the whole structure begins to founder under the resulting strain.

So far as the Foundation's Deputy Chairman (Professor Saunders) is concerned, again I regard the evidence as quite conclusive. Professor Saunders does have views of her own both on the need for constitutional change and, in many respects at least (e.g. the republic), on "particular changes that might be made". As a constitutional termite, it must be said that she has so far enjoyed considerable success, not least perhaps in having her views widely accepted as "non-partisan" and merely as "leading the debate in a neutral fashion".

Again, let me emphasize that, while I often disagree with Professor Saunders' views on these matters, I would defend to the last her right to hold them. The problem arises only because her views, as presented, persistently sail under the false colours of an allegedly "non-partisan" body which refers continually to its purely disinterested, "educative" role.

What, finally, do we say to those who, in seeking to rebut the thesis of this paper, point to the fact that the Foundation is chaired by no less eminent a figure than Sir Ninian Stephen, KG, AK, GCMG, GCVO, KBE, whose association with any "partisan" body holding "predetermined views" on any of these matters must surely be out of the question?

Before addressing that question, there is a prior one which is perhaps best encompassed in the words of none other than Mr Gough Whitlam himself who, writing in 1979 about the appointment of Sir John Kerr to the post of Australian Ambassador to UNESCO, had this to say:

"The principle [governing such matters] is that former governors and judges should never accept subsequent preferment or appointments from governments or interests to which they have stood in a constitutional or judicial relation; that is the necessary guarantee of their independence and impartiality whilst in office".60

Now of course the Chairmanship of the Foundation cannot properly be described as a "preferment or appointment" bestowed by the Hawke Government because, on the face of it at least, it was bestowed by a group of academic and other figures coming together in private conclave. Nevertheless, the strong Labor Party affiliations of those chiefly responsible, together with the handsome financial support rendered to the Foundation by Labor Governments in Canberra both before and since its inception, render even this a post which, perhaps, may have been better avoided by an ex-Governor-General.61

However that may be, an important point in assessing Sir Ninian's role in the Foundation's scheme of things would turn on the extent to which, in fact, he has been closely involved in its work, and particularly in the deliberations of its Board.

We are all familiar with the process whereby "figurehead" representatives of appropriate celebrity take on appointments, and as a result play out roles, while having rather little hand in the "policy" processes lying behind the facade.

It would be out of character, to say the least, to depict Sir Ninian behaving in that fashion, and I certainly do not do so; I raise the point only because it would be one way of resolving what is otherwise something of a conundrum.

If however we put that theoretical possibility aside, the question remains, to what extent has Sir Ninian himself been more than an intermittent player in the game which the Foundation has been carrying on? It is not possible, from the public record, to answer that question; and the only fair conclusion on these considerations, then, is to set them aside.

There is next the question of the Foundation's role (and hence, inescapably, that of its Chairman) in the Republic debate. Sir Ninian was, after all, first knighted, in the Order of the British Empire (KBE), in 1972. In 1982, following his appointment as Governor-General, he was created, in ascending order of precedence, Knight Grand Cross of the Royal Victorian Order (GCVO) an award, be it noted, within the personal gift of Her Majesty; Knight Grand Cross of the Order of St. Michael and St. George (GCMG); and Knight of the Order of Australia (AK). Most recently even these high and entirely merited honours have been overshone by Her Majesty's decision a few months ago to appoint Sir Ninian as a Knight of the Garter (KG) only the third Australian to be elevated to that role, and again a matter within the personal gift of Her Majesty.

Writing about this last, Mr Peter Ryan, who last year made the chattering classes' welkin ring with his long overdue assessment of the real worth as an historian of the late Professor Manning Clark, said:

"Sir Ninian Stephen, with minimal fanfare, meanwhile became a Knight of the Garter . . . With the Queen at its head, the Garter is about as royal as you can get; . . .

"Sir Ninian, since stepping down as Governor-General, has been of some service to Labor Governments; towards republicanism he has displayed an openness of mind which could best be called statesmanlike. Is there some faint discordance in his acceptance of so great a royal favour . . .? Or isn't there?"62

In one of its early newsletters the Constitutional Centenary Foundation included a rather good "Constitutional Crossquiz", in which the clue to "13 Across" read "The last British-born Governor-General". The answer, further back in the newsletter, was given as "[Lord] De Lisle". In fact, the last British-born Governor-General was Sir Ninian Stephen, who was born in Scotland (and very nice, too!) in 1923.

Perhaps that fact should guide us in assessing whether or not Sir Ninian, too, should be judged to be a termite in these matters. For there is, as I understand it, in the law of Scotland still a verdict of "Not Proven". It is perhaps fitting, therefore, that Sir Ninian should have the benefit of such a judgment, and we may leave it there.

What, in the end, are we to make of the work of these constitutional termites (Sir Ninian aside), who have been gnawing away now for over three years? Their efforts are not lightly to be dismissed, particularly since they are now extending into such areas as "Schools Constitutional Conventions", "Citizenship" ceremonies for native-born Australians, and other forms of unobtrusive brain-washing for the young.63

Perhaps, nevertheless, and having in mind the great good sense with which the Australian people have approached all proposals for constitutional change put before them over the past nine decades (in contrast, it must be said, to our High Court judges), we should bear in mind the comforting words of Edmund Burke:

"Because half a dozen grasshoppers under a fern make the field ring with their importunate chink, while the thousands of great cattle, reposed beneath the shadow of the British oak, chew the cud and are silent, pray do not imagine that those who make the noise are the only inhabitants of the field; that, of course, they are many in number; or that, after all, they are other than the little shrivelled, meagre, hopping, though loud and troublesome insects of the hour".

Endnotes:

1. While Professor Saunders' ability as a constitutional scholar is unquestioned, neither are her political associations. In an article in The Australian Financial Review dated 11 April, 1991 I had this to say on that topic:

"Dr Saunders chairs the Commonwealth Administrative Review Committee, a post to which she was appointed by the present Government. I note merely that Labor governments are not renowned for appointing other than their own.

"As it happens, Dr Saunders is married to Mr Ian Baker, the Minister for Agriculture in the Victorian Labor Government.

"One should not, naturally, visit the sins (or the political convictions) of the husbands on the heads of the wives. It must be said, however, that Dr Saunders does not appear to be intellectually uncomfortable in such company".

There was, I should say, one minor error in that comment my reference to Dr Saunders rather than Professor Saunders which I take this opportunity to acknowledge.

2. No doubt in the light of this onset of reality, this particular reference has been deleted from the 1993 Prospectus for the Centre.

3. For our present purposes, the chief interest of this program would seem to lie in its resemblance to what later became "issue 8" in the "Agenda for the Decade" issued by the 1991 Conference which led to the formation of the Constitutional Centenary Foundation see below. Note that in the 1993 Prospectus (the latest yet available) the title of this program has been altered to "Asia-Pacific Constitutional Systems". Since the content of the program does not appear to have been basically changed, this change of nomenclature is presumably chiefly a concession to fashion.

4. This particular "current activity" no longer appears in the Centre's 1993 Prospectus, the academic in charge of it having left the Centre for a post in Adelaide and, presumably, taken her "national network" with her.

5. In an article dated 21 July, 1994 in The Australian Financial Review I had this to say of the relationship between these two bodies:

"The Centre [for Comparative Studies] has what might be kindly termed a symbiotic relationship with another labourer in our constitutional vineyard, the Constitutional Centenary Foundation,

established by a 1991 Conference of broadly like-minded people on the Left (with some honourable exceptions) to promote what it called `an agenda for the decade' of constitutional change.

"The director of the Centre, Professor Cheryl Saunders, is also Deputy Chairman of the Foundation and (without undue disrespect to its Chairman, Sir Ninian Stephen) might be seen as its chief mover and shaker."

One other important aspect of this "symbiotic relationship" might be noted here. The 1993 Prospectus for the Centre includes (page 6) the following passage:

"The Centre provides professional services to the Foundation under a service agreement. Services include the provision of information on constitutional and legal issues to the public, press and Foundation members; assistance with the constitutional aspects of Foundation publications or other educational materials; assistance with minor constitutional research on Foundation projects; maintenance of a library for Foundation use; and advice and assistance to the Foundation on Australian and comparative constitutional matters generally".

Note 3 to the Accounts of the Foundation for the year 1992-93, as set out in its 1993 Annual Report, contains the following statement:

"The Constitutional Centenary Foundation has entered into an agreement with the Centre for Comparative Constitutional Studies whereby the Foundation is committed to pay $100,000 a year as consideration for consulting advice."

The same Note (and a similar note to the 1991-92 Accounts appearing in the 1992 Annual Report of the Foundation) makes it clear that this agreement entered into effect as from 1 April, 1992 (i.e. just prior to the official launch of the Foundation on 14 April, 1992).

6. Professor Crawford has since left Australia to take up a Chair at Cambridge University.

7. Quoted by Mr Peter Charlton in an article "Tough Task to Revamp our Constitution", The Courier Mail, Brisbane, March, 1991 (i.e. shortly before the Sydney Conference).

8. S E K Hulme, QC : Constitutions and the Constitution: Proceedings of the Samuel Griffith Society, Inaugural Volume, pp. 41-46.

9. Address by The Rt Hon Sir Ninian Stephen on the Occasion of the Official Launch of the Constitutional Centenary Foundation, Queen's Hall, Parliament House, Melbourne, 14 April, 1992.

10. Review of Constitution a Priority: News Release, Constitutional Centenary Foundation, 14 April, 1992. Further enquiries were directed to Professor Cheryl Saunders, Deputy Chairman and Mr Denis Tracey, Executive Director of the Foundation. (Prior to taking up his appointment with the Foundation, Mr Tracey was a Commonwealth public servant whose work had brought him into contact with Professor Saunders in her then role as Chairman of the Commonwealth Administrative Review Committee.)

11. An impression recently confirmed, perhaps, by his elevation to the NSW Supreme Court where he will, of course, like all Judges, be above criticism from mere mortals.

12. This may also explain it would be difficult to think of any more substantial reason why Senator Patterson was subsequently selected, and has remained, as a member of the Board of the Foundation.

13. "It is strange nevertheless that the Steering Committee proposes that the greater part of the Conference should be closed . . . Moreover, it is suggested that the record of the closed sessions should itself not be published for four years. There is absolutely no requirement for such secrecy. There is no-one who will be attending the Conference, and nothing which could be said, for confidentiality to be necessary."

(PP McGuinness, "Public Right to a Sound Constitution", The Australian, 2 April, 1991.)

Mr McGuinness returned to this point on the weekend following the conclusion of the Conference, as follows:

"The biggest mistake of the Constitutional Centenary Conference in Sydney over the past few days was to opt for closed sessions." ("Founders fathered a good Constitution", The Weekend Australian, 6-7 April, 1991.)

14. The fact that the Conference was held behind closed doors was also referred to, but only as "a perverse approach", by Mr Peter Cole-Adams in the course of an otherwise laudatory article, "A Brisk Constitutional", in The Age, 6 April, 1991.

15. Upon the winding up recently of the Electoral and Administrative Reform Committee, Mr Solomon took up a position as Contributing Editor of The Courier Mail, Brisbane.

16. The others include also Mr Peter Smark, of The Sydney Morning Herald; Mr Peter Cole-Adams, then an Associate Editor of The Age; and, if only for the sake of "balance", Mr John Hyde, a weekly columnist for The Australian and a former Liberal Member in the House of Representatives. Mr McGuinness, already mentioned, makes up the number.

17. See, for an example of this confusion of roles, the leading article "The Constitution and Economic Reform", The Australian Financial Review, 4 April, 1991. See also the lengthy article "Human Rights a Priority for Reform" by Mr Paul Kelly in The Weekend Australian, 6-7 April, 1991. Surprisingly, nowhere in this extensive article does Mr Kelly (unlike, it should be said, Mr McGuinness) inform his readers that he was reporting a Conference in which he had also been a participant.

18. During the course of his contribution to the closing proceedings, Dr Hewson said, inter alia:

". . ., I think we have to begin the process of designing a new Constitution; a Constitution now which will be consistent with us as an emerging, hopefully significant, nation in the Asia-Pacific region over the course of the next five to ten years. . . . it's against that background that we need . . . particularly to develop a new Constitution . . ..

"So I'm delighted to finish with an expression of support, total support, on my part and on the part of the federal Opposition to the concept of the Foundation and the work that's before it in the course of the next ten years."

As they listened to these words from the then Leader of the Opposition, whose knowledge and understanding of constitutional questions can most appropriately be described in that now well-known phrase terra nullius, one can only surmise that "even the ranks of Tuscany could scarce forbear to cheer". Never, perhaps, was Dr Hewson more popular with any audience. How strange that this one should have been so largely composed of those who would always be voting against him.

19. The extent of that increase in the power of State Governments and/or citizens generally would, of course, depend upon the modalities of any change to be adopted in the provisions of section 128 of the Constitution. Since only the Commonwealth Parliament, as things stand, can propose the terms of a referendum to change the terms of section 128, the framers of the "Agenda for the Decade" may not have felt unduly uneasy, as a practical matter, over this apparent concession to "decentralist" philosophy.

20. It is interesting to note that, most recently, when the Goss Labor Government proposed to the electorate of Queensland in 1991 that the State Parliament's present three year term be extended to four years (a proposal which was supported by the Liberal Party and opposed only by the much reduced National Party in the State), it was defeated by a clear margin.

21. In his report of the Conference see Endnote (17) above Mr Paul Kelly said:

"But the immediate upshot [of the Conference] is support for a four-year term for the House of Representatives. Mr Hawke and Dr Hewson will meet soon in an effort to reach a bipartisan

position. Both leaders gave strong support to the idea yesterday . . . Dr Hewson wants a four-year term referendum put soon and not delayed until the next election."

22. A paper by Mr Tom Courchene, of Queen's University, Kingston, Ontario presented to a conference on Australian Federalism in Melbourne on 15 July, 1994 makes an intellectually excellent (as well as refreshingly politically incorrect) case for precisely the opposite viewpoint. According to Mr Courchene, although the federalist nature of Australia's Constitution has served Australia well for almost the past century, the impact of "economic globalization" is such that "Australians in their second century will need a federal system much more than they did in their first century".

23. In his two articles in The Australian already referred to see Endnote (13) above Mr PP McGuinness refers at some length to this issue:

"There is an agenda for the Conference which suggests that some of the Steering Committee, at least, have notions of change which . . . closely reflect the academic fashions which grew out of the 1960s and '70s. This is most clearly evidenced in the idea that the Constitution should recognise . . . that `the Aboriginal and Torres Strait Islander people should be recognised as the indigenous peoples of Australia.' . . . What is to be achieved by elevating [this fact] into a constitutional principle? It is . . . merely fashionable breast-beating, . . .". Op. cit., 2 April, 1991.

In his post-Conference article, Mr McGuinness goes further:

"The final wash up of the question of recognition of indigenous peoples was not as clear as might have been wished. Although some people will be claiming that there was a firm decision that the assertion of original ownership should be included in the Constitution, this is a misrepresentation of the feeling of the Conference, which really agreed on the need for a process of reconciliation with the original inhabitants, and the need to do something practical instead of just talking in slogans". Op.cit., 6-7 April, 1991. (Emphasis added).

Note that the agreement, reported by Mr McGuinness, on "the need to do something practical instead of just talking in slogans", found no place in the Concluding Statement of the Conference.

24. Members of this Society, in particular, will recall the words of our President as to the pass to which the High Court's interpretation of those words over the years, and particularly since the Koowarta Case, have now reduced us:

"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 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." (The Rt Hon Sir Harry Gibbs, Address launching the Inaugural Volume of Upholding the Australian Constitution, Melbourne, 19 November, 1992. Reprinted in Upholding the Australian Constitution, Volume 3, Appendix I, pp. 135-143.)

25. As set out in the Foundation's Newsletter, No.1, April, 1992.

26. For example, "on the recommendation of the Board, to appoint a Patron . . ." (Rule 7.1 (a)); to appoint the auditor (7.1(e)); to consider and make recommendations to the Board on the activities of the Foundation (7.1(g)); and so on.

27. This list of Foundation General Councillors, comprising 20 Australians and one New Zealander, roughly coincides (with only two exceptions) with the initial Steering Committee for the Sydney Conference.

