Proceedings of the Fifth Conference of The Samuel Griffith Society

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Foreword

John Stone

In composing the program of the Conference whose proceedings form this Volume in The Samuel Griffith Society's series Upholding the Australian Constitution, it was necessary, as always, to reflect upon those constitutional topics which might most appropriately be addressed on this occasion.

At the time of our previous (fourth) Conference in July, 1994, three topics appeared to have taken on, over the then preceding six months or so, enormously enhanced importance: the republic debate; the Aboriginal question (the Mabo Case and all that); and the High Court's continuing distortion of the federal "balance" by, in particular, its interpretation of s.51(xxix) of the Constitution, the external affairs power.

Given the timing of this Sydney Conference, and the likelihood (when its program was being formulated) that the High Court would be delivering at about the same time its judgment on the two major cases then before it concerning the Native Title Act 1993 and Western Australia's Land (Titles and Traditional Usage) Act 1993, it seemed inopportune on this occasion to commission any papers on the second of those three topics. We shall of course return to it in the future.

As to the debate on the republic issue, a combination of, on the one hand, boredom with the topic generally and, on the other hand, a judgment that this Prime Ministerial initiative was in practice going nowhere, led to the decision not to commission, on this occasion, further papers on it. This decision seems, incidentally, to have been a more than usually prescient one; in the aftermath of the Canberra by-election, it might even be said to be shared by the Prime Minister himself.

Of the three major issues forming the core of the Society's fourth Conference, therefore, only that relating to the external affairs power seemed appropriate for further discussion at this time. With a view to lending additional point to that discussion, it was therefore decided to commission a paper on this occasion from Dr Colin Howard putting forward a specific form of words by which the present s.51(xxix) might be amended so as to prevent the Commonwealth Government's current illegitimate use of the treaty-making power. Two further papers were also commissioned, from Professors Winterton and Coper, both of whom were known to be unsympathetic (in varying degrees) to the Society's general view on this matter.

The result, including the interesting brief comments by each of the three participants during the extended discussion period which followed the presentation of their respective papers, provides an excellent resum, of the external affairs power controversy. Perhaps I may be forgiven if, availing myself of the prerogative of those who pen Forewords of this kind, I express the view that, despite the considerable erudition of Professor Winterton's paper and the more frolicsome flavour of Professor Coper's, Dr Howard (particularly in the course of his final remarks in response), had very much the better of the argument. Readers will, however, judge that question for themselves.

Beyond these remarks about the external affairs power discussion, it would doubtless seem invidious to single out other papers for specific mention. At the risk of that, however, I refer to three other elements of the Conference program, and hence, these Proceedings.

First and foremost I should mention the paper by Sir Garfield Barwick with which the Conference concluded. The presentation of this paper, it is fair to say, partook of the nature of an historic event (as the presence of the numerous media representatives indicated).

One of the sub-themes of Sir Garfield's paper, via which he led up to his major theme about the clash between the legal activism of "an unelected and unrepresentative judiciary" and the role of

a duly elected Parliament, had to do with the malign effect of the party system on the proper working of the latter.

Since I fear that the party system, in some form or another, may be here to stay, it was thus particularly opportune that, just prior to the delivery of Sir Garfield's paper, the Conference should have heard two papers on "direct democracy". The paper by Professor Philip Ayres, in particular, provided a fascinating account of recent developments in the USA and Canada in this area. These developments are designed to render the elected Congressional and parliamentary representatives in those two great democracies more responsive to the real concerns and views of those electing them, rather than to the narrow interest groups which, both in Washington, DC and Ottawa, have come to dominate the legislative agenda over the past two or three decades.

As Sir Garfield's paper indirectly, perhaps, acknowledges (though I certainly have no wish to put such words in his mouth) there are echoes in all this for our own democratic processes. As I said in the Foreword to Volume 4 in this series, "it is likely that discussion of the issues involved in [those] concepts....will be appropriate to this Society in the future".

Finally, at a time when belated attention is beginning to be seriously paid to the misallocation of taxing powers within the federation between the Commonwealth and the States, it would be remiss not to mention the notable contribution to that debate now provided by the paper to this Conference by the Society's own President, Sir Harry Gibbs. His paper on s.90 of the Constitution (the excise power) provides some hope that a way may yet be found out of the legal thickets in that area into which, for almost 90 years, successive High Court Justices (Sir Samuel Griffith himself, incidentally, notably apart) have been wandering.

More generally, these papers again provide highly readable but meaty fare for all those wishing to inform themselves about the debate on constitutional issues now under way in this country. It is to that debate that this Volume, like its four predecessors, is dedicated.

Dinner Address

Dividing the Great Australian Consensus

Peter Coleman

This very week, a splendid international conference is being held at another hotel up the street from here. I won't say it is a grander hotel than ours, but the conference certainly has a grander name. It is called `The 1995 Global Cultural Diversity Conference'. It is, we are advised, part of Australia's national contribution to the world-wide celebrations of the 50th anniversary of the United Nations, and a small part of our contribution to the International Year of Tolerance.

A Minister of the Crown (as he may still be jokingly called) – I mean Senator Bolkus – launched the Conference last Thursday at a breakfast – The Cultural Diversity breakfast. He was its keynote speaker. I didn't go to hear him because...well, he has given the speech quite a few times recently and I have caught his drift.

The drift is not what you might imagine. You might believe or hope that the New Diversity – the Diversity being sponsored by government – means at last some acknowledgement that enlightened Australians are not all of exactly the same opinion on the evils of racism, sexism, homophobia, wood chipping and privatisation, or the goodness of old-growth greenies, new-growth republicans, medium-growth arts bureaucrats and the ABC. But no. Caution is called for. New Diversity, it soon becomes clear, encourages all kinds of Diversity except Diversity of opinion.

