Chapter Seven

White Anting the Constitution : The Constitutional Centenary Foundation

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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

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1 As given in the Foundation's Newsletter, Number 1, April, 1992, page 11.