28. Constitutional Centenary Foundation Inc. : First Annual Report, 1992, Appendix V, page 20.

29. Address by The Rt Hon Sir Ninian Stephen on the Occasion of the Official Launch of the Constitutional Centenary Foundation, Queen's Hall, Parliament House, Melbourne, 14 April, 1992.
30. The Foundation's 1993 Annual Report is in all these respects equally impressive. A note on page 4 of the Foundation's Newsletter for May, 1993 (Volume 2, Number 2) tells us that this front cover illustration was painted by Anthony Chiappin "and was commissioned by the Foundation".
31. "This comprises grants from all Australian States and Territories according to their relative populations : NSW $86,000; Victoria $65,000; Queensland $40,000; WA – $24,000; SA $20,000; Tasmania $6,000; ACT $5,000; Northern Territory $4,000." (Constitutional Centenary Foundation, Annual Report for 1992, page 5, footnote.)
32. This comprises contributions of $10,000 each from three Sponsor members CRA, the AMP Society and the Commonwealth Bank of Australia. The Annual Report (page 5) also names Arthur Andersen & Co as a fourth sponsor; presumably, their first contribution was not due until 1993-94.
33. Including contributions of $1,000 each from two Supporting members, AOTC and Alexander Stenhouse, Limited.
34. Interestingly, the 1993 Annual Report of the Foundation, whose accounts cover the 1992-93 financial year, is less informative. "Commonwealth and State Government grants" are shown as $500,000, but no break- up is provided. "Other grants" of $25,000 are now included, but with no indication as to their source. "Members' subscriptions" are shown as $48,852 compared with the $36,000 "envisaged" in the 1992 Annual Report, but no explanation is given; one presumes that (at least) one additional Sponsor member has been recruited. Perhaps most surprisingly of all, neither the 1992 nor the 1993 Annual Reports contain any information as to the number of public members (apart from the membership of the Council).
35. As of October, 1991 the only exceptions were New South Wales and the Northern Territory.
36. It is however interesting to note in that context that the Institute of Public Affairs, Melbourne, which is chiefly funded by some 700 or so separate corporate subscribers and over 3,000 individual subscribers, is almost invariably referred to in media reports as "a right wing think-tank".
37. This is not to deny the force of the point, made most recently and most forcefully by Mr PP McGuinness, that relationships between the Foundation and the Keating Government have recently been by no means wholly harmonious, because "the Prime Minister was clearly unhappy with a committee that he had not stacked from the beginning". See "Constitutional Debate poisoned by Partisans", The Australian, 13 July, 1994.
38. "Politics and the Public Purse", The Australian Financial Review, 21 July, 1994.
39. JR Nethercote, in Legislative Studies, Vol. 8, No. 2, Autumn 1994, pp. 98-100. In a personal communication dated 19 July, 1994 Mr Nethercote has also expressed to me the view that "it is better if bodies of this type keep right away from government funding". Of course, the question which that observation raises (namely, what "type" of body the Foundation truly is) is what this paper is all about.
40. "The Foundation has asked a number of well-known and authoritative commentators to write papers on distinct aspects of parliamentary practice and procedure, and later this year will publish an Issues Paper which will consider the way Australian parliaments now operate and explore possible changes". Op.cit.
41. Representing the People : The Role of Parliament in Australian Democracy: The Constitutional Centenary Foundation, Foreword.

42. Report of the Royal Commission into Commercial Activities of Government and Other Matters: Government of Western Australia, 1992.
43. "Two lawyers Professor Paul Finn of the Australian National University and assisting counsel Michael Barker, QC determined largely the structure of the Second Royal Commission Report. They also prepared most of the first draft for the Commissioners". (Article by Professor Peter Boyce, Vice-Chancellor of Murdoch University; The West Australian, 30 November, 1992.)
44. Op.cit. The U.K. Parliament Act 1911 was of course the Act which effectively stripped the House of Lords of its previous powers and rendered the House of Commons, to all effects, all-powerful in the Parliamentary scheme of things. Whatever may be said as to the mode of constituting the House of Lords, the 1911 Act may be seen as the first step towards what is now commonly referred to in Britain as Prime Ministerial dictatorship.
45. Mr Nethercote notes, for example, that:
"According to Sir Ninian Stephen's Foreword, the Foundation has been established in `the interests of an informed debate'. It is to be hoped that in subsequent projects the Foundation takes this responsibility for informing debate a good deal more seriously than it has done in this venture . . .
". . . it is an error to imagine that any working parliamentary system can be devised which would or could remove such uncertainties [practices which are not explicitly set down in any authoritative form]. Uncertainty is at the heart of flexibility in any method of government .
"The paper also seeks to promote" [presumably, Mr Nethercote means "to lead the debate in a neutral fashion"] "an erroneous view that improvement in the practice of parliamentary government 'cannot be resolved' without considering Parliament's role. This approach is faulty on two grounds . . .
"The paper seems . . . to be overly preoccupied with the needs of `strong and stable government'. . . . There is much less about how governments . . . should or could reshape their methods to accommodate the needs of Parliament.
"The elitism of debate about constitutional and political issues, and the lawyers' domination, has ensured a healthy scepticism among Australian voters [about constitutional matters]. The Constitutional Centenary Foundation, with its deep academic and legal roots, is unlikely to disturb that scepticism. And, on the evidence of this paper, that is how it should be.
"It is a frightening thought that Australia may be in for a decade of this form of substantially government-funded discourse." Op.cit.
46. Op.cit.
47. Commonwealth Government Printer, Canberra.
48. The Way Forward (Conference Summary), Professor Cheryl Saunders, Constitutional Centenary Foundation., Op.cit., pp.16-19.
49. Op.cit., pp.17-18. Note (a) the personal pronoun "we" employed throughout, which hardly seems appropriate for a "non-partisan" body with "no preconceived views on whether the Australian constitutional system ought to be changed . . ."; and (b) the concluding sentence, which makes it clear that "the basis upon which this conference has been conducted" by its two organizers one of which was the Foundation was the need to focus on "constitutional rights" for Aboriginal and Torres Strait Islanders, including "rights to self-determination".
50. Self-Determination and Constitutional Change, paper by Professor Cheryl Saunders in Aboriginal Self- Determination in Australia, being the Proceedings of a Conference to celebrate the International Year for the World's Indigenous People : Australian Institute for Aboriginal and Torres Strait Islander Studies; Christine Fletcher (Editor), Aboriginal Studies Press, Canberra, 1994 : page 69.

51. The Sydney libertarian "push" was a gathering of intellectuals who, during the post-War period, had a considerable influence on literary, artistic and political discussion, and among whom "one felt the dominant presence of the late and immoderately revered Professor John Anderson". See, on this latter, Gross Moral Turpitude, by Cassandra Pybus; Heinemann, 1993, pages 22-23.
52. "In their paper Professor Colin Howard, Hearn Professor of Law, and Cheryl Saunders . . . told the seminar:
`In the events which happened it is possible to argue that by his intervention the Governor-General, far from giving effect to the intention of the Constitution, positively frustrated its express provisions'.
"The Chief Justice and the Governor-General, they said,
`both adopt the proposition that a supply deadlock should be resolved by the resignation of the Prime Minister. If this is the correct position, it needs to be emphasized that it rests entirely on an unwritten convention which, so far as the present writers can discover, was invented for the purpose in hand in 1975. There is no precedent for it'."
"Sir Garfield Barwick's intrusion has had as harsh things said about it as has Sir John Kerr's conduct. At the August 1976 seminar Professor Colin Howard and Cheryl Saunders said:
`Despite Sir Garfield Barwick's unargued assertion to the contrary, it was far from inconceivable that the matters upon which his advice was given would be challenged before the High Court at some future time . . .'" (Gough Whitlam, The Truth of the Matter: Allen Lane, 1979, pages 124 and 134.)
It would be only fair to add that, at the time in question, Dr Saunders was still a relatively young woman (32), from whom silliness of this kind might be forgiven. She may well have since resiled from the views then expressed (her co-author at the time, Dr Howard, has certainly done so); but whether she has or not, the embers of the so-called "constitutional crisis" of 1975 are still to be found glowing between the lines of her writings.
53. Professor Cheryl Saunders, Town-Gown Address, University of Melbourne, 26 May, 1992, page 3. As to this contention, see my earlier comments above on issue (1) of the "Agenda for the Decade".
54. Op.cit., page 4. Discouraging to whom? The persistent rejection, by the Australian people, of almost all of the centralist proposals put before them for amending the Constitution ought rather to be seen as encouraging evidence of the common-sense of our democracy. Note that, in responding to this toast on behalf of the Town, Mr John Ralph began by remarking that it was:
"interesting that when the Vice-Chancellor honoured me by asking if I would share the platform with Professor Saunders . . . to discuss Restructuring Australia, he and I did not feel it was necessary to discuss whether or not there was a need to restructure Australia. It was accepted".
55. Op.cit., page 7. Compare the continually reiterated slogan that "a Republic is inevitable".
56. Victoria's Constitutional Reform, transcript of interview between Ranald McDonald and Professor Cheryl Saunders, 13 November, 1992.
57. Taking the Republic Seriously, Address by Professor Cheryl Saunders to the Melbourne Rotary Club, 2 February, 1994, page 2.
58. Ibid, page 6.
59. "Let the people instigate referendums : academic", The Australian, 22 July, 1994. The full text of Professor Saunders' remarks, the existence of which was denied on 22 July by the Foundation, and which had to be subsequently obtained through other channels, fully bears out the accuracy of this report.
60. Gough Whitlam, The Truth of the Matter, op.cit., p.172.

61. A much earlier, and much clearer example which would appear to infringe Mr Whitlam's wholly proper dictum quoted above was Sir Ninian's appointment in 1989, not long after leaving Yarralumla, as Australia's roving "Ambassador for the Environment". That matter is, however, outside the scope of this paper.
62. Peter Ryan, "A Modest Proposal" : Quadrant, June, 1994, page 87.
63. In a paper delivered to a Foundation Council Forum on 12 November, 1993 Mr Paul Kelly, Editor-in-Chief of The Australian, advised the Foundation that "any campaign for change must focus on the schools and hammer the idea of an updated Constitution for 2001." It can only be said that the Foundation appears to have taken Mr Kelly's advice to heart.

Appendices to Chapter Seven

Appendix A - Participants of the Constitutional Conference 1991
Appendix B - Constitutional Centenary Conference Concluding Statement
Appendix C - Constitutional Centenary Foundation Board

Appendix A

Constitutional Centenary Conference 1991

Conference Participants

(* denotes members of the Steering Committee)
Ms Marcelle Anderson
Chief Executive
Department of the Cabinet, Western Australia
Ms Anna Booth
Secretary
Clothing Trades Union
Father Frank Brennan SJ
Director
Uniya
Professor Adrienne Clarke
School of Botany
University of Melbourne
Mr M H Codd AC
Secretary and Secretary to Cabinet
Department of Prime Minister & Cabinet
Mr Peter Cole-Adams
Associate Editor
The Age
Dr Peta Colebatch *
Deputy Secretary
Department of Premier & Cabinet
Tasmania
Dr H C Coombs
Centre for Resource & Environment Studies
Australian National University
Professor Michael Coper *
Law School
Universit y of New South Wales
Professor James Crawford *
Dean
Faculty of Law
University of Sydney
Professor Michael Crommelin *
Dean
Law School
University of Melbourne
Mr G L Davies QC
Solicitor-General for Queensland
Ms Hanifa Dean-Oswald
Multicultural & Ethnic Affairs Commission, WA

Mr Julian Disney
Board Member, ACOSS
Mr Clem Doherty
Partner
McKinsey & Company
The Hon John Dowd, MP *
Attorney-General for New South Wales
Mr John Doyle QC
Solicitor-General for South Australia
The Hon Michael Duffy, MP *
Attorney-General for the Commonwealth
Mr Michael Easson
New South Wales Labor Council
Mr Peter Emery
Under Treasurer
Treasury Department, South Australia
Mr Brian Finn AO
Managing Director & CEO
IBM Australia
Professor Paul Finn
Research School of Social Services
Australian National University
The Hon Peter Foss MLC, WA
Ms Ellen France
Senior Legal Adviser
New Zealand Department of Justice
Dr Brian Galligan *
Federalism Research Centre
Australian National University
Mr Laurie Glanfield
Senior Assistant Secretary
NSW Attorney-General's Department
The Hon Mr Justice A M Gleeson
Chief Justice of New South Wales
The Hon Justice Sir James Gobbo
Supreme Court of Victoria
Dr Gavan Griffith QC
Solicitor-General for the Commonwealth
Mr Stuart Hamilton
Secretary
Commonwealth Department of Community
Services and Health
Mr John Hyde
Executive Director
Australian Institute for Public Policy
The Hon Barry Jones MP
Mr Peter Jull
Acting Director

North Australia Research Unit
Australian National University
Mr Steve Karas
Senior Member
Immigration Review Tribunal, Queensland
Sir Kenneth Keith *
President
New Zealand Law Commission
Mr Paul Kelly
National Affairs Editor
The Australian
Dr Sue Kenny
Assistant to the Commonwealth Solicitor-General
Mr Wesley Lanhupuy MLA
Member for Arnhem
Mr Getano Lui Jnr
Island Co-ordinating Council
Professor Stuart Macintyre
Department of History
University of Melbourne
Mr Ian Mackintosh
Partner
Coopers & Lybrand
Mr Justice David Malcolm *
Chief Justice of Western Australia
Mr Laurie Marquet
Clerk of the WA Parliament
Mr Keith Mason QC
Solicitor-General for New South Wales
Mr Eric Mayer
Mr Padraic P McGuinness
The Australian
Mr Peter McLaughlin
Executive Director
Business Council of Australia
Senator Bob McMullan *
Ms Irene Moss
Commissioner
Human Rights & Equal Opportunity Commission
Mr Laurie Muller
Director
University of Queensland Press
Mr Naga Narayanan
Dr Hung Nguyen
ICI Industrial Chemicals
Mr Graham Nicholson
Legal Adviser
NT Parliamentary Committee on Constitutional Development

Mr Gerard Noonan
Editor
The Australian Financial Review
Mr Edward O'Farrell CVO CBE
Administrative Appeals Tribunal
Sir Arvi Parbo
BHP, Western Mining Corporation
Senator Kay Patterson *
The Hon Mr Justice C W Pincus *
Federal Court of Australia
Professor Jonathan Pincus
Department of Economics
University of Adelaide
Professor Paige Porter
Dean
Department/Faculty of Education
University of Queensland
Mr Terry Purcell *
Director
Law Foundation of New South Wales
Mr John Ralph AO
Managing Director & Chief Executive
CRA Limited
Mr David Rathman
Director
State Aboriginal Affairs, SA
Professor Henry Reynolds
Department of History
James Cook University of North Queensland
Mr Mike Reynolds AM
Local Government & Community Studies
James Cook University of North Queensland
Mr Peter Reynolds
Shire President
Wingecarribee Shire Council
Mr Alan Rose
Secretary
Commonwealth Attorney-General's Department
Mr Dennis Rose
Chief General Counsel
Commonwealth Attorney-General's Department
Professor Cheryl Saunders *
Director
Centre for Comparative Constitutional Studies
University of Melbourne
Dr Campbell Sharman
Department of Politics
University of Western Australia

Mr Ian Shepherd *
Partner
McKinsey & Company
Mr Peter Smark
Sydney Morning Herald
Mr David Solomon
The Australian
The Rt Honourable Sir Ninian
Stephen, AK GCMG GVCO KBE *
(Chairman of the Steering Committee)
Ms Pat Turner AM *
Deputy Secretary
Department of Prime Minister & Cabinet
The Hon Hugh Templeton
former Minister for Overseas Trade, New Zealand
Mr Bruce Tilmouth
Central Land Council
Mr Philip Toyne
Executive Director
Australian Conservation Foundation
Professor Cliff Walsh *
Federalism Research Centre
Australian National University
The Hon Mr Justice Murray Wilcox
Federal Court of Australia
Mr Roger Wilkins
Acting Director-General
NSW Cabinet Office
Professor Margaret Wilson
Dean, School of Law
University of Waikato
Professor Ken Wiltshire *
Department of Government
University of Queensland
Mr Charles Wright
Wright Corporate Group
Professor Leslie Zines
Faculty of Law
Australian National University

Appendix B

Constitutional Centenary Conference 1991

Concluding Statement

A Constitutional Review Process

The Conference believes that a public process of education review and development of the Australian constitutional system should be pursued, in the interests of all Australians, to be completed by the year 2000. The process should involve the widest range of individuals and of community, educational and business groups.

The Conference encourages its Chair, Sir Ninian Stephen, to accept appointment as the Head of the Foundation which, in association with the Centre for Comparative Constitutional Studies and similar bodies throughout Australia, will assist in this task. The Conference Steering Committee should be authorized to establish the Foundation.

The Conference requests the Prime Minister, Premiers, Chief Ministers, Leaders of the Opposition and other party leaders to support this undertaking, which should complement the examination of the issues being covered by the Special Premiers' Conference.

Funding for the Constitutional Review Process should be sought from governments, the private sector and individuals, to provide independence for the proposed body.

An Agenda for the Decade

The Conference identifies the following key issues to be pursued over the course of this constitutional decade.

1. The Head of State. Provisions should be made, through the constitutional review process, to define the powers of, and to consider the appropriate method of selection of, the Head of State.

2. Guarantees of Basic Rights. There was strong support for a guarantee of basic rights in some form, entrenching basic rights, and especially basic democratic rights. This would also have an important symbolic function. But achieving this would require broad support from the Australian community, and would necessarily be part of a long-term process of education and discussion.

3. Responsible Government and its Alternatives. Although the present system has both advantages and disadvantages, the general view was that the case for a full separation of legislative from executive powers had not been made out. But modifications of the present system should be explored, such as the possibility of appointing Ministers from outside Parliament.

4. The Effectiveness of Parliaments. There was general support for enhancing the standing of parliaments, and their role and operation strengthened. A range of initiatives which need to be explored and identified to increase the accountability of the executive (e.g. enhanced use of the committee system); to extend the role of parliament (e.g. in the ratification of treaties), and parliamentary responsibility over its own expenditure.

5. Four year terms for the House of Representatives. There should be a 4 year maximum term for the House of Representatives (although different views were expressed on whether either the Senate or both Houses should have a fixed term, or whether the Senate should have one or two of the extended House of Representatives terms).

6. Accountability for Taxing and Spending. There was broad agreement that in principle the Parliament which authorizes the expenditure of money should take responsibility for raising that money, and concern about the extent of fiscal imbalance in the Australian federation, even when allowance is made for the needs of fiscal equalisation. The imbalance could be redressed either by a reallocation of responsibility for raising taxation or by a constitutional allocation of taxes centrally raised.

7. Voter or State Initiative for Referenda. There was general support amongst participants for the idea that there should be additional ways of initiating constitutional referenda under section 128 of the Constitution; for example, by a specified proportion of electors, or by a specified majority of State parliaments.

8. Federalism and economic union. The continuation of a federal system of government is highly desirable for Australia in the 21st century. However, internationalisation of economic activity requires an effective Australian economic union.

The constitutional implications of closer economic relations with New Zealand and with other countries need to be explored.

9. Legislative powers. Considerable support was expressed for an examination of the distribution of the legislative powers between the Commonwealth and the States under the Constitution, including the possibility of new forms of techniques of distribution of power (e.g. in relation to national or minimum standards in a particular field). Particular areas which were raised as requiring examination included natural resources and environmental effects extending beyond any one State, and industrial relations.