This is what seems to have happened. Distortion of the ideals of multiculturalism has brought the very word into some disrepute. It always was, for the ordinary person, a bit of a turn-off. Some politicians can't spell it. It never commanded popular assent.

A man might rally to the colours for, say, God, King and Country, or for `The Land, Boys, We Live In'. But few are going to give much blood, sweat or tears for Multiculturalism, even for a Multicultural Republic, indeed even for the Multicultural, Ecological, Posthumanist, Poststructuralist, Ungendered, Rock-and-Roll and Queer Republic.

There is also an increasing awareness of an authoritarian, illiberal underside to some multicultural debates. Australians have for generations absorbed refugees and immigrants from foreign lands. This sort of openness was part of our liberal-democratic tradition, or even what was still called, a generation or two ago, our British inheritance. In a sense Australians were multiculturalist avant la lettre.

But the doctors of official multiculturalism despise Australian and certainly British traditions and have often called for their subversion. Anyone who challenges the multicultural catechism – nervously as Commissioner Fitzgerald did, or forthrightly as Professor Blainey – is in for a hard time. A new, simpler word was called for, something jargon-free. The one selected is Diversity. It sounds good. But it is important to see how thoroughly Orwellian it may be.

You will recall that in George Orwell's Nineteen Eighty-Four the department that invents all the political lies is the Ministry of Truth. Government-sponsored Diversity does not mean diversity in ordinary language, that is, tolerance, pluralism, a pleasure in variety. The New Diversity means Conformity, enforced by the opinion formers or network managers of the media, academia, the political parties, the thought police.

Consider. In the Age of Diversity, a Gay Mardi Gras is free to ridicule Christianity. But Christians are not permitted to ridicule the Gay Mardi Gras. That would offend the principle of Diversity. A conference on Population may demand the liberalising of laws on abortion, but calls for laws restricting abortions are not permitted: that would offend the principle of Diversity. (One headline read: `Bolkus Rebukes Pope'.) You may criticise discrimination, but not if it is

called affirmative action. You may call for more attention to `community languages', but not to English. You may discuss ethnic traditions, but not ethnic gangs.

There were several slogans inscribed on the walls of George Orwell's Ministry of Truth : War is Peace; Freedom is Slavery; Ignorance is Strength. The Australian contribution is : Diversity is Conformity.

This brings me directly to tonight's theme – the Great Australian Consensus. Australia, it often seems, labours under a more comprehensive orthodoxy than any other English-speaking country. Sydney or Melbourne, when compared with New York or London, seem to be closed societies. To describe them I would like to borrow a term from the poet Les Murray – a term he used to describe his experience as editor of a poetry magazine.

Murray, it should be recalled, has `come out', as it were, as a Christian and he found himself publishing the occasional poem of Christian inspiration. When, despite rumblings and warnings, he persisted and indeed did it twice in the one issue, the patience of the literary community was exhausted. The non-god of secular humanism, he wrote, is a jealous absence.

This is a literary journal, his critics exploded, not a Church propaganda sheet. Poets began withdrawing their contributions, readers cancelled subscriptions, the arts bureaucrats hinted at the suspension of subsidies. Humanist and secularist ideas were OK but not religious ones. Before resigning, Murray concluded that Australia was much further down the road of `quasi-totalitarian consensus' than he had thought.

Quasi-totalitarianism? I would prefer to modify it slightly and call it soft totalitarianism. It's the same thing.

If you offend, you do not get a bullet in the neck or end up in a slave camp in the Gulag. But you will be marginalised, boycotted, perhaps vilified, and in a bad case brought before the thought police and fined. Your career will be damaged, perhaps ruined. There are many names on the honour roll of those wounded in battles against this new Conformity now called Diversity – Gabriel Moens, Dr Tralaggan, Geoffrey Blainey. A recent addition to the roll is the late David Stove of Sydney University, a traditional philosopher who reflected in print, as such fellows do, on the feeble arguments justifying affirmative action in his university and the harmful results it was having on academic standards.

For his pains he was advised in writing by the university authorities that disciplinary proceedings against him were under consideration. He should desist forthwith from further thinking and, even if he did, it might be too late. Clearly the spirit of the New Diversity now prevailed in Sydney University.

The dissidents I have so far mentioned are all people of education and reputation, able to speak for themselves and, to some extent at least, look after themselves. But what of the inarticulate millions for whom words like multiculturalist society or equal opportunity tribunal or anti-discrimination board or homophobia or sexism are incomprehensible jargon? What chance do they have when confronted by the apparatchiks of the New Diversity?

However, I really do not want to strike a pessimistic note. Australia has for generations been one of the most liberal, lawful, democratic and prosperous countries in the world, a bastion of representative government, a haven for refugees. It would be absurd to assume some vogue could transform it so quickly into soft totalitarian conformity.

There is no ground for despair. I do not suggest we adopt without qualification the attitude attributed to Prince Metternich when he was advised about the desperate condition of the Austro-Hungarian Empire: the position, he said, is always desperate...but never serious. He was wrong, of course. A day did at last come when the Empire fell. But it lasted many centuries in its desperate state, and Prince Metternich has much to teach us.

The late Jim McAuley used to say that in the end the only really revolutionary act left to us, as we confront all the follies of the age, is to await the return of commonsense. There are a few straws in the wind that suggest this moment may be approaching.

Take the new play by David Williamson, Dead White Males, which is packing them in night after night at the Opera House. There have always been two David Williamsons. One was regularly on hand at writers- and-artists rallies, especially at election time, always good for a speech that was ... a bit heavy-going. Then there was the other David Williamson, the brilliant and witty playwright who cast a cold eye on both the Left and the Right. In his new play he casts this eye on feminist multiculturalism, or on the sort of academic literary intellectual who regards Western civilisation as a racket created by a repressive, sexist patriarchy – the dead white males of the title. Williamson comes down firmly on the side of liberal humanism – to the rage of the arts pages critics and the delight of the public. Such a play could not have been produced a few years ago.

Or take the popular film now showing throughout Australia, Once Were Warriors, based on the novel by the New Zealand Maori writer Alan Duff. Its subject is the fate or future of indigenous people, Maoris or Aborigines. Its message is the harm done by both government welfare services and by head-in-the-sand ethnic traditionalism. Its appeal is to self-help, independence, and spirited involvement in the modern world.

Alan Duff is not, he insists, politically correct, but the popularity of his work is significant and encouraging.

There are other straws in the wind. One is Helen Garner's courageous The First Stone, published this week, which takes up the theme of sexual harassment. Helen Garner is a feminist and one of the best writers in Australia. She writes sensitively of outsiders and misfits. In her new book, which may become a classic of its genre, she canvasses the question whether her generation of feminists has nurtured a new breed of power intoxicated young feminists who set out to destroy the careers of men in authority. The controversy attending her book shows no sign of abating. My point for the moment is that it could not have been published a few years ago. The ideas it raises would have been too far outside the Consensus.

Finally let me refer briefly to some recent, encouraging expressions of free thought in the field of gay liberation, homophobia and `sexist discrimination'. Robert Dessaix is another fine writer who is also the host of the ABC's Books and Writing program. He has written an acclaimed autobiography, A Mother's Disgrace, and edited an anthology of Australian homosexual verse.

This is what he is recently quoted as saying about the ABC in the Melbourne magazine of the arts, Storm:

`The political correctness of the ABC is extraordinary. There's no leeway in anything to do with race or gender or politics. There is only one attitude you can have to Aborigines, to multiculturalism and to feminism.'

The ABC, he went on, is a highly authoritarian organisation and that since he is anti-authoritarian, it means `I have to tailor what I say to the reigning ideology of the ABC'. As for career prospects in this bastion of gay men and feminists, `heterosexual males may as well go and commit suicide'.

Christopher Pearson is another writer and editor who, speaking as a founding member of one of the first `gay lobbies', has often written of his impatience with the clich,s of soft totalitarianism, defending the Tasmanian Government against the fatuities of Attorney-General Lavarch's privacy legislation, or criticising the NSW Anti-Discrimination Act, which actually permits discrimination by homosexuals against heterosexuals, and generally ridiculing the absurdities of the doctrines of `gay marriage'.

One could go on. There are other straws in the wind which suggest that the Great Australian Consensus is losing ground, that its heyday is passing.

The question remains: what can we do to hasten the process? As I have already suggested, following Jim McAuley, we must rely on the enduring commonsense of the public. Without that, the position would be hopeless. But commonsense needs buttressing, as Sir Samuel Griffith knew well.

Anything that supports the idea and spirit of independence and self-reliance becomes crucial. Independent courts. Independent schools. Independent press and media. Underlying them all is freedom of association, even more fundamental, it seems to me, than freedom of speech, precious as that must always be.

One of the most important of all, I believe, is independent States, or federalism and States' Rights. Since States' Rights are often the butt of merry jokes by our journalists and pundits, may I take a few moments to explain myself?

Many years ago when I first entered public or parliamentary life, the Premier of the State was the late Bob Askin and the Prime Minister was John Gorton. The inevitable tensions over the division of tax revenues was only intensified by John Gorton's centralist indifference to Askin's State problems and Askin's parochial indifference to Gorton's national problems.

Askin mounted a major campaign based on federalist principles and designed to embarrass the Gorton Government. State MPs were instructed to show no mercy in attacking their federal colleagues in public or in party assemblies.

You know the sort of demagoguery : the Commonwealth is spending a million dollars on a swimming pool in Canberra, or on a theatre restaurant or a public mortuary, but only has $100,000 to spare for child care centres or teachers' colleges or emergency services in the States. The State ambulances are poor but you can ring them up very efficiently on Commonwealth telephones. And so on. It was effective enough.

Some of us tried to pitch the debate at a higher, more philosophic level. I was one of those foolish fellows. I remember a political science conference at Sydney University in which I had to debate the issue with Gough Whitlam, whose centralist hostility to the States, or to any restrictions on Prime Ministerial power, left even John Gorton trailing.

I argued that the States were centres of social reform, experiment, innovation and insisted that the future of federalism depended on the States resuming income taxing power on the Canadian model. Lord knows what Bob Askin thought of all that. In any case he dropped the whole campaign as soon as he had extracted as much as he could expect from the Commonwealth and moved on to other issues – such as law and order.

I continued my own little campaign in journalism and speeches and at one stage even introduced a private member's bill for the resumption—and reduction—of income tax in New South Wales. I really only gave up the struggle when I finally realised that no one was listening.

But I still believe we should defend our federal system with its States' rights against the centralists. But today I would not base that defence on any belief in the splendours and glories of our State Governments.

Their value resides in the fact that, along with the other constituents of the balance of power — the Courts, the Senate, the Governor-General — they limit the power and the grasp of the central and centralising government.