New models for the allocation of powers between levels of government (including local government), and for sharing and managing responsibilities, should be explored, and mechanisms to ensure that intergovernmental arrangements and institutions are accountable to the relevant parliaments devised.

10. The Aboriginal and Torres Strait Islander Peoples and the Australian Constitutional System.

(1) There should be a process of reconciliation between the Aboriginal and Torres Strait Islander peoples of Australia and the wider Australian community, aiming to achieve some agreed outcomes by the Centenary of the Constitution.

(2) This process of reconciliation should, among other things, seek to identify what rights the Aboriginal and Torres Strait Islander peoples have, and should have, as the indigenous peoples of Australia, and how best to secure those rights, including through constitutional changes.

(3) As part of the reconciliation process, the Constitution should recognize the Aboriginal and Torres Strait Islander peoples as the indigenous peoples of Australia.

11. Judicial Independence. The constitutional system should secure the principle of an independent judiciary (at federal, State and Territory levels) with jurisdiction over the constitutional validity of laws and the lawfulness of executive action. Security of tenure should extend to the loss of office by abolition of a court. There should be appropriate guarantees of the structural and financial independence of courts.

12. Trial by Jury. An accused person should be entitled to a trial by jury for any serious criminal offences (e.g. an offence punishable by more than 2 years' imprisonment) under federal, State and Territory law.

Sydney
5 April 1991

Appendix C

Constitutional Centenary Foundation

The Foundation Board1

The members of the Foundation's Board are:
Chairman:
The Rt Hon Sir Ninian Stephen AK GCMG GCVO KBE
Governor General of Australia, 1982-89
Deputy Chairman:
Professor Cheryl Saunders
Director, Centre for Comparative Constitutional Studies
University of Melbourne
Members:
Mr Ross Bowe
Under Treasurer, Department of Treasury,
Western Australia
Dr Michael S Keating AO
Secretary
Department of Prime Minister and Cabinet
The Hon Michael Duffy MP
Commonwealth Attorney General
Padraic P McGuinness
The Australian
The Hon Andrew Peacock MP
Shadow Attorney-General
Mr John Ralph AO
Chief Executive, CRA Limited
Mr Des Ross AM
Mr Gary Sturgess
Director, NSW Cabinet Office
Ms Pat Turner AM
Deputy Secretary
Department of Prime Minister and Cabinet
Professor Kenneth Wiltshire
Department of Government, University of Queensland

_____

1 As given in the Foundation's Newsletter, Number 1, April, 1992, page 11.

Chapter Eight

The Republic: Will Blinky be the Only Bill?

Lloyd Waddy, QC

May I say how greatly I appreciate the honour you do me in inviting me to speak to my fellow members tonight.

In particular, may I publicly acknowledge our debt, and I believe ultimately the debt of the nation, to Sir Harry Gibbs and his colleagues for all they are doing through the work and publications of our Society. They have highlighted some of the real problems and issues that confront Australia as we approach the next millennium.

Not least of our problems is the severe outbreak of millennium madness developing around us. I believe The Samuel Griffith Society has an effective antidote to that inane disease: rationality!

Historical Retrospect

When asked to provide a title for this speech, I chose The Republic: Will Blinky be the only Bill?

Let me begin with a brief retrospect of the so-called "republican debate" and explain how I came to be involved.

As is well known, republicanism in some form or other has been around for millennia. The ancient republics of Greece and Rome were followed in the Middle Ages by Venice and others. It has often arisen after someone has cut off the head of a king (figuratively or actually) and, rather than replace the decapitated with another dynasty, society has evolved some elective leader as Head of State or head of the Executive Government.

The British political inheritance has been somewhat different. Its constitutional history can be shortly characterised as the struggle of the people, vanquished in 1066 (and all that!) by William the Conqueror, to bring an overlord with a (foreign) army under civilian then parliamentary control.

In England in 1215 the powerful people the barons insisted that the King acknowledge that he reigned and ruled under the law of the land laws that still protect our liberty today. And so we obtained (and keep) the Magna Carta or Great Charter of Liberties.

If we skip over the intervening period to the Stuarts, we recall their extreme claim to rule by divine right. The King also claimed, as "the fountain of justice", to have the right, if not the duty, to dispense justice in person, and to rule by Royal prerogative. Let us say that the parliamentary forces under Cromwell, and the axeman, put paid to such pretension.

Oliver Cromwell refused the Crown and styled himself Lord Protector. On his death, moves were made (shades of North Korea today) to make the Glorious Leader's son his successor. "Tumbledown Dick" lasted only months and the monarchy was restored.

But, like the Bourbons later, the re-installed Stuarts had learned little and the Glorious Revolution of 1688 bloodless only in England effected a quantum change in constitutional power.

Thus, England in the 17th century was in turmoil torn between those of republican persuasion and those who wanted to restore a monarchy; those who wanted the Jacobites and those who wanted only a Protestant succession.

The latter won but neither republicanism nor the Jacobites were silenced. Both remained potent forces in the rather uneasy Protestant monarchy of Dutch William.

Under the Hanoverians we notice the evolution of the ascendancy of the will of the people (at least those of them enjoying the limited franchise) and their elected representatives over the King and, over time, his Ministers.

Gradually, personal Royal prerogative was replaced by total, or virtually total, reliance on the advice of elected advisers. Whilst the whole theory of government remained monarchical, and the practice remained monarchical, whilst the King reigned, others, enjoying the confidence of Parliament, ruled both country and monarch.

And under German George (no nationalistic symbolism there!) and his successors, cabinet government grew up, Prime Ministers evolved and so much of our conventional theory and practice of government became established.

The early Georges also ruled Hanover, which was a medium-sized German State with a population of approximately 400,000 in 1700. Whilst George could claim he reigned in England by hereditary right, there were more than 50 Catholic relatives whose claims were better. To avoid acknowledging this embarrassment, in his first speech to Parliament, King George I claimed that it had `pleased God' to call him to the throne of his ancestors. Nevertheless, he proposed the severance of the joint succession to England and Hanover by leaving Hanover to any second son whom his grandson, Frederick, might have. George II, on his accession, pocketed his father's will and the union of the two realms remained until Victoria's succession, in 1837, only to the throne of the United Kingdom.

It was George II who expressed most bitterly his lack of royal power under the English constitution.

In 1744, he remarked that in England, "Ministers are the Kings in this country." In 1755, contemplating returning to England from Hanover, he said:

"There are Kings enough in England. I am nothing there. I .... should only go to be plagued and teased there about that damned House of Commons".

Over 30 years before Australia adopted its federal Constitution, Walter Bagehot, the political journalist, was able to point out that after 1832 the constitutional monarchy had given way to "a disguised republic". He wrote that "the appendages of a monarchy" had "been converted into the essence of a republic," which had its "dignified" and its "efficient" parts.

If that were the state of political thought by 1867, no wonder the new constitutional monarchy of Australia was readily called a "Commonwealth".

No wonder, too, that in our own literature, we of Australians for Constitutional Monarchy refer to our present constitutional arrangements as being a "Crowned Republic".

Nevertheless, the whole of our political theory, culture, conventions and executive government, our legislatures and our system of justice springs from this theory (and often the practice) of constitutional monarchy.

Refuting some Republican Claims

Perhaps I can turn now to refute some of the outrageous distortions and assertions of the republican movement. Indeed, it is interesting to note the various matters we have needed to rebut over the past two years.

1. Patriotism

The first and most basic, perhaps, was Mr Turnbull's characteristic claim that not to be a republican was to be "unpatriotic". He later qualified this somewhat to being "less than patriotic", which is better than his May, 1992 line that such people are "less than Australian", and that "those who support the monarchy despise themselves, they despise Australia and they despise Australians".

Mr Turnbull seems to have dropped these allegations now, and generalises the suggestion by claiming only that republicanism is a matter of "patriotism". In whatever guise, the charges, the inferences and the mind-set on which they are based are highly distasteful. If taken seriously, they call into question the loyalty of almost half the population. They are patently absurd.

2. Australian Independence

Another canard has been the assertion that Australia will not be independent (sometimes they say "truly independent") until we become a republic. This utter misrepresentation has wide credence. It is refuted by authorities as diverse as Sir Garfield Barwick and Gough Whitlam. It ignores the Labor Party's Australia Act of 1986 which asserts a pre-existing status of the Commonwealth of Australia as "a sovereign, independent and federal nation".

Professor Lane's Commentary on the Australian Constitution (The Law Book Company Limited, 1986) contains an introduction by the Right Honourable Sir Garfield Barwick, the longest serving Chief Justice of Australia (1964-81), which includes this interesting statement:

"The Constitution was not devised for the immediate independence of a nation. It was conceived as the Constitution of an autonomous Dominion within the then British Empire. Its founders were not to know of the two world wars which would bring that Empire to an end. But they had national independence in mind. Quite apart from the possible disappearance of the Empire, they could confidently expect not only continuing autonomy but approaching independence. This came within 30 years. They devised a Constitution which would serve an independent nation. It has done so, and still does." (page viii). [Emphasis added].

In the same work Professor Lane wrote:

"Cl II gives an ambulatory reading to "the Queen" wherever occurring in the Act, namely Cl II, III, V, ss 1-4, 34, 44, 57-61, 64, 66, 73-4, 117, 122, 126, 128, the schedule; "the Crown" incidentally appears in the Preamble and s 44. With twenty-five references to the Queen and the Crown and thirty-one references to the Governor-General, the republicans would really do better scrapping the whole Constitution Act with the help of the United Kingdom Parliament than by piecemeal amendment." [Emphasis added].

Writing this year in An Introduction to the Australian Constitution, Professor Lane said:

"Under the formal terms of the Constitution we owe allegiance to a monarch abroad with a local representative, a Governor-General who is appointed by the monarch. But in the 1990s the monarch has a status presence only, occasionally opening Federal Parliament ....."

"The monarch is only a shadow over a de facto republic. The Governor-General is appointed by an elected Prime Minister, and answerable to this Prime Minister, almost invariably acting on his advice (that is, the Governor-General may see himself, in most exceptional circumstances, answerable to the nation)". [Emphasis added].

Professor Lane went on:

"The Australianisation of the Crown is now complete. The Governor-General or the Governor has become in substance an Australian institution.

"Not only that. Because of the method of appointment, the incumbent and the independence of the office, this Australian Crown is less like a monarch than a President, while still standing aloof from politics."

3. Is Any One Yet An Australian?

Only slightly more foolish than the charges about our current lack of "independence" is the remark of the former Chairman of the Australian Republican Movement, Mr Keneally, that "no-one will know what it means to be an Australian until they wake up under a republic". The problem with that proposition is that people have woken up before there is a republic and, hence, will have to continue in a happy state of ignorance of Mr Keneally's blissful state for the foreseeable future.

4. Minimalism

A fourth major misconception peddled by the Australian Republican Movement and repeated by the federal government has been the "Tippex", "white-out", or "minimalist" solution to becoming a republic by replacing the words "Queen", "Crown" and "Governor-General" with the word "President". There are subtle variants on this, but they all boil down to a simplistic approach. The Independent Monthly even published a draft Constitution by Professor Winterton, which largely comprised such an exercise, showing the actual lines through the words replaced. One glance at it is enough to see the extent of the textual corrections necessary. Common-sense dictates that the overthrow of the entire theoretical basis of the law and practice of the Constitution is, to put it mildly, somewhat more complex.

It is instructive perhaps to look at comments by constitutional lawyers made before republicanism was a hot political issue. In the fifth edition of W. Anstey Wynes' text Legislative Executive and Judicial Powers in Australia (Law Book Company Limited, 1976) there appears this statement (page 7):

"Viewed generally, the Australian Constitution appears largely as a compromise between the Canadian and American models."

"The central characteristic of the Australian Constitution is the predominance of the Crown in every aspect of governmental powers. As we have seen, the Constitution Act recites the agreement of the people of the several Colonies to unite `under the Crown' and the new political organism, the `Commonwealth of Australia', was itself called into being by a Royal Proclamation. Not only is the Queen an essential part of the Federal Parliament, but the Executive power of the Commonwealth is expressly vested in Her and She is in theory present in every Court in the land. Special point to this fundamental truth, frequently overlooked, was given by the tour in 1954 of Her Commonwealth of Australia by our present Sovereign, Her Majesty Queen Elizabeth, who for the first time in history performed in person Royal acts which had up to that time been performed either indirectly through Her Representative, the Governor-General, or, at best, at a distance from our shores.

"The principle of Royal supremacy that all power derives in the last resort from the Crown is both fundamental and of practical importance for the interpretation and understanding of the Australian Constitution; it has received more than passing notice from the High Court of Australia on many occasions." [Emphasis added].

Does that not warn us that a change from monarchy to republic can never be minimal even if it can be made at all?

Similarly, HE Renfree, a former Commonwealth Crown Solicitor, in his text, The Executive Power of the Commonwealth of Australia (Legal Books Pty. Limited, 1984) devotes an entire volume to the relationship of the Crown and government. Even the headings of the chapters are illuminating, for example:

Chapter 1 - The Sovereign and Her Australian People (137 pages)

Chapter 2 - The Governor-General of Australia (43 pages)

Chapter 3 - Ministers of the State and other Servants of the Crown in Right of the Commonwealth (202 pages)
Chapter 4 - Executive Power and the Crown Prerogatives (207 pages).
Commonsense alone would seem to indicate that a "Tippex solution" of removing references to the Crown in the Constitution must have vast implications for our system of government.

5. Anti-British Sentiment

The fifth strand peddled by various republicans has taken the form of expressions of overt, and sometimes covert, anti-British sentiments. Perhaps its high point has been the Prime Minister's May, 1992 attacks on the opponents of republicanism as "bootlickers" and 'lickspittles" to the British. In its subtler forms, it embraces descriptions of the Queen by the Prime Minister as "a foreign Queen" or "the Queen of England" or "the British Queen". This is repeated frequently, although the Queen is, by statute, part of the Federal and State legislatures and head of our Executive Government. When challenged, variants include descriptions of the Queen as "a grandmother living in England", or even "quaint".

6. Denial of Australian Identity to the Queen

To deny any Australian identity to the Queen is tantamount to denying Australian identity to all those holding dual nationality. This is despite the fact that many such persons in Australia have the vote and wield actual power in the body politic, rather than the essential but impersonal role that attaches to the Monarch.
At one stage, the debate went through an absurd phase with the Prime Minister informing the Indonesians that he was going to change our flag because it has the flag of a foreign country on it; kissing the ground in Niugini, an impulse unlikely to overtake anyone who had actually seen military service; and then alleging that the British "betrayed the interests of Australia" in Asia. This latter calumny was so far wide of the mark that it brought almost universal condemnation.
By the time of the celebration of D-Day, the Prime Minister seemed to have found British valour acceptable and the royal yacht accommodating, but went on immediately to explain to the French why he wanted Australia to become a republic.
Apart from the inherent discourtesy both to the Queen and the Australian people, at least the Prime Minister on this occasion was talking to experts, who have tried five different republics and seem to have ended up with the worst of all worlds.

7. Ageism

Mr Keneally has asserted that support for republicanism would be overwhelming "if we could get rid of the over 55s" that is, 20 per cent of the Australian population! Personally, I would have only one year left nay, less than five months to enjoy our constitutional monarchy.
But this was not just the random thought of an Austral-Irish novelist as he landed at Mascot once again. The Prime Minister also has characterised monarchists as "blue-rinse" presumably "aged", at least, camouflaging their grey hair.
A Mr John Gulpers, writing to The Adelaide Advertiser (19.7.94) raced to the Bureau of Statistics figures of 1992 to show that, by 1996, some 769,000 first-time voters will go to the polls, "while 320,000 people above 55 years will die (mainly monarchist). The figures for 1999 and 2002 are similar". By 2002, "one million people over 55 will have died since 1993."
This line of argument has even nastier sides. I was invited recently to be Master of Ceremonies at a dinner given by the Monarchist League, a totally different body from the Australians for Constitutional Monarchy. Dame Pattie Menzies was Guest of Honour. She made an impassioned, and splendid, speech outlining her reasons for supporting the monarchy. This brought forth the gallant comment in The Sunday Mail (Adelaide) by Peter Goers:

"Forgive my error. But until recently I thought Dame Pattie Menzies was firstly a yacht and second dead. However, she is constantly being resurrected in the cause of the constitutional monarchy ..... . At 95 years of age, dear Dame Pattie is the last gasp and the forlorn hope of a lost cause."

Mr Goers added, for good measure:

"We may well be the `arse end' of the earth because we have been treated like that by Menzies and the British for so long. Too long."

What sort of a republic does this suggest we are heading for?

Predictably, it was Paddy McGuinness (The Australian, 7.7.94) who noted the backlash to strident republicanism evident in the polls of those 18-24 year-olds who, he claimed, "are clearly fed up with the Keating government". After the over-55s, support for changing the flag is lowest amongst 18-24 year olds at present, and a large number of the latter are also "don't knows" about the republic. Says McGuinness:

"It is probable that for purely demographic reasons the Coalition vote and the anti-republican vote will continue to rise over the rest of the century."

8. Personal Attacks

Perhaps the most tasteless attack during the whole republican debate has sprung from Mr Keneally. He chose the Feast of the Blessed St. Patrick to assert, in a memorable phrase which the ABC News courteously carried throughout Australia, that the monarchy was "a colostomy bag on Australia". He has never since claimed the Prime Minister's defence: that he was only speaking "figuratively".

Professor John Hirst has published in The Australian, and included in his recent treatise, the extraordinary statement that the Queen is "the enemy of rural Australia". One is left to wonder at his thought processes. If there were one person in the world from whom no shadow of danger or faintest sign of ill-will towards this country has ever come, it must be Elizabeth II.