When, in a federation such as ours, a central government adopts a policy on, say, land use or sexual morality or constitutional practices or Aboriginal policy or whatever, we rely on the fact that there are other authorities with entrenched powers which may arouse public opinion or sometimes obstruct the central government.

If this seems a negative defence of federalism, it is not really. It acknowledges the central power, and asks only that it be limited, that the liberty and consent of the subject come first. It is the same liberal and sceptical spirit that has so often led Australians to vote No in referenda. They were not always mistaken to do so. May they, at least sometimes, continue so to do.

Introductory Remarks

John Stone

Ladies and gentlemen, it is a great pleasure to welcome you all to this, the fifth major Conference of The Samuel Griffith Society, and particularly to do so in Sydney.

Last night we were privileged to hear a sparkling address to our opening Dinner from Peter Coleman – a man of whom it could be justly said, I think, that he has given a great deal of his life to the pursuit of ideas in the cause of freedom. To me, he struck precisely the right note when, towards the end of his remarks, he recalled his own earlier experience with so-called "States' rights" issues over 20 years ago as a member of the Askin Government in this State.

Before I comment further on Peter Coleman's paper, however, I should note (and I know that Mr Coleman will not mind me doing so) that, in line with our practice at our second and third Conferences (and our intentions, which for good reasons could not be achieved, at our fourth), we might have hoped for our Dinner last night to be addressed by the Premier of New South Wales. However, when we fixed the dates for this Conference last December, we noted the close coincidence with them of another notable event – the general election in New South Wales, which took place a week ago today. In the light of that timing, the Board was forced to acknowledge that even the privilege of addressing a Dinner of this Society might not be sufficient to induce either Mr John Fahey or Mr Bob Carr to accept an invitation to do so. There was also, of course, the little matter of to which of them such an invitation should be extended.

The voters of New South Wales having now resolved that latter point, it remains only for me to say that, in more usual circumstances, we should certainly have been keen to ask Mr Carr to address us. I also personally believe that, other obligations permitting, he would have been glad to do so. I hope there may yet be some future occasion for us to test the accuracy of my prophecy in that regard.

Let me now return to Peter Coleman's invigorating address to us last night, and in doing so remind you that this is our first Conference in the State of New South Wales.

New South Wales has not, I think, been in the vanguard of those promoting the federalist cause in Australia over the years. Even at the time of federation, there was a significant element of opinion in the then Colony that Australia would be better as a unitary state (centred, of course, on New South Wales) than as a federation of six States; and although, mercifully, that view did not prevail, it was sufficiently strong to require a second referendum (the first having failed to obtain the required majority) before this State agreed to federation.

As someone remarked to me recently, one of the reasons why it is hard to interest people in New South Wales in a federalist view of Australia is because, at heart, so many of them actually regard New South Wales and Australia as being (more or less) one and the same thing.

That was why, last night, I was so glad to hear Peter Coleman (as a long-time resident of New South Wales) take up the view which I (as a Western Australian, although a long-time non-resident there) have come to believe lies more and more, these days, at the heart of the argument for federalism – the cause to which, essentially, this Society is dedicated.

I refer to the great virtue which federalism has of dividing power, and serving thereby as a very important bulwark against oppression – including the kind of cultural oppression to which Peter Coleman was directing the earlier portion of his remarks last night.

It is precisely because federation does offer greater opportunities for Diversity that it renders attempts from a centralist Canberra to impose Conformity so much more difficult. Peter Coleman's Orwellian tag, "Diversity is Conformity", simply becomes that much harder to enforce.

Our President, Sir Harry Gibbs, made much the same point to us, in his own limpid prose, when he spoke at our second Conference about the division of power, which a federation naturally provides, as being one of our most treasured defences against the potential oppression of centralised authority:

"There is no more effective way to curb abuses of political power than to divide it..... A federal system cannot guarantee freedom and tolerance, but it can help to protect them".

One of the ways in which the power of centralised authority in Canberra has grown over the years, and particularly during the past 15 years or so, is via the High Court's increasingly permissive interpretation of s.51(xxix), the external affairs power. Accordingly, as you know, in organising our Conference on this occasion we have sought to focus discussion upon a specific proposal for amendment of that provision. Professor Winterton and Professor Coper will, in effect, have the opportunity of criticising the specific amendment (the "Howard amendment") to be put forward shortly by Dr Colin Howard, and thereafter we shall have some general discussion on all three papers with a view to seeing where the balance of that argument lies.

Later today we shall have what I also regard as an extremely important paper on s.90 of the Constitution (the excise power). To quote, again, Sir Harry Gibbs on that topic during the same address from which I quoted earlier:

"Section 90 is an impediment to the rational division of financial powers between the Commonwealth and the States".

This evening, Sir David Smith will honour us with his presence and, in speaking to us about the 1975 dismissal of the Whitlam government, will provide for the annals of the Society a paper which, from his unparalleled vantage point at the time, will "set the record straight" regarding those tumultuous events.

Tomorrow we shall be further honoured by a paper from no less a figure (and incidentally one who played some part in those 1975 events) than Sir Garfield Barwick – our President's predecessor as Chief Justice of the High Court of Australia. Sir Garfield's paper will be read on his behalf by Sir Harry Gibbs, but I understand that he intends to be present in person to answer any questions upon it. We shall look forward to receiving him.

Meanwhile, we shall now proceed to our first bracket of papers this morning which, as noted earlier, relate to the external affairs power, and I shall accordingly hand over to the Chairman of that session, Mr Ray Evans, who will introduce our first speaker, Dr Colin Howard.

Chapter One

Amending the External Affairs Power

Colin Howard

The purpose of this paper is to argue that s.51(xxix) of the Constitution should be amended, and to propose an appropriate form of words. This audience hardly needs to be reminded that s.51(xxix) is the power of the Parliament to legislate for the peace, order and good government of the Commonwealth with respect to "external affairs".

To advocate an amendment to the Constitution implies a shortcoming in its operation which would be remedied by the proposed change. In the present instance the shortcoming is the extent to which High Court interpretation of the external affairs power has enabled the federal Parliament, at the behest of the executive government, to circumvent limitations on other legislative powers.

The result has been increasing intrusion by the Commonwealth into areas of the national life which the framers of the Constitution clearly intended should remain under the control of the States. Or, to put the matter another way, although s.51(xxix) of the Constitution is expressed to be a power to legislate with respect to external affairs, in practice it has now become a source of power to legislate upon an ever-widening variety of topics the significance of which is overwhelmingly domestic, not external.

Let me first dispose of the cynic's view of the matter. As he, or she, sees it, throughout the life of the federation the flow of power has been almost uninterruptedly from the States to the Commonwealth, particularly through the exercise of the latter's control of the national finances. That being so, the cynic asks, why worry about a bit more power going the same way via external affairs? My response is that the fact that the constitutional intention has been defeated in one important respect is no argument for sitting idly by watching the same thing happen in another.

Cynics however have a second string to their bows. They can point to the notorious difficulty of getting any proposed amendment past the constitutional obstacles that lie in its path. They can claim with some plausibility that nowadays even to try is a waste of public money and time. I do not accept this objection as sufficient either, but I shall not pause at this point to examine it further. I shall return to it later.

There was a time, not so many years ago, when to mention the external affairs power was to invite in return a blank stare. Offhand the topic meant very little, even among constitutional lawyers. I suppose that current equivalents might be the powers to legislate for lighthouses, lightships, beacons, buoys and astronomical and meteorological observations. Times have changed. Even if the exact number of the relevant subsection continues to escape the memories of all but specialists, the expression "external affairs" is becoming widely known. So is unease about its significance.

A striking instance occurred early last year. In a joint statement released on 20 January, 1994 eight major industry associations urged the federal government to change its approach to treaty-making. The parties to this statement were the Australian Chamber of Commerce and Industry, the Australian Mining Industry Council, the Business Council of Australia, the Council for International Business Affairs, the Environmental Management Industry Association of Australia, the Metal Trades Industry Association, the National Association of Forest Industries and the National Farmers Federation.

That is a formidable concentration of opinion. As far as I know, it represents the first formal expression of disquiet from commerce and industry at the use which has been made by successive federal governments of the concept of an external affair. The signatories to the

statement were concerned primarily with identifying deficiencies in current procedures, but they did not rest content with that. They suggested also many improvements, mostly by way of wider consultation before entering into treaty obligations and closer parliamentary supervision both before and after the event.

This document was followed, towards the end of 1994, by the entry of the external affairs power into politics. The Senate referred the operation of s.51(xxix) to its Legal and Constitutional References Committee. Submissions were requested by 24 February, 1995. At the time of writing the Committee has not yet reported. There can be little doubt that Senate interest was aroused by the extraordinary use made of the external affairs power in the Industrial Relations Reform Act 1993, otherwise known as the Brereton Act, and the sterling work of Senator Rod Kemp of Victoria in keeping the implications of the power before the Senate.

A further sign of mounting interest was the publication in October, 1994 by the Institute of Public Affairs of a paper on the subject by the Honourable Peter Durack QC, a former Senator for Western Australia and, among other ministerial posts, Attorney-General. I shall have occasion later to refer to this paper again. Also in October 1994, in that month's issue of The Adelaide Review, Mr Tony Abbott recommended a constitutional amendment which, by coincidence, accords with my own line of thought, although in some respects differently worded. I shall have occasion later to refer to this again too.

If one is familiar with a topic and has spoken on it on a number of occasions, which is the case with me and the external affairs power, one is apt to find oneself after a while in a situation resembling the sea route in the Straits of Messina, which separates Italy from Sicily and runs between the rock Scylla and the whirlpool Charybdis.

On the one hand I am in danger of hitting the rock of boredom by repeating information already familiar to my listeners; but on the other I risk falling into the whirlpool of confusion by assuming that my listeners are as conversant with the subject as I am. On the whole I am more apprehensive about Charybdis than about Scylla, so please forgive me for outlining yet again the precise nature of the problem with which we are confronted.

I have referred already to the Brereton Act. Because it surpasses by far in selectivity any previous legislative reliance on the external affairs power, a useful way of summarising the present situation is to outline the position as it was immediately before the Brereton Act and then briefly consider how that Act has extended it. Shortly stated, successive High Court decisions had developed a doctrine that s.51(xxix) empowers the Parliament to legislate for the implementation within this country of any international obligation to which Australia is a party.

That is not the whole scope of the power. It extends also, naturally enough, to matters which in themselves are entirely external but have a reasonable connection with Australia. Examples of such matters are the adjacent sea bed, Antarctica, overseas aid and diplomatic representation abroad. There is also, and not at all naturally, a vaguer category of external affairs which seems to comprise anything of international concern in which Australia takes an interest. In the context of the external affairs power, Australia means the federal government of the day.

The power is subject to outright prohibitions in the Constitution, whether express or implied, but there are not many of these. The general effect therefore is that the external affairs power holds out the temptation to any federal government to resort to it to circumvent limitations on any of the Commonwealth's numerous other legislative powers. All the government needs to do is find an international obligation or, failing that, a matter of international concern in which it can claim to have an interest, and base an Act of Parliament upon it.