Finally, in a catalogue that, time-wise, must be brought to a close, personal abuse of the Queen will be found in the Hansard of the Legislative Council of New South Wales where the Labor Party Councillor, Dr Burgman, adopted the view that "the Queen should be re-trained as a steno-typist and put to useful work".

As the Queen worked on military transport during the second World War, there is no doubt as to her capacity for manual work. I choose not to comment on Dr. Burgman's potential.

I forbear to list the personal attacks on me, Sir Harry Gibbs, Dame Leonie Kramer and others and the threats of legal action by Mr Turnbull.

The Republican Debate

May I now remind you briefly of the so-called progress of the republican debate.

The Australian Republican Movement was launched in mid-1991, at about the same time as the Australian Labor Party resolved that Australia would be a republic by the year 2001. The decision to form the Australian Republican Movement was taken around the luncheon table of the Hon. Neville Wran, QC, a former President of the Australian Labor Party and Premier of New South Wales. He is on record as advocating the abolition of the States. The peripatetic Mr Keneally was appointed Chairman and was active when in Australia. He made much of Australians having a "divided soul", but it has proved to be a malady from which most of us cannot discover that we have ever suffered.

While calling for bi-partisan support and claiming members from many political parties, the triumphalism with which the Australian Republican Movement announced that a member of the Liberal Party State Executive in New South Wales, Ms. Marise Payne, had been appointed Vice

Chairman as "the first significant Liberal to join", indicates the shallowness of actual bi-partisan representation in A.R.M.

The Forces of Republicanism

From the time when socialists broke up Federation meetings in the 1890s in the name of republicanism and "White Australia", through the political crisis of 1975 and the militant republicanism of the 1990s, the republicans have gained strength. It would now be fair to say that the republican forces, at least overtly, include the Prime Minister, the Australian Labor Party and its machine, the Managing Director of the ABC, Mr David Hill, The Australian newspaper, The Sydney Morning Herald, the Australian Republican Movement, the Republic Advisory Committee and the former Liberal Premiers, Mr Nick Greiner of New South Wales and Sir Rupert Hamer of Victoria. One may add also Professor Donald Horne's "Ideas for Australia" project and Professor Horne himself, the prime mover for the establishment of Centres for Australian Cultural Studies. By way of aside, their first conference, held in Canberra, was called "Freedom for the Golden Lands of Australia" (this in 1993) and was attended by approximately 50 people over 3 days and comprised 38 speakers. Only Justice O'Keefe and Sir David Smith were invited to put a pro-monarchist point of view, and their views were omitted from the subsequent publication.

According to the press, it would also be safe to add 100 Liberals in New South Wales and the Young Liberals, by a small majority, in the same State. For a movement which is claimed to well from the hearts of the people, the cracks are small in the political divide of the Liberal Party. The Labor Party members of monarchical persuasion, who are very numerous, have no voice in that Party.

Why Change?

It took the Prime Minister's intervention to concede that our Constitution "is not broken and does not need fixing". The change to a republic, which his own Republic Advisory Committee had indicated was "purely symbolic" was, according to the Prime Minister, allegedly needed because the monarchy is "inappropriate".

The Royal Family "Irrelevant" to the Debate

Recently, the advent of Mr Alexander Downer to the Leadership of the Federal Opposition has caused the first real let-up in the debate by clearly re-positioning in the public mind the propositions that the Queen and the Royal Family are "irrelevant" to the debate and that the Queen exercises no relevant power in the day- to-day running of this country. As any referendum proposal cannot succeed without the imprimatur of the government, Mr Downer is correct to stress that it is useless discussing change in the abstract until the Prime Minister indicates clearly what change (if any) the government proposes.

Minimalism Dead

At this stage it can be said, I believe safely, that minimalism is dead. Even Professor Horne is no longer repeating his claims to have invented application of the word to the debate. Anyone in any doubt has only to read the voluminous Republic Advisory Committee Report to apprehend that change from a monarchy to a republic will have far reaching consequences.

A Constitution in Simple Language?

The Prime Minister, at Corowa, blandly claimed that the whole Constitution needed to be re-written in plain English. Lawyers who have any acquaintance with one of the simplest provisions of the Constitution, Section 92, which states that:

".....trade, commerce and intercourse among the States, whether by means of internal carriage or open navigation, shall be absolutely free",
will rub their hands at the thought of a plain English constitutional lawyer-fest.

God or Secular Humanism?

As to the preamble, those who lust after the American preamble, "We, the people ....." are unable to see anything democratic in our present preamble, "Whereas the people .....". Few of the replacement preambles that I have seen have sought to retain the recital "humbly relying on the blessing of Almighty God", or to replace it with any other reference to the deity. The removal of this part of the preamble would represent another victory for secular humanism, despite the Census finding that over 70 per cent of Australians still claim faith in a Supreme Being.

Will the States Survive?

Republican advocates, such as the ALP Member for Melbourne in the House of Representatives, Mr Lindsay Tanner, continue to advocate the abolition of the States. Lately, such calls have been joined by Senator Kernot of the Australian Democrats. According to an editorial in The Sydney Morning Herald on 14 July, 1994 Senator Kernot described Australia as wanting:
"a republic, a Bill of Rights, a new voting system, another look at the powers of each tier of government and, it almost seems, a block of flats and Tasmania".
The Democrats also supported a ban on Ministers being chosen from the Senate, and sided with the Australian Republican Movement in having the politicians choose a President. This is surprising, as almost 80 per cent of voters are in favour of direct election of any President.
As recently as 16 July last, the former federal Treasurer, Mr Dawkins, has urged business to push for the States to be abolished.
The hidden agenda, which so many have feared for so long, is becoming less hidden as the discussion goes on.

Will Men have a Role in a New Republic?

This month, Susan Ryan, a member of the Republic Advisory Committee and an ex-Minister in the Hawke Labor Government, claimed that a republic and a new Constitution were the logical outcomes of feminism because our current Constitution was "sexist, undemocratic and unaccountable". She claimed that:
"A republic is the pinnacle of democracy .... where leadership is elected, where fair and frequent election processes allow every person to make a decision. ..... This is going to be a republic made for women."
Poppi King, a 22-year old recent recruit to the A.R.M. cause, described the monarchy as "riddled with sexism. It holds women in traditional roles and portrays them as victims .... an instrument of patriarchy". (Telegraph-Mirror , 7.7.94).
This would no doubt have surprised Queen Victoria and, indeed, would surprise Queen Elizabeth they having reigned now in excess of a hundred years since 1837.
The longer discussion goes on, and the more varied and bizarre the ideas tacked on to republicanism, the more the people are seeing it for the diversion and empty notion that it is.

A "Hardline" Monarchist's Manifesto

Having been attacked as a "hardline monarchist", I would like to make the following propositions clear. I try to do this each time I speak publicly on this matter:
1. I am a democrat and will, without cavil, accept the legally expressed wishes of my fellow countrymen and women in a proper referendum. Incidentally, on this topic I believe this to be a majority of all voters together with a majority in every State, before there can be any change to a

republic. This is due to the operation of Section 128 of the Constitution and the provisions of the Australia Act.

2. If you ask me to name the republican model I would favour, it is that of the United States of America. We know it has worked for over 200 years with only one bloody civil war. Nevertheless, the effectiveness of the government in the U.S.A., I believe, is infinitely inferior to that delivered by our own constitutional monarchy.

The `Wombat' Republicans

I often find my views substantially explained and, indeed, expressed by Padraic McGuinness, a republican, but a perspicacious commentator on the current debate. He dismisses the present rash of republicans as "wombat republicans", and has amusingly assigned the leading lights parts in The Adventures of Blinky Bill. He writes:

".... re-reading Blinky Bill does rather stimulate the imagination. There is a large cast of characters, all of them reminiscent of the various actors in the neo-republican movement. Most notable of all is Blinky's main offsider, Splodge the kangaroo, who reminds one of the chairman of the Republic Advisory Committee, Malcolm Turnbull. To his name has to be added the Reverend Fluffy Ears, who cannot help but be identified with Tom Keneally, a first-rate writer but a second-rate guru. And Mr Wombat is just like Donald Horne.

"Other wombat republicans who correspond to the entourage of Blinky Bill include Mrs Grunty (ex- Senator Susan Ryan), and Jack Kookaburra who sounds just like the chief publicist of the group, Mark Day.

"Mr Wombat is not altogether politically correct, since he is not very fond of black fellows, but Blinky is proud to announce himself as "PC" (meaning "police constable", not "politically correct"), while the loyal Splodge takes umbrage at being described as "Splodge ASS" (even though this means, of course, assistant).

"So Blinky, Splodge, Mr Wombat, Mrs Grunty, Jack Kookaburra et. al. have a fine old time of it in the bush, transforming their society while it is perfectly clear that they have not the faintest idea what is going on in the real world. It is a great children's story.

"But none of this has anything to do with the real political issues of how we should run our real world country, nor about the political institutions which are appropriate to our present stage of development and government. To address this requires serious thought, and there are no simple solutions like a republic achieved by a wave of the magic wand, which can bring about any substantial improvements on our present state."

As you can see, McGuinness roundly condemns the ineptitude of the Australian Republican Movement's campaign. I think he believes, as I do, that, if Australians want to be governed under a republic, then the American model, or something close to it, is the only safe and likely alternative to our present regime. Fiddling with what we have I believe to be a recipe for disaster.

Australians for Constitutional Monarchy

Ranged against the Australian Republican Movement we have convened a group, now a series of groups across Australia, to expose what the republicans have been doing. We have called it "Australians for Constitutional Monarchy". Under the inspired guidance of Sir Harry Gibbs and the Honourable Michael Kirby, and with the extensive efforts of Gareth Grainger, we gathered together ex-Senator and Aboriginal leader Neville Bonner, Dame Leonie Kramer, the Honourable Barry O'Keefe, former Labor Lord Mayor Doug Sutherland, Aboriginal activist Margaret Valadian and many others active in the arts, ethnic and political communities of Sydney. Since then we have established Councils in the Australian Capital Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia.

Here in Queensland, Neville Bonner and Sir Harry Gibbs have been joined by twenty-one other prominent Queenslanders including the Honourable Peter Connolly, Dean Grimshaw, Major General WB James and Professor Darrell Lumb, to mention only a few.
In New South Wales we are shortly to set up a State Council which will be convened by Mr Tony Abbott, MP, and include several members of the National Council and others such as war hero, Nancy Wake.
In Victoria, the Honourable Lindsay Thompson has been joined by the Honourable Don Chipp, the Right Honourable Malcolm Fraser, Dame Phyllis Frost, Lady Murray, Professor Joan Rydon and many others well-known both in that State and nationally.
In Tasmania our Council includes Sir Stanley Burbury, Miss Coral Chambers and Mr Edward O'Farrell, while in South Australia, Mr Kym Bonython has gathered together a representative Council which includes Mr RW Law-Smith, Sir Bruce Macklin, Justice Robin Millhouse and Mr Hill-Ling.
In Western Australia the Council includes Mr Graeme Campbell, the Labor Member of the House of Representatives for Kalgoorlie, Rabbi Coleman, Sir Charles Court and the Honourable JH Muirhead, QC.
I have not given you every name as it would be tedious, but each of our Councils has, we believe, a balanced representation which is non-sectarian, non-sexist, non-Party political and includes a wide range of different ethnic backgrounds.

ACM's Progress to Date

We do not have the luxury of Mr Turnbull's merchant bank providing us with headquarters, nor Directors of his bank, such as himself and Mark Ryan, as activists in our cause. We have had under 100 donations in excess of $500, but we do have over 9,000 signed-up, pledged supporters who have been pleased to adopt the Charter the Foundation Council issued, and which was substantially drafted by the Honourable Michael Kirby.
I believe in the leadership shown by those I have mentioned in so many spheres of our national life. Together with all those whom I have not had time to mention, we are providing leadership in this campaign to what, we believe, is a majority of Australians. We hope our efforts will be effective to expose and defeat the republican "push".

Views within the Labor Party

Whilst the Labor party pursues its avowed policy, things are not always what they seem. Rumour has it that whilst none of the Federal Cabinet are monarchists, only the Prime Minister is a fervent republican.
His predecessor, Mr Bob Hawke has said that the republic is an "issue of small importance" and that it "should be postponed during the Queen's lifetime". As the Queen Mother is still alive, on that time scale few of us here will need to hold our breath. Incidentally, Sir Rupert Hamer, opening the A.R.M.'s first branch outside a capital city at Bakery Hill in Ballarat, was of the same view. He would not like to see a move to a republic before the end of the Queen's reign and added that, while Mr Keating keeps his present course, "the present nominal constitutional monarchy is absolutely safe". (The Age 8.7.94). Some republican!
Mr Hayden, Mr Hawke's predecessor as Leader of the Labor Party, has warned that change has "the potential for long periods of great instability." No-one who saw it would ever forget the apparent ease, if not glee, with which the former Prime Minister and the present Governor-General discussed the issue for the benefit of TV.
Mr Barry Jones, the President of the ALP has said, in one television debate, that he would not want a President to be head of the Executive Government, nor to command the Armed Forces.

He did not go on to state (nor was he asked, of course), which politician would command the Armed Forces and to whose benefit.

Recently, Mr Beazley provoked the Prime Minister's wrath by suggesting that any referendum would not be held till the end of the century. The Prime Minister's apoplexy reached Australia from Paris, insisting that the debate was a live issue. Nevertheless, changing the flag has now allegedly been postponed until after the advent of a republic, if we can rely on government statements.

Is Blinky the only Bill?

Well, what of the bills for all this? In cold money terms, the Republic Advisory Committee cost approximately $600,000. The Republican cause has been allocated federally $200,000 annually for the next three years. A committee is working out of the Prime Minister's office. Quite extraordinarily, it was from this source that the notion of a compulsory course in Civics was suggested for the nation's school children. When the Prime Minister's Department was asked for details of it this week, our office was referred, not to the Education Department, but and this you may not credit to the offices of the Australian Republican Movement.

Maintaining a Presidential System

If we are to be permitted to elect the Head of State, as 80 per cent of Australians indicate they would like to do in the event of a republic, the Republic Advisory Committee has calculated that the cost will be in the order of $44.5 million per election, with another $4.7 million if biographies of the candidates are to be distributed to all the voters. If held in conjunction with a general election, which would be highly undesirable, the cost would reduce to $4.6 million for the ballot and $4.7 million for the booklet.

The next bill would come with maintaining the President in proper presidential style. Les Hollings, writing in The Australian this month, ridiculed the Governor-General's entourage to Kazakhstan, although most reports skilfully glossed over the fact that the Governor-General was received there with a twenty-one gun salute, an honour reserved for a visiting Head of State.

Would it be possible for a President to survive without a presidential flight of his own? What President could resist continual State visits overseas? Can you imagine the costs?

And let us remember that the President would not be alone. We will need another new President six in all in each of the six States. Thus, republicanism will replace one hereditary monarch and seven nominated local representatives with seven Presidents, only the first of whom will cost $50 million to elect. The costs of electing the State Presidents has not yet even been calculated.

Other Changes to Cost

The Republican Advisory Committee Report (p.148) listed some other changes necessary if we move to a republic:

Executive Councils will need re-constitution.

All offices filled by commission will need to be provided for.

The use of the word "royal", e.g., "Royal Charter", etc., will need to be provided for.

The interpretation of all laws referring to the Queen, the Crown or the Governor-General, etc., will need to be provided for.

Interim provisions for the change-over will need to be addressed.

Provision for some form of prerogative to replace the Royal prerogative will be needed.

Then there are the constitutional referenda and presumably the alteration of all royal insignia in the Army, Navy, Air Force, Fire Brigades, etc.

All land title will need to be provided for.

None of these changes has yet been costed.

Some More Bills

Other major "Bills" in abolishing the monarchy will include non-monetary losses:
It will tear the heart out of our inherited political and administrative structure, and politicise our Head of State for the first time since Cromwell.
It will be essential that, for their own protection, political parties control the President, with all the questions that will raise.
It will re-visit the divisions of 1975 as to whether the Governor-General's power to dismiss the Government would be given to a new President and, if so, how it would be controlled.
Decisions will need to be made as to where the vast powers of the Governor-General:
- the power to command the armed forces;
- the power to call Parliament;
- the power to prorogue Parliament;
- the power to appoint Ministers; and
- the power to dismiss Ministers,

will be placed. Who will they be given to? How will they be controlled? Won't they go to the Prime Minister?

Dead Losses!

Discarding our system of constitutional monarchy would sever the traditions of our inherited public life, our political culture and conventions.
It would mean a deliberate break with the international nature of our Head of State system, which combines our total sovereign independence with a figure of world renown, who is the Head of State of 16 countries including Canada, New Zealand, Papua Niugini and the United Kingdom, our Head of State being also Head of the Commonwealth of Nations comprising 51 nations of the world.
In breaking with our present system of government, we would swap an easily recognisable member of a family of international renown and repute, with over 1,000 years' history behind it, and an institution of equal integrity, for a series of failed politicians.

The Cost to Christians and Other Believers

The Republic Advisory Committee has asked the Acting Solicitor-General if the Preamble to the Constitution could be deleted.
Many Christians like the fact that our Constitution vests the executive government in the Queen (of Australia) and that she is part of our Parliament and the fountain of justice. As such, at her Coronation she was anointed by the Church in the name of God, and dedicated her life to the service of God and her people (according to the respective laws of their respective lands).
No Christian could seriously doubt that a change to the republic will mean the imposition and triumph of a secular humanist society.

The Cost of the Integrity of Australia

The Republic Advisory Committee pointed out that the original Federal compact involved the joining together of the former colonies into "one indissoluble Federal Commonwealth under the Crown of the United Kingdom", and that this resulted in the Constitution that Australians devised and voted for.
The Crown was the neutral pivot and basis on which the colonies agreed to unite. The Crown became the Head of State both of the Commonwealth and of each State in it. Allegiance to the Crown was the tie that bound the peoples of the various colonies in the union. If that bond is severed, a new basis of union must be found, or in other words, there must be a new agreement to a new union.