It is far from clear how a sufficient degree of genuine interest in a matter of international concern is to be proved. The method employed thus far, sometimes with considerable ingenuity, has been to rely on international instruments like treaties, or on covenants and conventions of the United Nations and its associated bodies, such as the International Labour Organisation (ILO).

The High Court has held that in this situation the domestic legislation, to be valid, must amount to a reasonable attempt in both letter and spirit to implement the international instrument relied

on. The Court has said also that it is not open to a government to manufacture spurious obligations or interests for the sole purpose of empowering the Parliament to legislate on a particular topic. This limitation is distinctly theoretical. No-one so far has been able to work out how the absence of a genuine obligation or interest could be evidenced to the satisfaction of a court.

This then is in broad outline the position as it was before the Brereton Act. Before the passing of that Act the application of these principles had bestowed upon the federation such blessings as the complex legislative scheme to nullify the effect of the Seas and Submerged Lands Case, New South Wales v. Commonwealth (1975) 135 CLR 337; the Racial Discrimination Act 1975, which was upheld by a 4:3 majority in Koowarta v. Bjelke-Petersen (1982) 153 CLR 168; the World Heritage Properties Conservation Act 1983, upheld in the Tasmanian Dam Case, Commonwealth v. Tasmania (1983) 158 CLR 1; the Sex Discrimination Act 1984, and also the Human Rights and Equal Opportunity Commission Act 1986, the validity of neither of which has been challenged.

It is no doubt only a matter of time before the beneficiaries of most of this legislation, almost none of which is on the face of things within Commonwealth legislative power, will be joined by children, regardless of their parents' wishes, every known form of animal life, and every existing aspect of the environment. Meanwhile we shall just have to make do with the Brereton Act.

The Act is no lightweight. It inserts about 300 sections into the Industrial Relations Act 1988 (the IR Act). It consists of 8 Parts and 4 Schedules, one of which also adds 12 additional schedules to the IR Act. These are a collection of texts of international instruments, or extracts from them, to most of which Australia is a party, plus in one case a code of law on the topic of parental leave.

The instruments relied on to invoke the external affairs power nearly all emanate from the ILO. They comprise eight ILO Conventions and four so-called ILO Recommendations. Australia is a party to the Conventions and has ratified all of them. In one case the ratification occurred shortly before the passage of the Act and long after the Convention came into existence. Australia is not a party to the Recommendations because nobody is.

The difference between ILO Conventions and ILO Recommendations is that the former purport to impose obligations upon member nations to implement them but the latter do not: they are only what they say they are, recommendations. Reliance upon them, if it is upheld by the High Court, represents yet a further extension of the external affairs power. Presumably they will fall into the "matters of international concern in which Australia takes an interest" category of external affairs, for they certainly do not even purport to impose obligations in the manner of a treaty or a Convention.

In the Brereton Act, not even the invocation of ILO Recommendations is the high water mark of innovative optimism. One of the many rights which the Act purports to confer is a limited right to strike. Implementation of such a right is said in the Act to be an international obligation. It seems however that parliamentary counsel had some difficulty in providing a basis for this particular bastion of democracy.

It is said to derive from no less than five sources: a United Nations Covenant, two ILO Conventions, the Constitution of the ILO and customary international law. Perhaps the hope is that the proposition can be sustained by weight of numbers, not to mention variety. It certainly does not seem to be sustainable as an implementation of any of the grounds relied on. Only one of them even refers to a right to strike, and that one says that such a right can be exercised only in accordance with the laws of the relevant country, which is manifestly self-contradictory.

That particular exercise illustrates well the intellectual level of some of the international material that Labor governments in particular are addicted to introducing into Australian domestic law. It illustrates also what I have referred to as the selectivity of the Brereton Act. In many places it falls far short of adopting a complete set of principles enshrined in some Covenant or comparable document. It picks and chooses bits and pieces of text according to the government's

domestic shopping list. Words begin to lose meaning if we have to accept this sort of thing as genuine implementation of an international obligation.

The Brereton Act does not rely by any means wholly on the external affairs power but it does rely on it to an extent, and in ways, which surpass anything seen thus far in any context. Little wonder that the validity of substantial parts of it are under High Court challenge by Victoria, South Australia and Western Australia.

Lastly in setting the scene I refer to a different aspect of the matter which, if I may say so, has been brought out particularly well by Senator Rod Kemp in his various parliamentary speeches and submissions to committees. He draws attention to the increasing influence over our domestic affairs of policies fashioned by UN instrumentalities which are composed to a significant extent of people from countries with no claim to be even remotely democratic and whose personal competence is usually invisible.

In Senator Kemp's view this trend is in a subtle but effective way undermining the very sovereignty and independence which we had thought to be safely enshrined in the Australia Acts of 1986. The only answers I have seen to his contentions seem to me to be nitpicking and legalistic, and therefore merely evasive, characteristics which they have in common with the republican movement.

It is against that background that I turn now to the question of amendment. Much of the problem of s.51(xxix) derives from its undue economy of self-expression. I have described on a previous occasion with what admirable foresight Sir John Quick and Sir Robert Garran, in their Annotated Constitution of the Australian Commonwealth, perceived that the uninformative words "external affairs" would one day cause trouble. That day has now come and it falls to us to see if we can do something about it.

It is inherent in the character of a specific power to legislate upon a given topic that it should be framed in positive terms. It is similarly inherent that its scope of operation is coterminous with the scope of the topic to which it refers, but quite where the line is to be drawn between what the power does, and what it does not, authorise can never be wholly foreseen. Life is too various. Hence, if there is a possible area of operation which you definitely do not want that power to have, it is advisable to fall back on the negative and prohibit that particular application of the power.