The Republic Advisory Committee acknowledged the force in the suggestion that change to a republic "cannot be forced on the States", and that the Commonwealth "cannot alter the fundamental character of the parties to the compact without requiring re-negotiation of the entire agreement". However, in the same volume it listed, as an option, the mechanism which it believed would be effective to force individual States to adopt republican constitutions against the will of that State's voters, and over-riding all entrenched State constitutional provisions. How totalitarian is the new republic to be?

The ultimate effect of the republican push may well be the disintegration of a unitary nation on the islands that comprise Australia.

Vale Blinky

And what of Blinky Bill? Doesn't he seem as pathetic as the entire proposal? All that can be said of him is that, unlike the republicans, to this point he has never done the nation any harm and is considerably better looking than most of its proponents.

He is a symbol of innocence, so that, used in conjunction with republicanism, he was an example of totally false advertising.

I was awakened at 6.30 am one day this month to comment on the radio at the astounding news that the "new-look" Australian Republican Movement (now run by Turnbull Bank director, Mark Ryan, a long-term friend and political adviser to the Prime Minister), was spearheading a new push to get the republican campaign back on the rails. Since then, we have indeed witnessed a sustained, co-ordinated and skilful media barrage that included new stories popping up each day.

One such story was that the Australian Republican Movement had abandoned its mascot, Blinky Bill, and was searching for a new logo. Would I care to comment?

I must confess I had difficulty stopping laughing; I got into dangerous ground in my semi-somnolent condition. When they asked me if I could suggest a replacement logo, all that came to mind was "rats leaving a sinking ship". Unfortunately, I said so.

On reflection, however, rats would not have the misleading effect that Blinky Bill had. But, I hasten to add, it was a jocular suggestion and, as it was a logo, I was obviously speaking "figuratively". Well, if Prime Ministers can, why can't I?

The A.R.M.'s new seriousness, we hear, is to work republicanism into "soap operas". Two years ago that was their complaint about the Royal Family's troubles!

"A spokeswoman for the ABC said the national broadcaster would probably be `responsive' to the idea of including republican versus monarchy storylines in its dramas .... it's quite likely." (Telegraph Mirror, 6.7.94).

Not only in the "soaps", however.

The approach of the totalitarian State is boasted of by none other than Mr Michael Lynch, the new General Manager of the Australia Council (under Ms Hilary McPhee, the wife of Don Watson, the Prime Minister's speech writer and arch-republican). Mr Lynch said of his appointment:

"Arts play a significant role in determining what is going on in society, and they will play a significant role in helping lead the country to a republic ..... I have no qualms about admitting I am an avowed republican. I have got this appointment for five years to 1999, and I would certainly hope that what happens under my management of the Australia Council will progress the debate towards a republic."

Is this what we want for our nation?

A Message to the Nation

It is time to stop the republican nonsense and send as loud a message to the nation as we can that there are concerned Australians who value our life under God, Queen and Country and will fight

bitterly and trenchantly to retain our liberty under our present Constitution. Many have the heart for the cause.

Australians for Constitutional Monarchy organised a rally in the main Sydney Town Hall on Friday, 26 November, 1993 which was addressed by, amongst others, the Liberal politician, the Honourable John Howard and Mr Graeme Campbell, MP, the Labor Member for Kalgoorlie. Over 2,500 people filled that hall to overflowing a thousand more than attended all the public meetings of the Republic Advisory Committee. If each one of us speaks to our friends, and they to their friends and so on, our message will spread like wildfire through the grass roots of this nation, until it culminates in the annihilation of the millennium madness of minimalist (or maximalist) republicanism.

I leave you with that thought.

Chapter Nine

Direct Democracy and Citizen Law-Making

Geoffrey de Q Walker

My topic this morning is direct democracy. In its modern form this comprises two essential characteristics: (1) the people have the power to initiate a referendum on whether a particular law should be enacted or repealed; and (2) the result of such a referendum is binding on government and parliament.

The debate over direct democracy is part of a wider re-evaluation of constitutional fundamentals that promises to make the 1990s a time of constitutional debate and possible change unparalleled since the 1890s. A number of actual changes have been delivered by the High Court of Australia, and more are likely. The Australian Capital Television Case establishes that the Australian people enjoy a right of political communication and discourse that parliaments are powerless to take away. Justice Toohey of the High Court has proposed that the courts might identify a wider range of protected civil rights, that is, rights that could not be taken away by ordinary legislation.

Many other possible changes to the constitutional order are being canvassed by the federal Government and by such bodies as the Centenary Constitutional Conference, its successor the Constitutional Centenary Foundation, and its rival The Samuel Griffith Society. In addition, the movement for an Australian federal republic is again gathering support and momentum. The prospect of abandoning the monarchical symbolism in government is giving rise to serious debate about the arrangements that would replace it.

Pioneering Democracy

When so many competing ideas are vying for public attention and support, there is much to be said for returning to first principles. The first principle of constitutional doctrine is that the true constitution of a nation is to be found in the temper of its people. Any meaningful debate about constitutional issues in Australia must start by acknowledging that nowhere has the democratic spirit flowed more strongly than in this country. We were among the first to introduce universal manhood suffrage, well before Great Britain and the United States. We were among the first countries to introduce the vote for women. We pioneered the secret ballot, and indeed in America it is so strongly associated with this country that Americans still call it the "Australian ballot". Our Senate was from the outset directly elected by the people, whereas its American equivalent at that time was not, and the Canadian Senate still is not. The British upper house, of course, is entirely unelected. Our federal Constitution was among the first national constitutions to be adopted by a direct referendum of the people. The American Constitution was adopted by a constitutional convention, and the Canadian, New Zealand and British Constitutions have never been submitted to the people at all. In 1992, when Canadians were for the first time given the opportunity of expressing their views at a referendum on a package of 69 different amendments to their Constitution, they sent a resounding message to Ottawa that they were dissatisfied with the current process of constitutional change by political elites.

As the Clerk of the Senate, Mr Harry Evans, has pointed out, most of the radical constitutional reforms being sought in Canada, Great Britain and New Zealand are already in place in Australia. One Canadian law professor recently described Australia's federal Constitution as a

"people's Constitution", as opposed to the "governments' Constitution" that exists in his country. The formula for amending the Constitution (in our case s.128) answers, he argues, the fundamental question of where sovereignty lies.

Australians have much to be proud of in this connection, and indeed, in the early part of the century, political science textbooks the world over treated the Australians as being second only to the Swiss as innovators of practical democratic reforms. Democracy is natural in this country. Just as in some other countries there is an instinctive habit of deference, in Australia there was seen to be an instinctive habit of democracy.

Yet that central characteristic is almost unrecognized in Australian constitutional debate today. One even hears prominent people such as Mr Hawke declaring that our democratic institutions were inherited from Britain. From Britain we certainly did inherit the traditions of liberty and the rule of law, and they are priceless indeed. But the Westminster constitution, which took its basic form in 1689, was designed mainly as a check on Royal power. It was never intended to be a democratic system of government. It later became one, but only grudgingly, incompletely, and well after Australia and other countries had led the way.

Although that Australian democratic spirit is still there, and at least as strong as in 1901, it has since then almost ceased to find any outlet in proposals for reform of Australian constitutional structures. Most of the changes advocated in recent years are elitist in inspiration, resting on the premise that the problems of representative democracy stem from the restraints imposed by constitutional checks and balances and by the pressures of almost constant electioneering. One of the main elitist solutions offered is therefore to lengthen the parliamentary term. The now defunct Constitutional Commission strongly advocated this solution in its 1988 report.

Another is to propose removing the few remaining checks and balances on the near-absolute power of the Premier or Prime Minister, for example by curtailing the powers of upper houses. The Constitutional Commission advocated that expedient too. Other proposals of this kind rest on the argument that the solution is to give incentives that will induce "better" people to enter Parliament: higher salaries, increased resources, larger support staffs and the like.

Not all these ideas are necessarily bad, but they do form part of a broad elitist approach to constitutional development.

In the past few years, however, a movement has developed which follows in a straight line from the great democratic mainstream I referred to earlier. This movement argues that the remedy for the failings of our representative democracy is not less democracy, but more.

Democratic Solutions

The democratic proposed solutions to our problems broadly envisage wider use of the ballot box through the mechanisms of direct legislation by the people. This system was first introduced at the national level in Switzerland in 1874 and was later adopted in 26 of the American States. Since the 1970s it has also been used with great success in Italy. In Canada it is widely employed at the local government level.

The case of Italy is significant, because here is a country which, ever since the late Middle Ages, has been regarded as a political and economic basket case. Its fortunes started to change dramatically in the 1970s, though, when the Italian people began to activate a provision that had been inserted in their 1945 Constitution, and which allowed 500,000 citizens by petition to require a referendum on whether an existing law should be retained or repealed. It was first used to challenge Italy's new divorce law, and the pundits confidently predicted that such was the Vatican's influence over voters' minds that they would overwhelmingly reject it. Instead, they upheld the new law by a large majority. That taught the Italian people something important about themselves but, more importantly, it took hold of an issue that could have been highly divisive in Italian society and resolved it once and for all in accordance with the wishes of the majority, not

of any particular group. Also during the 1970s, direct legislation was used to modify (though not repeal) Italy's abortion law, and to uphold some anti-terrorist statutes. The availability of direct democracy lowered the entire operating temperature of Italian politics, and set the stage for an economic boom that has given Italians a higher standard of living than the British and, on some readings, than Australians.

But even those successes are minor when compared with those achieved more recently. Last year a citizen petition signed by 1.1 per cent of the voters required certain provisions of Italy's electoral laws to be submitted to a referendum. These provisions had made it possible for the Mafia and other corrupt groups to manipulate the electoral process and debase the whole fabric of government.

Some politicians adopted a policy of ignoring, then denigrating, belittling, then opposing and misrepresenting the referendum issue. Nevertheless, the Italian people turned out to vote in near-record numbers. There was not a region in Italy that registered less than 91 per cent in favour of repealing the law in question, and the average was 94.6 per cent for the reform initiative. Through direct democracy, the citizens had achieved a breakthrough in an area that politicians had avoided for a generation.

The ensuing judicial enquiries led to a wave of resignations from the Italian parliament. There was a striking correlation between the names of those who had opposed the citizen initiative measure and those of members resigning from parliament because of corruption disclosures.

A complete political, economic and social revolution has been brought about in Italy in an unprecedentedly peaceful manner and in a way completely in accordance with the wishes of the Italian people.

Direct democracy through the initiative and referendum system has been publicly advocated in Australia since the 1890s. It was one of the main objectives of the Australian Labor Party and remained so, at least nominally, until 1963. Between 1914 and 1919 a number of bills for the introduction of the system were introduced by the Queensland ALP government, but were delayed in the then upper house and eventually abandoned. After World War I, the ALP lost interest in the idea and it remained forgotten until the late 1970s, when the Democrats in the Senate began introducing a series of bills for a constitutional amendment to provide for the system.

Classifications and Rationales

There are two main forms of direct legislation. The first is the legislative petition referendum, or "people's veto". This allows a specified number of voters (usually between 2 and 5 per cent) to petition for a referendum on a bill that has passed through Parliament in the normal way but has not yet taken effect. When a petition signed by the prescribed number of voters is presented to the Government, the statute's operation is suspended until the voters have had the opportunity to approve or reject it in a binding referendum. In Switzerland this mechanism also extends to the ratification of treaties. This type of voters' veto has not been seriously advocated in Australia because of the political resistance to the idea of suspending the effective date of legislation.

The other form is the legislative initiative, which permits a prescribed number of voters to compel in the same way the holding of a binding poll on whether a proposed law of their own choosing should be adopted, or whether a particular law already in force should be repealed. This terminology is slightly confusing because the initiative obviously involves the holding of a referendum in the ordinary sense of the word, while the legislative petition referendum incorporates an element of citizen initiative, in the sense that the petition is launched by voters of their own motion.

The initiative may also be used to propose amendments to the Constitution; in this case it is called the "constitutional initiative". This was the particular form supported by the Centenary Constitutional Conference.

The arguments for and against direct democracy I have canvassed in my 1987 book Initiative and Referendum The People's Law (Centre for Independent Studies, Sydney, 1987). They are summarized succinctly by Brian Beedham in The Economist of September 11, 1993.

As to its advantages, time does not permit me to list them this morning, but the main ones could perhaps be summarized. First, enormous benefits have been found to accompany the introduction of the direct legislation system. It gives back to the people the real power to determine the laws under which they live, a power that is rightly theirs but has been usurped by party machines and by pressure groups. Initiative and referendum force politicians to take more notice of the values and opinions of the people, because unpopular legislation rammed through Parliament can be promptly overturned by the people. As time goes on, resort to the referendum petition becomes less and less necessary as parliaments gradually learn that lesson. Again, controversial issues can be taken out of the hands of extremists and dealt with in accordance with the usually more moderate views of the majority, as in Italy in recent years.

Initiative and referendum are immune to the arts of electoral geometry and the other techniques used by parties to reduce the influence of the people over the legislative process. They do not eliminate political parties or lobby groups; nor should they, for these bodies have a part to play. But they do force pressure groups to persuade rather than dictate. They do check the tendency of parties to make laws that are contrary to the wishes or beliefs of the people. They also allow the people to distinguish between policies and personalities, so that they no longer need to turn out of office a government of which they basically approve, simply because they object to one of its legislative policies. This, incidentally, is also a great advantage from the point of view of elected politicians, because it increases their security of tenure. Conversely, politicians can say "no" to minority pressure groups agitating for extreme legislative solutions, while pointing out that if they really believe they have popular support, they can launch a petition drive.

Direct legislation gives the people an incentive to take an interest in public issues and so makes the best use of their talents and experience. It is sometimes said that the Australian people are politically apathetic and ignorant. On particular issues, people may well be ill-informed, and many are certainly apathetic. But that is itself a result of the present system. As modern economics has shown, information is not costless. To become well-informed or active on a particular issue takes time and effort. At present citizens have no incentive to seek full information on any particular issue, because they know that when the next election comes, they will be confronted with the same political cartel offering a choice only between two, or at the most three, inseverable packages of personalities and policies. The voter's opinion on any current issue, no matter how well informed and thoroughly reasoned it may be, will have no effect on legislation, which is the product of party policy and the activities of pressure groups.

The system of direct legislation, on the other hand, calls on the voter to express a considered opinion that will automatically count in the law-making process. This gives the voter an incentive for independent and considered thought. Most people behave responsibly when responsibility is placed upon them. As Thomas Jefferson said, men in whom others believe come at length to believe in themselves; men on whom others depend are in the main dependable. In these times of upheaval and radical change, society and government need the benefit of all the new ideas, new methods, new store-houses of personal initiative and energy that are available. The simplest way, and indeed the only way, to tap those reserves is to ask for them, by allowing direct individual participation in law-making.

Above all, direct legislation tackles the root cause of much of our constitutional and political malaise, which is fear. I do not believe that most politicians behave the way they do because of megalomania. Their subterfuges, prevarications, dealmaking, tampering with the rules and so on stem, not from a lust for power, but from a fear of what the other side will do if it comes to power. Under present constitutional arrangements and doctrines, a government that wins an election is virtually given dictatorial power for the next three or four years. In that time there is little or nothing to stop it from using its parliamentary majority to destroy society's most precious institutions or trample on its most cherished values. Those who adhere to AV Dicey's theory of parliamentary sovereignty would assert that an Act of Parliament requiring that all blue-eyed babies be killed would be a valid statute with the force of law.

Direct legislation changes all this. A government that used its temporary majority to enact outrageous statutes would find itself facing referendum ballots on them. It is interesting in this context to notice the incidence and success rate of referendum petitions (the "people's veto" type) over time. In Switzerland (and the American experience is similar), when the petition referendum was first introduced, about 12 per cent of all statutes were challenged. Of these, a high proportion was rejected by the people over 60 per cent in Switzerland and around 90 per cent in some American States. These results are the best possible proof of the need for the petition referendum, for they make it quite clear that representative assemblies do not always represent the voters. But between 1950 and 1974, the proportion of acts challenged fell to 4 per cent. In California no people's veto referendum qualified for the ballot between 1942 and 1982. The main reason for this decline seems to be greater voter satisfaction with the output of legislative assemblies.

Parliamentarians in states where the referendum is available have become more respectful towards public opinion. They have learned to give more thought and care to legislative proposals, and to avoid passing any bill that is vehemently opposed by a substantial portion of the population. In Switzerland, the referendum in fact accomplished a political revolution. This single institution led to the development of what has come to be called "consensus democracy", in which the ranks of the government are opened to members of the opposition parties by a proportional allocation of Cabinet positions. This is the basis for the extraordinary stability of Swiss Governments and the long tenure of elected representatives in that country. But even apart from that, direct legislation takes some of the life-or-death character out of parliamentary elections, because the winning party no longer gains near-absolute power. It dispels the climate of fear that surrounds party rivalry and reduces the incentive or pressure to engage in unscrupulous or arbitrary behaviour.

The Case against: Does it Fit the Facts?

When one considers the arguments against direct citizen legislation, one is first of all struck by the way in which the same arguments have been put forward again and again each time another state or country moves to adopt the system. No systematic regard is had by critics to experience since 1874. The points raised today by opponents are identical to those put forward by the Swiss opposition in the 1860s, with the exception that in those days it was possible to raise the objection, no longer available today, that if direct legislation was such a great democratic advance, how was it that it had never been introduced in the United States, which was the birthplace of modern democratic practice?

Again, time does not permit me to canvass all the counter-arguments in detail (in any case I have done so in the book cited earlier), but some of the main ones should be mentioned.

It is sometimes objected that direct voter participation in the law-making process is inconsistent with the supremacy of the Westminster-style Parliament, and especially with the theory of parliamentary sovereignty elaborated by AV Dicey in his 1885 classic Introduction to the Study

of the Law of the Constitution. Today, Dicey's extreme and absolutist formulation of the supremacy theory, which was and is unsupported by any binding authority, is being increasingly criticized by academic writers and by some judges. But in any case, the argument overlooks the fact that Dicey himself was a life-long advocate of the Swiss referendum system. Along with other British constitutional luminaries such as Lord Balfour, Sir William Anson and Viscount Bryce, he strongly advocated adoption of certain forms of direct legislation in Great Britain.

A simpler variant of this argument is the general proposition that initiative and referendum are "inconsistent with the Westminster system". But if Australia had been content passively to follow the Westminster system, we would not have adopted universal manhood suffrage or the vote for women when we did, because in both these important matters we were well ahead of Westminster; we would not have pioneered the secret ballot, and we would have unelected upper houses consisting of Dukes, Earls and life peers; we would not have made the extensive use of referendums that has long been a distinguishing feature of our political life; nor would we have introduced proportional representation, universally acknowledged as the fairest method of parliamentary representation, into the Senate; nor, for that matter, would we have written Constitutions at all. Indeed, experience suggests that if we adopt the direct legislation system, Westminster might well follow us.

It is sometimes said that direct legislation could never work in this country because Australians always vote "no" in referendums. Of course a "no" vote is a decision, not a failure of the referendum process, but the assertion is in any event a misconception. If we look at the record of State referendums held since Federation, we find that two-thirds have been carried. At the federal level, it is true that of the 42 proposals for alteration of the Commonwealth Constitution that have been put to referendum, only 8 have been approved. But all of the rejected measures were calculated to increase the power of the Commonwealth executive, judicial, or legislative government. Now one can agree or disagree with the voters' position on this, but to say that people do not want to give more power to Canberra is not the same thing as saying that they always vote "no" in referendums. Further, the 1967 referendum reforming the Constitution in relation to the position of Aborigines attracted a "yes" vote of 90.8 per cent, one of the highest affirmative referendum votes ever recorded in a democracy. In 1977, of the four amendments simultaneously put to the voters, three were carried by majorities averaging 3 to 1. Further, the electors displayed no tendency to vote "yes" or "no" on the four measures en bloc, but showed a clear propensity to differentiate between them. This is striking in itself, as all political parties had campaigned for a "yes" vote on all four questions.

Fears that direct democracy would install a tyranny of the majority have been shown by experience to be unfounded. Quite apart from direct legislation, it is difficult to think of a single historical example of a democracy operating under the majority rule principle that could generally be characterized as a tyranny. But there have been innumerable tyrannies by absolute rulers and oligarchies. One can think of cases where democratic governments have performed a particular act or acts that we might describe as tyrannical, but a striking feature of these is that they are almost invariably done immediately after an election, and sometimes after an election campaign in which the winning party has specifically denied any intention of doing the act in question. So the winning party is acknowledging that democracy is not favourable to tyranny: the government can act tyrannically only when it knows there is a long time until the next election.

Specifically in relation to direct legislation, there does not appear to be a single recorded instance in which the initiative and referendum have been used in any State or country to enact legislation oppressing minority groups, to effect massive and uncompensated expropriations of property, to dissolve or persecute trade unions or to do any of the other extreme acts predicted by opponents. Nor is there any observable tendency for voters to support measures that give selfish short-term

benefits. In fact, they have proved far more responsible than politicians, whose main preoccupation, after all, is re-election. California's famous Proposition 13 in 1978 put an end to the rapid escalation of property taxes in that State, which had trebled in 5 years and led to a revenue surplus of US$7.5 billion, but more extreme tax reduction measures were later rejected by the voters as unpractical. The same pattern appears in other American States and other countries. For example, in 1985 Italian voters rejected an indexation measure that would have given many people higher wages in the short term, but at the expense of longer-term dislocations such as we have experienced in Australia. In 1993 the Swiss voted to increase their petrol tax.

Studies of voting behaviour in direct legislation ballots show that people's values and convictions remain politically middle-of-the-road and do not consistently favour either the left or the right. A 1984 study of initiative and referendum ballots in the United States over the previous eight years found a nearly identical number of initiatives sponsored by the left (79) and the right (74). There was an almost identical voter approval rate for both sides: 44 per cent for the left and 45 per cent for the right. Of a third category of 46 initiatives that could not be classified as left or right, exactly half were approved by the voters. Overall, it was found that the more moderate and reasonable the approach of the initiative measure, the more likely it was to succeed at the polls, whether the subject matter were nuclear waste disposal, tax reductions, business regulation or anything else.

Contrarily to the fears of opponents, people cannot be manipulated by costly advertising or biased media coverage used in the period before the ballot. No researcher has ever been able to find any correlation between advertising outlays and the chances of an initiative succeeding at the polls. At one time there did seem to be a correlation between spending against a measure and its chances of being defeated, but in recent years even that connection has weakened as heavy campaign spending has tended to become an issue in itself. This brings us to the fundamental insight, or re-discovery, of direct legislation practice, namely, that the people are not stupid. They are perfectly capable of noticing a one-sided and obviously costly advertising campaign, and immediately tend to ask where the money came from. So heavy advertising expenditure tends to rebound on those who use it. Conversely, some successful initiatives that have relied on voluntary canvassing have been able to succeed at the polls with very little expense. One successful California environmental initiative involved a total expenditure by proponents of only $9,000, while the opponents of a marijuana legalization initiative were able to defeat it with the expenditure of only $5,000, a mere fraction of the expenditure in favour of the measure.

Similarly, the influence of media comment has been greatly exaggerated. One study of over 1,000 actual ballot papers in Los Angeles found no-one marked a ballot paper in accordance with the recommendations of the Los Angeles Times. Again, the almost unanimous media condemnation of Proposition 13 was to no avail.

Naturally there are costs involved in all this, but there are structural and procedural ways of minimizing them. One of the most expensive parts of the process is the checking of thousands of petition signatures for genuineness, absence of duplication and voter qualifications. This item can be made more manageable if recognized sampling techniques are permitted, as in California, where some 8 per cent of signatures are actually checked. The costs of the ballot itself can be reduced by synchronizing referendum ballots with general elections, as is commonly the case in the American States. At each biennial election in California there is an average of 2.7 citizen measures on the ballot paper.

A marked departure from the long-time average occurred in 1988, however, when California electors were invited to vote on 12 citizen measures not 29, as Laurie Oakes stated in The Bulletin of 26 July, 1994 (the other 17 questions were government measures proposing minor amendments to the State Constitution or seeking approval for bond issues). The larger than usual

number of questions led some observers to resuscitate the old "ballot clutter" objection to direct democracy, predicting that large numbers of voters would be discouraged from voting on the ballot propositions. No such problems materialized, nor, contrarily to Mr Oakes' report, did "three-quarters of Californian voters interviewed in a survey on the State's referendum system believe[d] it had got out of hand". On the contrary, 73 per cent still supported the initiative process. A similar majority did, however, support the procedural change of requiring the Secretary of State (Chief Secretary) to review initiatives for conformity to existing law and clarity of language before they are circulated by proponents. And supporters of the initiative process still outnumbered its opponents by 10 to 1 (Initiative and Referendum: The Power of the People, Spring 1989, Winter 1989). The procedural suggestions mentioned have already been taken on board by those formulating the outlines for possible Australian direct legislation systems.

In 1989, the number of California citizen initiatives dropped to more normal levels, which suggested that the 1988 phenomenon was a short term one, perhaps a reaction to conspicuously poor performance by government and legislature.

Any form of democracy always seems at first glance to be more cumbersome and costly than a less democratic option, but that is true only in the short run. The more democratic a State or country is, the less likely it is to be plagued by build-ups of resentment, sullen defiance or passive resistance. These undercurrents bring heavy costs of their own, either by exploding violently, by requiring heavy enforcement expenditure or simply by undermining the will to engage in productive activity. It is no coincidence that democratic societies have higher living standards than undemocratic ones. The Swiss, who make freer use of direct legislation than anyone else, and whose referendum costs are inflated by the need to print everything in three languages, have seen their nation change from being the most poverty-stricken and strife-torn country in Western Europe in 1874 to being the world's most prosperous and stable nation today. I have already mentioned the Italian economic miracle that has taken place almost unnoticed since the 1970s. There is of course more than one factor at work there, but the role of initiative and referendum in creating a more stable political climate cannot be denied.

The misgivings that attended its introduction in other countries have been seen to be unfounded. Dire predictions of demagoguery and mob rule have proved utterly without foundation; and indeed, direct legislation has made such phenomena less likely. After all, who has ever heard of a Swiss demagogue? The people turn to demagogues and their quack remedies only when they are frightened, confused and desperate, when they feel there is no other way they can reassert control over the direction of the state and over their lives.

As public dissatisfaction with the Australian political scene has certainly not decreased in recent times, support for direct democracy has quietly followed. It is growing both among members of our Parliaments and among the people. I have found quite consistently in my conversations with people of all kinds over recent years that as soon as they learn that such a system exists, and has previously worked successfully for over a century overseas, they become quite indignant that no-one has previously brought it to their attention, and demand to know what can be done to introduce it here.

The result of this growing support is that in every State of the Commonwealth and in the Australian Capital Territory there are, or recently have been, draft direct democracy bills in existence or in preparation.

A factor that may add intellectual impetus to moves for direct democracy is the growing understanding of public opinion and the way in which people reach judgments on public affairs. An influential book by Daniel Yankelovich, Coming to Public Judgment (Syracuse University Press, 1991), noting a growing gulf, indeed an adversary relation, between expert policy making

and public opinion, has identified a basic misunderstanding of public opinion and of the way in which it develops and becomes public judgment. Public opinion, he argues, improves in quality as it moves from snap opinion to public judgment, as people hear the other side of the argument and become aware of the consequences of their preliminary opinions. Views arrived at in this way are stable and responsible, though not always in harmony with elite views.

That public opinion should follow this path from initial impression to considered judgment should not surprise us such a progression underlies the jury system, and indeed the whole of the system of justice in courts. For that matter, it is the assumption that underlies the process of parliamentary debate. Nevertheless, the failure to distinguish between the stages through which opinion develops, and the preoccupation of the media with quick polls that identify mainly snap opinions, has led to a view that public opinion is fickle and irresponsible. Studies such as Yankelovich's are challenging that view and thereby strengthening the case for direct democracy.

Current Australian Examples

Most of the current direct democracy bills in Australia are private members' bills with uncertain prospects of passage in the short term, though they could become harder to ignore as time goes on. Among them is the set of two bills introduced in the House of Representatives by Mr Ted Mack MHR, independent Member for North Sydney, and seconded by the ALP's Hon. Frank Walker MHR.

There are also some significant bills in State and Territory legislatures. (For a comprehensive analysis of Australian bills on this subject, see Peter Reith MHR, Direct Democracy: The Way Ahead, Canberra, 1994.)

Australian Capital Territory

The Liberal Opposition in the Australian Capital Territory plans to introduce a CIR bill in the Territory's Legislative Assembly, partly in order to pre-empt a private member's bill which an independent member has tabled. The Liberal bill has not yet been printed so it is not available for study, but it has good prospects of being enacted as Australia's first direct democracy Act. In general terms it is said to be similar to the Tasmanian measure, which we may now briefly look at.

Tasmania

The Tasmanian bill is interesting, not because it is particularly comprehensive, but because it came close to being enacted and may yet be. Direct legislation is a matter of steady political debate in Tasmania, and the local media, especially the press, take it seriously and are generally supportive. The movement gained a substantial boost when Burnie Municipal Council adopted its own system, which requires a petition bearing 500 ratepayers' signatures and a deposit of $500. The mechanism is not provided for in the Local Government Act, and therefore has no legally binding force, but the Council treats the results of the referendum as conclusive. Several referendums have already been held, one on the subject of saving a small park in the municipality, another concerning the establishment of a pulp mill. Polling takes place over a period of a week, and the Council sent a mobile polling booth into the more remote parts of the quite large municipality.

The bill provides essentially for a system under which citizens could seek the repeal of any legislation except appropriation or tax Acts. The trigger is 18,000 electors (about 5 per cent of the enrolled voters), of whom 20 per cent or more must be enrolled in each of three House of Assembly electorates. Petitioners have 12 months to collect the signatures, and the chief electoral officer is under an obligation to make reasonable inquiry as to the genuineness and validity of signatures. Sampling techniques may be used for this purpose. The petition may seek the repeal of more than one enactment. The referendum is to be held on the same day as the next election, if such election is due within twelve months, otherwise a special date may be set.

The chief electoral officer is required to circulate a summary of the arguments for and against. But, in an appalling provision inserted at the insistence of the Greens, all other citizens were originally to be prohibited from publishing or circulating any arguments for or against once the date of the referendum was notified. This clause was removed from a later version of the bill and might now be unconstitutional in light of the High Court's decision in the Australian Capital Television Case.

The bill then proceeds in clause 33 to state the effect of the referendum results. Again at the insistence of the Greens, the bill originally required a double majority a majority of voters and a majority of voters in a majority of electorates, a provision unknown in any other country where direct legislation is in use for ordinary legislation. It is notable that in all Australian States, even constitutional amendment referendums are determined by a simple majority of voters in the State. The proponents removed this provision from the later version of the bill and returned to a simple majority requirement.

Constitutional Theory for a Free People

Modest though the Tasmanian bill is, it is difficult to exaggerate the legal and constitutional consequences that would flow from the enactment of this or similar measures. It would change the entire constitutional order of the country by showing that it is possible in Australia to move away from the servile constitutional doctrines that have stifled our democratic tradition and helped to distance the Parliaments from the people.

The old Diceyan theory of parliamentary omnipotence would be finally banished. Similarly the old theory of the British constitution according to which all power flowed from the Crown, not from the people. It was the duty of the citizens (or rather "subjects") to submit to the Crown, and not vice versa. With the advent of de facto republicanism under the Australia Acts 1986 and the clear possibility of de jure republicanism within the decade, that could be a dangerous theory, in that it might tend to give an additional element of spurious legitimacy to the already extreme concentration of power in the hands of Premier or Prime Minister.

With the enactment of any direct democracy legislation in Australia, however, we would begin to move towards the democratic doctrine of delegation, under which the institutions of government are conceptualized as agents or delegates of the people. That would be nothing less, on the theoretical plane, than a democratic revolution.

Chapter Ten

The Constitution and our State Constitutions

David Russell, QC

As has been pointed out in previous papers to this Society, the Schedule to the Commonwealth of Australia Constitution Act 1900 (Imp.) represents only part of our body of constitutional law and practice,1 and has changed in its operation since its adoption to an enormous degree, notwithstanding the almost universal lack of success of proposals for formal amendment in accordance with the procedure laid down within it.2 These changes have been uniformly in favour of the product of the Federal compact, the Commonwealth, and usually, it is said, at the expense of the States. Notable amongst the causes of increased central power have been the financial powers of the Commonwealth Government,3 and the conjoint operation of section 109 of the Constitution and the doctrines which prevailed in the High Court for the first time in the Engineers' Case4 and had their most notable recent success in Tasmania v Commonwealth.5

The underlying conclusion of this Paper is that there is a third fundamental cause of these developments, that it has interacted with the second (and in particular, the approach to the external affairs power preferred by the High Court), and that it has important implications for future constitutional developments in Australia, particularly if it were to be the case that the republican cause prevailed to the extent of successful carriage of a referendum on the topic which was nonetheless bitterly resisted by the people and/or Government(s) of one or more of the States.

The Formal Framework

As with the confederation which existed in what are now the Continental United States of America between the conclusion of the American War of Independence and the adoption of the Constitution of the United States, the Commonwealth was not the first Federal body in Australia with law-making powers. The Federal Council of Australasia Act 1885 (Imp.) created the Federal Council of Australasia, which had power to pass laws whose effect was preserved by section 7 of the Commonwealth of Australia Constitution Act. The Federal Council itself was, however, abolished by that Act.

The Constitutions of the several States are referred to in Chapter V of the Constitution. The critical provisions are sections 106, 107, 108, 109, 118, and 119. These respectively provide:

Chapter V - The States

106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the

Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

109. 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.

118. Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

Reference should also be made to section 105A of the Constitution which provides, inter alia:

105A. (1) The Commonwealth may make agreements with the States with respect to the public debts of the States, including –

(a) the taking over of such debts by the Commonwealth;

(b) the management of such debts;

(c) the payment of interest and the provision and management of sinking funds in respect of such debts;

(d) the consolidation, renewal, conversion, and redemption of such debts;

(e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and

(f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.

(5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

Each State, as contemplated by these provisions, has its own Constitution Act. Those of most States6 are reasonably comprehensible as comprehensive statements of formal aspects of their State Constitutions although, like the Constitution of the Commonwealth, they do not address issues involving the conventions of responsible government to any great degree. They are notable for the ease whereby they can be amended (in most cases, by simple Act of Parliament). In every case, they are the culmination of a legal framework which commenced with prerogative acts of the Crown or Acts of the Imperial Parliament, and until 1986 were controlled by the Colonial Laws Validity Act 1861 and the Australian States Constitution Act 1907, each of which has now been repealed by the Australia Act 1986.

The establishment of the separate States was not without its difficulties in each of the jurisdictions. The judicial activities of Mr Justice Boothby in South Australia provided a major part of the impetus for the enactment of the Colonial Laws Validity Act.7 Perhaps the State which had the most difficult constitutional birth was that of Queensland, details of which are recounted by Mr Justice McPherson in his history of the Supreme Court of Queensland.8

Sovereign States?