It is well to bear these simple principles in mind in the present case. Starting from the position that s.51(xxix), by interpretation, now authorises too wide a range of laws, the problem can be tackled either positively or negatively. The grammatically positive approach seeks to identify in more detail than at present what sort of laws the subsection should authorise. This method is likely to have only partial success at best, for no more than any other legislative power can it cover every possible future situation.

The negative approach is much less vulnerable, which is why constitutional guarantees tend to be prohibitions. A notable exception in this country, which helps to prove the point, is the freedom of interstate trade guarantee of s.92 of the Constitution. It is expressed in the positive and has caused immense trouble to everyone except the legal profession all this century.

Hence my first proposition is that we should forget about tinkering with the words "external affairs" to make them express more clearly what we want them to mean, and devise a prohibition to prevent them being given a meaning and effect that we do not want. In principle the prohibition should be as simple and straightforward as possible. Language of such vivid and dedicated obscurity as the Income Tax Assessment Act, the Native Title Act and the Corporations Law should be avoided.

Fortunately, the enterprise is assisted by the fact that we know exactly what we do not want s.51(xxix) to authorise. We do not want it to authorise laws which operate in the States, at all events not without State consent. It seems to me that to devise a form of words which achieves this is one of life's less demanding intellectual challenges.

What I would propose is adding after the words "external affairs" in s.51(xxix) the following:

"provided that no such law shall apply within the territory of a State unless
(a) the Parliament has power to make that law otherwise than under this sub-section; or
(b) the law is made at the request or with the consent of the State; or
(c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia."

There are some consequential matters. The question may be asked whether such an amendment can or should be retrospective. Although no doubt an interesting point when expressed in that way, it does not in fact arise. The effect of the amendment would be that existing laws enacted in reliance on s.51(xxix) in its original form would no longer be operative in any State in the absence of a request or consent, unless they related to diplomatic representation.

If in any case a State had indeed been previously consulted, and had consented informally, the question might arise whether such a consent could operate, perhaps with the help of retrospective State legislation, to avoid a hiatus in the application of the Commonwealth law. I think the answer probably is yes, but, fascinating though such hypotheticals are, I would not recommend complicating the amendment by trying to foresee and provide for them in the Constitution itself. Consequential questions are matters of interpretation for the High Court.

There may be a view that rather than amend subsection 51(xxix) itself, a guarantee to the same effect be put in an altogether separate section numbered, say, 51A. If it were to cover the same ground as my proviso it would have to be rephrased along the following lines: "No law made by the Parliament pursuant to sub- section (xxix) of section 51 can apply within ... etc, etc." I do not feel moved to go to the barricades over what may be a mere matter of style, but what I can only call professional instinct leads me to believe that the closer the connection between the legislative power itself and any limitations upon it, the better. I am sticking with my proviso.

Lastly there remains the second argument of the cynic that I put to one side at the outset. This was that there is no hope of an amendment getting through, so we might as well forget it. Although the paper by Peter Durack that I mentioned earlier is not at all the work of a cynic, but a constructive consideration of the issues based on his long and varied experience, he does come to the same conclusion about the prospects of an amendment.

At p.8 he writes:

"It certainly can't be said that the question has been ignored these last eleven years, or that no genuine effort in fact has been made to find a solution to the problem. On the contrary, a great deal of thought and action has been given to it, and a number of proposals have been debated and some partial modifications of Federal policy have been agreed. Nevertheless, no substantial agreement has been reached on any amendment to the Constitution itself. This means that no change to the Constitution is in sight."

This is the view that a minimum condition for constitutional amendment is bipartisan political support. Perhaps nowadays, plentifully supplied as we are with Greens, Independents, Independent Greens, Democrats of assorted hues and so on, I should say multipartisan political support. It would be idle to deny that there is much evidence to support this view, although perhaps not as much as seems at first glance.

However that may be, I do not take the view that a proposed amendment is not worth proceeding with unless it enjoys virtually unanimous political support. At the very least, a proposal that fails by only a narrow margin (and remembering that an amendment that has around 66% support in the national electorate can fail under the requirement that it must pass in four of the States as well) can send a powerful political message.

Furthermore, the lessons of 1967 should not be forgotten. Two amendments relating to Aborigines were put up and passed with overwhelming support. An accompanying amendment which would have broken the nexus of s.24 of the Constitution, and enjoyed almost complete parliamentary support, failed decisively. It was widely believed, whether rightly or wrongly is immaterial, that the Aboriginal amendments were included only because, being popular, they might bring s.24 in on their coat-tails. In the result the electorate gave a clear demonstration that

it was perfectly capable of distinguishing between proposals on the basis of their perceived merits.

Moreover the perceived purpose of the Aboriginal amendments was to benefit Aborigines, a simple and readily grasped concept. Here too it is immaterial that that perception was naive. Then, as now, dramatic Aboriginal welfare initiatives are intended, at all events primarily, to benefit the politicians who make them. 1967 is an excellent example. Having accepted the electoral kudos of supporting the amendments, all political parties ignored the matter for the next 15 years or so.

But the point is that the Aboriginal amendments conveyed a simple and attractive message to the electorate. By contrast, the proposed s.24 amendment to break the nexus had considerable merit but unfortunately was confusingly technical in character and easily capable of being attacked as political trickery.

We can learn from all this. The amendment that I propose takes a form which seems to me readily comprehensible. It says clearly enough that henceforth the Commonwealth cannot do something without the consent of the States. Moreover it is capable of being explained, perfectly correctly, along the lines developed by Senator Kemp. My guess is that there is already a substantial body of opinion in the electorate which would readily rally behind the message that we are increasingly being delivered into the hands of incompetent foreigners for short-term political advantage.