One frequently hears the comment made that prior to Federation there were six sovereign States, whose sovereignty and independence has been increasingly impaired by a centralist Federal Government. Whilst it is undoubtedly the case that the power of the Commonwealth Government has been increased since 1901, and the freedom of action of the States decreased, the notion of sovereign States existing in 1900 is wholly illusory.

In English law, sovereignty had a different aspect depending upon whether one was concerned with the United Kingdom or with overseas possessions. Within the United Kingdom, the conventional formulation is that the Sovereign is the Queen (or King) in Parliament,9 i.e., that

the command of the Sovereign exercised by Royal prerogative is not binding in English law except to the extent that it is confirmed by Act of Parliament.

The position in relation to the Colonies was different. British subjects abroad did not enjoy the rights and privileges available as a matter of course to their compatriots within the United Kingdom. For example, they were subject to the jurisdiction of the last of the prerogative courts, the Privy Council, whose jurisdiction was abolished in England by the Long Parliament (1640-1660). They were subject to regimes of taxation without representation. In due course, insensitivity by the British Government in the handling of the grievances of the American colonists led to these rights being asserted and achieved by force of arms.10 The extent to which the rights contended for by the American colonists in the Declaration of Independence are coincident with rights contended for by the Long Parliament in England, and achieved by the Civil War and the execution of King Charles I, is not surprising when regard is had to the intellectual underpinnings of early American political thought.11

Just as it is misleading to analyse the Australian Constitution in terms of the Schedule to the Commonwealth of Australia Constitution Act, so it is misleading to analyse the position of the then Australian Colonies by reference to their Constitutions as they stood prior to Federation, particularly when regard is had to the fact that State Governors were responsible, admittedly to a degree which lessened over time, to the Colonial Office in London rather than to the ministries which they appointed.

Attempts to perform acts of sovereignty frequently met with lack of support or outright opposition from the Colonial Office, as was the case with initial attempts by the Queensland Government to annexe Papua New Guinea.12

At a time when statute law was relatively unimportant in the regulation of commerce, when the non- statute law was determined in the Privy Council, and the major commercial (in the sense of international trade) laws were to be found in statutes such as the Navigation Act and the Merchant Shipping Act of the Imperial Parliament, when the powers of the Colonial Office over both legislation and the conduct of the Queen's representative were unquestioned, and there was (from 1885) a supra-colonial body with law-making powers, the notion of independent Sovereign States which voluntarily conferred their powers upon the newly formed Commonwealth is wholly insupportable.

The Accretion of Nationhood

A more accurate description of the legal consequence of the creation of the Commonwealth is to be found in the judgment of Dixon J in In Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation13:

"A federal system is necessarily a dual system. In a dual political system you do not expect to find either government legislating for the other. But supremacy, where it exists, belongs to the Commonwealth, not to the States. The affirmative grant of legislative power to the Parliament over the subjects of bankruptcy and insolvency may authorize the enactment of laws excluding or reducing the priority of the Crown in right of the States in bankruptcy and it has been held that the taxation power extends to giving the Commonwealth a right to be paid taxes before the States are paid (South Australia v The Commonwealth14). But these are the results of express grants of specific powers, plenary within their ambit, to the Federal legislature, whose laws, if within power, are made paramount. Because of their content or nature, the express powers in question are considered to extend to defining the priority of debts owing to the States or postponing State claims to taxes. The legislative power of the States is in every material respect of an opposite description. It is not paramount but, in case of a conflict with a valid Federal law, subordinate. It is not granted by the Constitution. It is not specific, but consists in the undefined residue of legislative power which remains after full effect is given to the provisions of the Constitution

establishing the Commonwealth and arming it with the authority of a central government of enumerated powers. That means, after giving full effect not only to the grants of specific legislative powers but to all other provisions of the Constitution and the necessary consequences which flow from them.

It is a fundamental constitutional error to regard the question of the efficacy of s. 282 of the Companies Act 1936 of New South Wales as if it were an exercise of an express grant, contained in the Constitution, to the States of a power to make laws with respect to the specific subject of the winding up of insolvent companies. It is a provision enacted in intended pursuance of a general legislative power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever. The content and strength of this power are diminished and controlled by the Commonwealth Constitution. It is of course a fallacy, in considering what a State may or may not do under this undefined residuary power, to reason from some general conception of the subjects which fall within it as if they were granted or reserved to the States as specific heads of power. But no fallacy in constitutional reasoning is so persistent or recurs in so many and such varied applications. In the present case the fallacious process of reasoning could not begin from s. 107 as the error has so commonly done in the past. For it is not a question whether the power of the Parliament of a Colony becoming a State continues as at the establishment of the Commonwealth. The Colony of New South Wales could not be said at the establishment of the Commonwealth to have any power at all with reference to the Commonwealth. Like the goddess of wisdom the Commonwealth uno ictu sprang from the brain of its begetters armed and of full stature. At the same instant the Colonies became States; but whence did the States obtain the power to regulate the legal relations of this new polity with its subjects? It formed no part of the old colonial power. The Federal Constitution does not give it. Surely it is for the peace, order and good government of the Commonwealth, not for the peace, welfare and good government of New South Wales, to say what shall be the relative situation of private rights and of the public rights of the Crown representing the Commonwealth, where they come into conflict. It is a question of the fiscal and governmental rights of the Commonwealth and, as such, is one over which the State has no power."

The process whereby the combination of techniques of literal construction of the grants of power contained in section 51 of the Constitution, coupled with section 109, which have operated to severely limit the powers of the States, has already been comprehensively covered in papers given to this Society,15 and does not warrant further comment here.

However, it is instructive to make reference to section 105A, because many of the difficulties which have arisen with the external affairs power arise also under it. Nothing in section 105A requires the agreements to which it refers to be submitted to any Parliament in Australia. Once the agreements are made, they have force and effect notwithstanding anything contained in the Constitution or the Constitutions of the several States. The only apparent limit on the ambit of the provision is that the agreement must be between the Commonwealth and at least one State, and it must be with respect to "the public debts of the States", a topic of consuming interest to the residents of all States except Queensland at present. In New South Wales v The Commonwealth (No. 1),16 it was held that this provision enabled the Commonwealth to require payment to the Commonwealth of moneys which had not been appropriated by the New South Wales Parliament.

Given the ingenuity with which financial instruments are now being created,17 the scope for operation of this provision should not be underestimated.

Accretion of Sovereignty and Praemunire

As previously noted, at Federation a substantial body of Sovereign power in relation to matters which occurred in Australia resided not in Australia but in London. The Commonwealth

Government has been assiduous in seeking to have the remnants of this Sovereignty transferred to itself and, with the notable exception of matters involving the appointment of State Governors, has been largely successful in these endeavours, dramatically altering the nature of the original Federal compact.

It is said that nature abhors a vacuum, but that abhorrence is a trifle compared to the abhorrence which those seeking to be Sovereign have of those who challenge their Sovereignty. In this respect, there is an interesting historical parallel between the steps which have been taken in Australia to end residual United Kingdom Sovereignty, and the succession of measures adopted by the English Monarchy and Parliament and the influence of the papacy within England up to and including the Reformation.

Prior to the Reformation, the papacy exercised considerable temporal power within England and controlled a very substantial part of the nation's wealth. Frequently, the great officers of State were also senior prelates. Moreover, by use of the spiritual powers available to the papacy, the course of public policy within England was frequently capable of being altered or affected by the Pope of the day. The papacy regulated a great deal of international commerce. By way of example, in the fourteenth century, commercial dealings required the authentication of documents by a notary. Prior to the Reformation, the appointment of notaries throughout Western Christendom lay with the Pope, who so far as regards to the whole of England and Wales delegated his powers of appointment to his legate, the Archbishop of Canterbury. Accordingly, in England and Wales it was under a licence or faculty granted by the Archbishop of Canterbury in exercise of his legatine powers that a notary in this period received the right to practice.18

Early legal weapons developed in the long running conflict between the papacy and the English Government were the Statutes of Praemunire, first enacted in 1392, which prohibited the admission or execution of papal bulls or briefs (the means whereby the wishes or commands of the Pope could be made known) within the realm. Prior to that the Statute of Provisors 1351 had denied the papal claim to dispose of benefices and appoint Bishops.19 At a later time the holding of a legatine court was prohibited by the Statutes of Praemunire.20

In 1533, Parliament enacted the Act for the Restraint of Appeals whose preamble declared that:

"This realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the imperial crown of the same, etc",

by which it asserted that there was no temporal (or spiritual) authority which was superior to the English authorities.21 Shortly afterward, the universalist vision of Western Christendom, of which Sir Thomas More was perhaps the foremost contemporary exponent, was comprehensively routed by the Pelagian concept of the nation-state.22

In 1900, the British Empire for its inhabitants (or at least those of British descent) in many ways resembled the universalist world, except, of course, that its centre was London rather than Rome and God was, if not an Englishman, at least some one very like one, and spoke in terms of Milton's Divine Mission for their race23 or Ruskin's Imperial Destiny.24 The dismantling of Australia's links with that world in many ways the most profound constitutional change since Federation was accomplished wholly without reference to the formal processes laid down in the Constitution, driven largely by Commonwealth Governments of both Parties with attitudes remarkably similar to the Parliament which enacted the Act for the Restraint of Appeals.

The Statute of Westminster, ratified by the Statute of Westminster Adoption Act 1942, made it clear that the exercise of powers by the Crown in Australia would be on the advice of Australian Ministers rather than United Kingdom Ministers. The sole remaining institutional link was the possibility of appeals to the Privy Council, which the Constitution itself permitted, although it

provided that inter se matters might only be appealed from the High Court with its leave pursuant to section 74 of the Constitution.

A promising means of avoiding this requirement was to raise the inter se matter in a State Supreme Court and appeal from its judgment to the Privy Council,25 a technique blocked by the addition of section 40A to the Judiciary Act in 1907.26

The long process whereby appeals to the Privy Council were abolished has been told elsewhere, perhaps nowhere as well as in Michael Coper's work.27 Initially, appeals from the High Court in Federal matters were abolished,28 then all appeals from the High Court.29 Finally, the residual jurisdiction of the Privy Council was ended by the Australia Act 1986. The preamble to that Act is strangely reminiscent of the Act for the Restraint of Appeals:

"Whereas the Prime Minister of the Commonwealth and the Premiers of the States ... agreed on the taking of certain measures to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation ..."

As Senator Kemp has pointed out in another paper to this seminar, the contrast between attitudes to the relics of Imperial institutions expressed in the above excerpts and to United Nations bodies is acute and not readily reconcilable on grounds of principle.

Since the passage of the Australia Act, there remain no residual constitutional links between Australia and the Australian States, on the one hand, and the United Kingdom on the other. The only part of the residual sovereignty which existed in 1901 in the United Kingdom which has not been transferred to the Commonwealth is the power to appoint State Governors, which under the Australia Act became vested in State Premiers.30

Continuance of State Constitutions

It will be recalled that the Australia Act was passed both as an Act of the Australian Parliament (with the request and consent of the States) and of the United Kingdom Parliament (with like request and consent). The Commonwealth view in the negotiations was apparently that there was no need for the United Kingdom Parliament to become involved, because the Constitution conferred adequate power under placita 51(xxxvii) and (xxxviii)31 to enable the Commonwealth to deal with the matter with the consent of the States. The States declined to agree.

Be that as it may, it is now clear that the ultimate constitutional basis of the State Constitutions is Chapter V of the Commonwealth Constitution and, if it were validly altered by the process set out in section 128, that alteration would have the effect of altering the State Constitutions to the extent of the change.

It is trite law that the Commonwealth Constitution, to the extent that it creates individual rights, is binding on the States: W & A McArthur Ltd v Queensland.32 This was established even before it became clear that it bound the Commonwealth.33

The scope for the States to be abolished, have their constitutional powers substantially altered, or to be even further diminished by means of passage of Commonwealth laws in reliance on the specific heads of power as construed by the High Court, or by way of formal amendment to the Constitution, is very largely unlimited, although amendment of the Constitution would be necessary if the actual existence of the States or their capacity to operate as effective institutions of government were threatened by a Commonwealth law that was otherwise within power, having regard to the implied prohibitions doctrine first expounded in Melbourne Corporation v The Commonwealth.34

It is not to be expected that the proponents of a republic would wish to put forward, in any referendum proposal, a schedule of detailed amendments to the respective State Constitutions necessary to force recalcitrant States to adopt republican structures. To do so would expose them to even greater attack based upon the alleged complexity of the proposals. Since each State

contains provision in its Constitution for the exercise of the functions of the Office of Governor if no Governor has been appointed, legislation which simply forbade the Premiers to communicate with the Monarch for the purposes of appointing Governors would achieve, for all practical purposes, a republican structure within each State. Such legislation would be modelled on the concepts underlying the doctrine of praemunire. I have little doubt it would be held to be valid by the current High Court as an exercise of the external affairs power, and its result in practice would be to force the States to amend their Constitutions to make other arrangements, or have the functions of Governor devolve by default upon the Chief Justice when the commissions of the current incumbents expire.

The Substance or the Shadow?

The foregoing conclusions, if correct, demonstrate the contemporary fragility, in a purely legal sense, of our State Constitutions. They are vulnerable to change at the whim of their current parliamentary majorities, the Commonwealth in exercise of its legislative and financial powers, parliamentary collusion between the Commonwealth and the State concerned under placita 51(xxxvii) and (xxxviii) of the Constitution, and the Commonwealth and State Governments, in exercise of executive powers, entering into agreements pursuant to section 105A of the Constitution and (in the case of the Commonwealth) entering into international treaties.

It is also pertinent to note that State legislatures can, by agreement with the Commonwealth, assist the Commonwealth to evade constitutional limitations upon it, as occurred in the facts the subject of the litigation in Pye v Renshaw,35 where grants under section 96 to a State Government willing to resume lands at below market value to enable Commonwealth policy to be implemented, thereby defeating the protection otherwise available under placitum 51(xxxi), were held to be valid.

There have been over the years many thoroughly unsatisfactory attempts, some unfortunately successful, to change State Constitutions. Probably the darkest aspect of that history was the conduct of the Theodore Government in Queensland between 1919 and 1922.

1921 was not an auspicious year for Queensland's democracy. In 1920 the Theodore Labor Government had taken advantage of the retirement of the Governor to appoint as Lieutenant Governor William Lennon, the Speaker of the Legislative Assembly, a former (Labor) Minister.36 He acceded to its recommendation to appoint sufficient Members of Legislative Council to ensure passage of the Government's legislative program (including abolition of the Legislative Council hence their nickname of "the suicide squad").

In addition to the passage of legislation for the abolition of the Legislative Council,37 1921 saw the enactment of legislation which removed three judges from the Supreme Court by reason of a retrospective age limitation, shortened terms of office of the remainder and abolished the District Court.

The Government justified these measures on the grounds that the Legislative Council and Supreme Court were frustrating the will of the democratically elected government of the day. Although this argument had a superficial attraction,38 it does not withstand close analysis. Since 1908, the Parliamentary Bills Referendum Act had permitted the Government to enact legislation not approved by the Legislative Council by submitting it to a referendum. The only legislation so submitted was a Bill for abolition of the Legislative Council, which was decisively defeated in 1917.39 Moreover, Ryan and Theodore had been able to placate their more radical supporters by proposing legislation neither supported, secure in the knowledge that the Legislative Council would reject it.40 Decisions of the Supreme Court, whether favourable or unfavourable from the Government's viewpoint, were subject to appeal to either the Privy Council or the High Court, neither of which was amenable to changes in composition at the instance of the Queensland

Government to secure more favourable outcomes. Nor, in any event, is it clear that the decisions to which the Government took exception were wrong as a matter of legal principle.41

It should not be thought that the "suicide squad" were unmindful of the possible loss of perquisites of office when they voted to abolish their positions. The Constitution Act Amendment Act of 1922 provided42 that upon abolition of the Legislative Council, its members should retain the privileges of office, including gold travel passes. These were abolished by the Moore Government,43 and restored by the Forgan Smith Government.44

As a result, the imbalances in executive and legislative power which apply throughout Australia are very much greater in Queensland due to the abolition of the Legislative Council in 1922. The only contemporary Australian Parliaments in which the Government controls the Upper House of its Parliament are those of Victoria and Western Australia: indeed, in New South Wales (and prior to their most recent elections, Western Australia and South Australia), the Government does not control the Lower House either. The occasions when Governments have controlled their Upper Houses have been comparatively rare: in the Senate, the Government of the day has had a majority for only 5 years out of the past 27.

Mr Justice McPherson has expressed a similar view in his observation that:

"A tendency for the legislature to assert its dominance over the judiciary, and for the executive to dominate the legislature, may have its origins in the bungling of Queensland's Constitution at Separation ... Its apotheosis was the decision in McCawley's Case and The Supreme Court Act of 1921, followed a year later by the abolition of the Legislative Council. In fashioning an instrument of power for their use the politicians of that era lacked the wisdom to foresee, or perhaps to care, that control of it would one day pass to their opponents. Those who now regret the ambit of Executive authority in Queensland can be in no doubt who were responsible for creating it ... "45

Nor should it be thought that the consequences in Queensland of abolition of the Upper House were unintended. Premier Theodore, proposing it, expressed the view that an upper house which duplicated the composition of the lower house would be superfluous, while one that obstructed the working of a constitutionally elected lower house would be destructive of parliamentary democracy.46

Whilst conservative parties in Australia have generally been supportive of bicameral Legislatures, that was not universally the case. The Bill for abolition of the Legislative Council was carried in the Legislative Assembly by a majority of 51 to 15, even though the composition of the Assembly at the time was 34 Labor to 32 non-Labor.47

Subsequent attempts to re-establish the Legislative Council by the Moore Government, which was elected in 1929 with a promise to do so, came to nothing in 1931 when 12 members of the Government Party wanted a referendum on the subject first, and indicated they would cross the floor if the Government proceeded without one.48 Since 1934, re-establishment of a Legislative Council has required a referendum.49 No attempt was made to re-establish the Legislative Council after Labor lost office in 1957, although it was National Party policy to do so for much of that time.

Nor, in any event, would re-establishment of the Legislative Council of itself be adequate to fully restore the necessary checks and balances. It would take Queensland only to the position of the other States and the Commonwealth. That position is not regarded by many as satisfactory. And if Australia were to become a republic on the basis presently suggested, with political appointees not directly elected simply taking on the roles of Governor-General and Governor, it would present a real risk of untrammelled executive dominance. This Society is pledged to support the system of constitutional monarchy. But if its views on that subject ultimately do not prevail, it is

of profound importance that the form of republican government adopted does not exacerbate an already unsatisfactory state of affairs.

Given that the legal foundations of the States are not particularly secure, wise statecraft would involve not only seeking to increase that security by legal means, but also by creating a situation in which the State Constitutions were held in some affection by their citizens. The conduct of many recent State Governments suggests that such has not been a priority in the handling of the public administration for which they have been responsible.50

Another step would be to entrench provisions so that future changes can only be made by referendum. Even this, however, is subject to limitations, as the history of amendments made to the Queensland Constitution in 1977 shows. The Constitution Act Amendment Act 1977 inserted new sections in the Constitution of that State, including sections 11A, 11B, and 53. Section 53 provided that those sections, together with section 14, could be amended only if it had been submitted for the approval of the electors at a referendum. Notwithstanding that, the Queensland Parliament, by the Australia Acts (Request) Act 1985, requested amendments to sections 11A, 11B, and 14 of the Constitution Act by both the Parliament of the Commonwealth and the Parliament of the United Kingdom. Those Acts were duly passed, and although there has been no formal amendment to the law by the Queensland Parliament amending the Queensland Constitution, there is little doubt that the provisions of the Australia Act have amended the Queensland Constitution Act in a manner which section 53 seeks to forbid, and presumably, a request to the Commonwealth Parliament for legislation amending a State Constitution would be held to be equally effective in terms of placita 51(xxxvii) and (xxxviii).

Truly, the States stand on inadequate legal foundations in the event of future determined attacks upon their operation and independence.

Endnotes:

1. See, e.g. SEK Hulme, QC, The Constitution: Its Defects or Ours, (1992) Proceedings of the Inaugural Conference of the Samuel Griffith Society ("1 Proceedings") 21.
2. Section 128.
3. See, in particular, D Chessel: The Lion in the Path, 1 Proceedings, 89-104.
4. Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd. (1920) 28 CLR 129.
5. (1983) 158 CLR 1.
6. But not Queensland – see the EARC Report on the subject.
7. See Lumb: The Constitutions of the Australian States (2nd ed. Rev.), (1962) University of Queensland Press at p.90.
8. B H McPherson: Supreme Court of Queensland (1989), Butterworths Pty Ltd, Sydney, at pp.23- 25.
9. Dicey: The Law of the Constitution (10th ed.) pp.39-85, IV Halsbury's Laws of England, Vol. 8 para 811.
10. For a more comprehensive discussion, see Johnson, P: The Offshore Islanders (1972), Holt Rinehart and Winston, New York, pp.224-235.
11. Johnson, op.cit., esp. at p.228.
12. See Cilento and Lack: Triumph of the Tropics (1959), Smith & Paterson, Brisbane at pp.166-176.
13. (1947) 74 CLR 508, at pp.529-531.
14. (1942) 65 CLR 373.
15. e.g. Sir Harry Gibbs: The Threat to Federalism (1993), 2 Proceedings, 183.
16. (1932) 46 CLR 155.
17. The Papua New Guinea Government was recently reported to have securitised its future revenue streams in a transaction involving a Bank in the Cayman Islands.

18. V Halsbury, Vol.34 para.201.
19. E Carpenter: Cantuar – The Archbishops in their Office (1971), Cassell, London at pp.42-43.
20. It was for this that Cardinal Wolsey was prosecuted in 1530, the Clergy being required to pay a collective fine and acknowledge the King as Head of State by way of penalty.
21. See generally in this area Hutchinson: Cranmer and the English Reformation (1951), English Universities Press, London at pp.39-63, and JR Green, A Short History of the English People (1874) (rep.1992), The Folio Society, London at pp.339-351.
22. See Johnson, op.cit.
23. Johnson: op.cit., esp. at pp.205-6, 218, 234-5.
24. Quoted in J Morris: Pax Britannica (1992), Folio Society, London, Vol.1 pp.317-8.
25. As occurred in Webb v Outtrim (1906) 4 CLR 356.
26. Judiciary Act 1907.
27. M Coper: Encounters with the Australian Constitution (1987), CCH, Sydney at pp.14-18.
28. Privy Council (Limitation of Appeals) Act 1968.
29. Privy Council (Appeals from the High Court) Act 1975.
30. Subsection 7(5).
31. "(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:
"(xxxviii) The exercise within the Commonwealth at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia: "
32. (1920) 28 CLR 530.
33. James v Commonwealth (1936) 55 CLR 1, at p.220.
34. (1947) 74 CLR 31.
35. (1951) 84 CLR 58.
36. The traditional practice was to appoint either the President of the Legislative Council or the Chief Justice : see (ed.) Murphy and Joyce: Queensland Political Portraits, p.317 (Murphy).
37. Constitution Act Amendment Act of 1992.
38. Murphy (ed. Murphy and Joyce, op.cit., pp.315, 320) and Cilento and Lack (Triumph in the Tropics, pp.403-4) accept it.
39. For abolition, 116,196: against abolition, 179,105 (figures quoted in (ed.) Murphy and Joyce, op.cit., p.277.)
40. Irwin E Young, Theodore : His Life and Times, Alpha Books, 37.
41. See, e.g. McPherson: op.cit. at pp.290-1.
42. Section 3.
43. Constitution Act Amendment Act of 1929 (No.2).
44. Constitution Act Amendment Act of 1935.
45. McPherson: op.cit., p.399.
46. Quoted by Murphy, (ed.) Murphy and Joyce : op.cit. at p.322.
47. ibid. at p.321.
48. Costar, (ed.) Murphy and Joyce, op.cit., p.390.
49. Constitution Act Amendment Act of 1934, section 3.
50. See e.g. B Lawrence: WA Inc: Why didn't we hear the alarm Bells? (1994), 3 Proceedings, 37.

Concluding Remarks

The Rt Hon Sir Harry Gibbs, GCMG,AC,KBE

I think you will agree that the organisers deserve our thanks and congratulations for having organised a very successful conference.

For some years there has been a movement, hardly noticed by the general public, directed towards the achievement of increased Commonwealth power and increased Executive power. Those who are urging that we become a republic are simply the vanguard before the main offensive. This movement would, amongst other things, attempt to destroy the checks and balances for which the present Constitution provides, particularly by reducing the power of the Senate, and would redistribute power by giving constitutional protection to the so-called rights of the Aboriginal people and other favoured groups. It is encouraging to learn that the States are apparently launching a counter attack, and have, only two days ago, committed themselves to establishing a new Australian Federation.

An important aim of this Society is that questions of this kind should be fully and openly debated. The papers delivered at earlier conferences have, I believe, made a useful and influential contribution to the public discussion of these issues. The papers delivered at this conference will make a further contribution to the achievement of that objective.

I should like now to make some brief remarks of my own on some of the matters which we have here discussed during the last two days. I must necessarily be selective. The Aboriginal question is potentially more divisive than any other in Australia today and Dr Partington showed us most convincingly how the work of Dr Henry Reynolds seems to have profoundly influenced the High Court in some of its judgments in Mabo. Some of us have, in the past, tended to decry the practice of the rulers of the U.S.S.R. of rewriting history for the benefit, not only of their ideologies, but also of their political factions. It seems that this technique has been thoroughly mastered in Australia. Dr Forbes has shown how the Parliament, not fully considering, or perhaps not caring, how its legislation would work in practice, has set up a procedure for recognising native title which has the capacity to work inefficiently and unjustly.

Of all the constitutional questions that concern us and there are not a few the operation of the external affairs power, and the subordination of Australian sovereignty to some of the organs of the United Nations, are among the most serious. Senator Kemp and Mr Ray Evans have given us examples of that subordination. It would be a matter of amusement, if it were not so serious, that our Government, after abolishing appeals to the Privy Council, which was usually constituted by eminent and well known lawyers experienced in the common law, should thereafter give Australians the right to appeal to nondescript bodies composed of persons who may have no particular qualifications, and who may be citizens of regimes which pay no respect to human rights or the rule of law. By entering into treaties the Executive can, in effect, expand Commonwealth power so that no sphere of State activity is free from it.

Remedies must be found for these two mischiefs. Two suggest themselves. First, it is desirable that the power of the Executive to enter into treaties should be made subject to parliamentary control. In America, the approval of the Senate is necessary before a binding treaty can be made but in Australia, where the influence of political parties is so strong, it would be preferable to

require the approval of the States as well, at least in matters that impact on the States, although failing that, the approval of the Senate would be an improvement.

Secondly, the power of the Commonwealth Parliament to legislate to give effect to treaties, and other international obligations, must be limited if federation is to survive. I can think of no better way of achieving that result than by a constitutional amendment of the kind suggested by Mr Peter Durack when he was a Senator (the text appears in Upholding the Australian Constitution, Volume 2 at page 219). The first of these remedies could be given effect by legislation, but the second would require an amendment to the Constitution.

I cannot agree with the suggestion made by Dr Howard regarding the selection of members of the High Court. A system of public inquiry into the suitability of candidates for judicial office, such as that employed in America, would deter all but the thickest skinned from seeking judicial preferment, and is not likely to work more satisfactorily here than it has in the United States.

Mr Callinan has expressed the real concerns of the Bar regarding the special leave procedures in the High Court. The pressure of litigation makes it a practical necessity that the High Court should take cases, other than constitutional cases, only by special leave, but one hopes that the Court will endeavour to ensure that it does hear all cases which are of real importance, either because of the questions they raise or because of the monetary sums in issue. It would be regrettable if the Court were to confine itself largely to constitutional questions and cases involving human rights.

Mr John Stone has left us in no doubt as to his views concerning the aims of the Constitutional Centenary Foundation. If those views are correct, perhaps the States may review their involvement in the Foundation now that they are committed to a new Federation.

Professor Walker has done us a service by reminding us of the democratic traditions of this country and the democratic origins of our Constitution, and has shown us the need to revive democratic traditions in Australia. With the support of Professor Cooray he has made a persuasive case for the adoption of a procedure for citizens initiated referenda, at least as a means of exercising a power to veto or repeal legislation. I rather incline to the view that if this process were used as a means of introducing legislation, there would be a danger that popular prejudice, perhaps manipulated by a special group, would enact laws harmful to the public, for example, laws providing for an unrealistically low level of taxation, an unduly severe mandatory penalty for a particular offence, or a stringent and unnecessary environmental control perhaps a three coal mines policy. This danger would be the greater if the procedure could be used to amend the Constitution. There is, however, much to be said for allowing a State Parliament to initiate a referendum to amend the Constitution. The whole question obviously merits consideration.

The reference made by Mr David Russell to certain buildings in Canberra reminded me of one of Parkinson's laws, namely that the importance of an institution is inversely proportional to the magnificence of the building in which it is housed. I am not sure whether this is true in Australia. He has raised the question whether the Constitution of a State could be amended, at the initiative of the Commonwealth and against the wishes of the electors of that State, in the way necessary to enable a republic to be established. That question is complex and arguable, and it may in future years be more than purely hypothetical. I completely agree with his suggestion that the quality of government in Queensland has been diminished by reason of the abolition of the Legislative Council and the consequent increase of the power of the Executive vis-a-vis that of the Legislature.

It is not to be expected that all members of this Society will agree with every point of view that is expressed at our gatherings. There is room, within our Society, for differences of opinion on the matters we discuss, for we are a democratic body dedicated to freedom of discussion. We shall

achieve one of our objectives if, to echo the words of Sir Paul Hasluck in the last memorable paper he wrote and it was written for this Society – we ensure that the debate on the Constitution is an intelligent debate, and that any changes that have to be made to the Constitution should be made only after the widest range of thought and opinion has been canvassed.
Thank you for joining our deliberations. I declare this conference closed.

Appendix I

Contributors

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1. Addresses

S E K HULME, AM, QC, was educated at Wesley College, Melbourne and at the University of Melbourne (Queen's College) and Oxford (Magdalen College). He was Rhodes Scholar for Victoria in 1952 and the Eldon Scholar, Oxford in 1955. He was admitted to the Victorian Bar in 1953 and at Gray's Inn, London in 1957. Since 1957 he has practised as a barrister-at-law, becoming Queen's Counsel in 1968. He has published in various legal journals, and is a Director of several public companies.

Lloyd WADDY, RFD, QC, was educated at Cranbrook and The King's School, Parramatta and at Sydney University (Ll.B, 1962). He was admitted to the New South Wales Bar in 1963 and has since practised as a barrister-at-law, becoming Queen's Counsel in 1988. He has been a Fellow of St Paul's College, University of Sydney, since 1971; a Governor of The King's School since 1975; a Director of the Australian Elizabethan Theatre Trust since 1975 (Chairman since 1992); Vice-President of the Royal Agricultural Society of NSW since 1992; and National Convenor, Australians for Constitutional Monarchy since the foundation of that body in 1992.

2. Conference Contributors

Ian CALLINAN, QC, was educated at Brisbane Grammar School and the University of Queensland (Ll.B). He was admitted to the Queensland Bar in 1965 and has since practised as a barrister-at-law, becoming Queen's Counsel in 1978. He has served as President of the Queensland Bar Association (1984-87) and of the Australian Bar Association (1984-85), as Chairman of the Brisbane Community Arts Centre (1973-78) and as a Trustee of the Queensland Art Gallery (1987-90). He is a Director of QCT Resources Ltd and of Queensland Coal Resources Ltd.

Ray EVANS was educated at Melbourne High School and the University of Melbourne, where he graduated in Electrical Engineering (1960), Mechanical Engineering (1961) and later M.Eng.Sc. (1975). He worked as an engineer with the State Electricity Commission of Victoria (1961-68) and then lectured in engineering, first at the Gordon Institute of Technology and then at Deakin University (1976-82), becoming Deputy Dean of its School of Engineering. In 1982 he joined Western Mining Corporation and has since worked as personal assistant to its Chief Executive Officer, Mr Hugh Morgan. In 1971 he was a founding sponsor of the Australian Council for Educational Standards, and foundation editor (1973-75) of that body's journal. He was one of the founders of The H R Nicholls Society and has been its President since 1989, in which year he also became a member of The Mont Pelerin Society.

Dr John FORBES was educated at Waverley College, Sydney and the Universities of Sydney (BA, 1956; Ll.M, 1971) and Queensland (Ph.D., 1982). He was admitted to the New South Wales Bar in 1959 and subsequently in Queensland and, after serving as an Associate to Mr Justice McTiernan of the High Court, practised in Queensland as a barrister-at-law. He is now Reader in Law at the University of Queensland Law School, and has published texts on the

History and Structure of the Australian Legal Profession, Evidence, Administrative Law and Mining and Petroleum Law.

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. (1939-45), 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 (1962-67), 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.

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.

Senator Rod KEMP was educated at Scotch College, Melbourne and the University of Melbourne (B.Comm, 1968). He worked as a journalist with The Melbourne Herald (1967-69), as a research economist with Eurofinance in Paris (1969-72) and as a public relations officer with Hamersley Iron (1972-77), before becoming Senior Private Secretary to the then Commonwealth Minister for Finance, Dame Margaret Guilfoyle (1977-82). In 1982 he became the Director of the Institute of Public Affairs, Melbourne and was elected a Senator for Victoria in 1990. He is currently Shadow Minister for Administrative Services and the ACT in the Federal Opposition.

Dr Geoffrey PARTINGTON was born in Lancashire and was educated at Queen Elizabeth Grammar School, Middleton and the Universities of Bristol (B.A., 1951; M.Ed., 1972), London (B.Sc., 1971) and, after his emigration to Australia in 1976, Adelaide (Ph.D., 1988). He was a teacher, headmaster and Inspector of Schools in England and has since taught in the School of Education of Flinders University, South Australia. During that time nearly 200 of his essays and articles have been published, many in scholarly journals as disparate as anthropology and moral education. His books include Women Teachers in the Twentieth Century, The Idea of an Historical Education, What do our Children Know?, and most recently, The Australian Nation: Its British and Irish Roots.

David RUSSELL, RFD, QC, was educated at Brisbane Grammar School and the University of Queensland, where he graduated as BA (1971), Ll.B. (1974) and Ll.M. (1983). He was admitted to the Queensland Bar in 1977 and has since practised in that and other jurisdictions as a barrister-at-law, becoming Queen's Counsel in 1986. He has lectured at the University of Queensland and published numerous articles in professional and other journals. He is the current President of the Taxation Institute of Australia and a director of several companies. He has been a member of the State Management Committee of the Queensland Branch of the National Party since 1984 and, since 1990, Senior Vice-President both of the Queensland Branch and of the National Party of 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, Melbourne, Chairman of J T Campbell & Co., and writes a weekly column in The Australian Financial Review.

Professor Geoffrey de Q. WALKER was educated at a number of State High Schools and the Universities of Sydney (Ll.B., 1962) and Pennsylvania (Ll.M., 1963 and SJD., 1966). He was admitted to the New South Wales Bar in 1965, and practised both there and in industry before becoming an Assistant Commissioner with the Trade Practices Commission (1974-78). He has taught law at the University of Pennsylvania (1963-64), the University of Sydney (1965-74) and the Australian National University (1978-85), before becoming, in 1985, Professor of Law (and, since 1988, Dean of the Faculty of Law) at the University of Queensland. He is the author of four books and a large number of articles on a variety of legal topics, including in particular citizens-initiated referendum systems.