The reservation for laws relating to diplomatic representation is entirely in keeping with the original constitutional intention. The Commonwealth must certainly have overriding power to legislate for the establishment and protection of embassies and diplomatic staff of other countries in Australia, including the customary exemptions from criminal process, customs searches and so on.

I hardly need labour the point also that on a number of fronts current political correctness is facing a mounting backlash. I have in mind, for example, the shrill vociferousness of all manner of minority groups incessantly carrying on about their rights. Then there is that legislative caricature the Brereton Act, a grotesque and unworkable pay-off to the trade unions on the basis, very largely, of waffle borrowed from the ILO.

In the realm of grotesque legislative caricatures one must not overlook the Native Title Act, which is increasingly emerging as not only similarly unworkable but equally out of touch with public opinion. To these concerns there may be added mounting apprehension about sweeping UN involvement in almost everything on environmental grounds. And of course the republican push is making its contribution to the general annoyance with the Commonwealth by encouraging us to project to the rest of the world the impression that we are ashamed of our Head of State. Even the High Court only got stuck into our achievements.

For such reasons as these I believe that the time is fast approaching when an external affairs amendment will be a reasonable and practicable proposition to put to the electorate. No doubt it will be contentious at the Commonwealth level because it unambiguously proposes a curtailment of Commonwealth power. This affects every federal government, whatever its political character. Nevertheless, it is hard to believe that there would be serious objections at State level. On the Coalition side, it seems to me also to be difficult to oppose such a measure at the federal level without a serious loss of credibility.

In conclusion I suggest also that there may still be something to be said for acting on principle and conviction. The perversion of the external affairs power has a fair claim to be the most blatant and cynical departure from the original constitutional intention that we have yet seen. If ever there was a de facto amendment of the Constitution in manifest defiance of its own prescribed procedures, surely this is it.

Chapter Two

A Framework for Reforming the External Affairs Power

Professor George Winterton

The most logical framework for evaluating any reform proposal is to identify the deficiencies in the current position, determine criteria for overcoming or at least ameliorating them, and then evaluate the proposed reform by reference to those criteria. This paper will adopt such an approach.

1. Deficiencies in the current position

The Commonwealth's external affairs power (section 51(xxix)) is frequently criticized for undermining three of the fundamental political principles upon which the Commonwealth Constitution is based: federalism, and representative and responsible government. Federalism is imperilled, it is claimed, because the present liberal interpretation of the power enables the Commonwealth Parliament to legislate on subjects which the Constitution did not specifically confer on the Commonwealth, and representative and responsible government are allegedly undermined by leaving treaty making solely in the hands of the executive.

Federalism

An indication of the potential ambit of the external affairs power appears from Justice Murphy's summary in the Tasmanian Dam Case.

"To be a law with respect to external affairs it is sufficient that it: (a) implements any international law, or (b) implements any treaty or convention whether general (multilateral) or particular, or (c) implements any recommendation or request of the United Nations Organization or subsidiary organizations such as the World Health Organization, the United Nations Educational, Scientific and Cultural Organization, the Food and Agriculture Organization or the International Labour Organization, or (d) fosters (or inhibits) relations between Australia or political entities, bodies or persons within Australia and other nation States, entities, groups or persons external to Australia, or (e) deals with circumstances or things outside Australia, or (f) deals with circumstances or things inside Australia of international concern."

While it is true that not all these limbs or aspects of the power have been established by a decision of the High Court, all have been endorsed by at least some justices of the Court, if not by a majority.

The potential breadth of controversial aspects of the power, such as the power to legislate on matters of "international concern" (which has not been established by a decision of the Court) is readily apparent; a leading commentator has remarked that the power would become "unlimited in scope". The great scope of the external affairs power is underlined by considering its well-accepted and relatively uncontroversial aspects, such as the power to regulate domestic matters which could affect Australia's relations with other countries, which was established by the High Court as long ago as 1949 and has never been judicially questioned since, and to regulate the relations between persons or bodies in Australia and persons or bodies overseas, which was endorsed not only by Justice Murphy, but also by Chief Justice Gibbs.

"A law which regulates transactions between Australia and other countries, or between residents of Australia and residents of other countries, would be a law with respect to external affairs, whatever its subject-matter."

Thus it would seem that the Commonwealth could, for example, prohibit protests or demonstrations by Australians in Australia against the actions of a foreign country or organization, and could prescribe where Australian students may study abroad and with what overseas persons or organizations they may communicate.

However, notwithstanding the considerable breadth of the non-treaty aspects of the external affairs power, it is the Commonwealth's power to implement treaties which has attracted most controversy. It is now established that, subject to express and implied constitutional limitations, the external affairs power authorizes "the legislative implementation of any (genuine) international treaty, regardless of subject matter". Sir Harry Gibbs recently quipped that

"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 [section 51(xxix)]".

With respect, this is a considerable overstatement for, while it is true that any subject may potentially fall within the power, legislation implementing a treaty, for instance, must be reasonably appropriate to that end, and all aspects of the external affairs power are subject to express and implied constitutional limitations, the latter appearing to be a continually expanding category.

The potential for virtually any subject to fall within the treaty implementation or "international concern" aspects of the power has led some commentators to suggest that the States effectively exercise power at the sufferance and by the grace of the Commonwealth, with only political considerations restraining the Commonwealth from legislating on virtually all subjects, thereby reducing the States at best to mere administrative agencies of Commonwealth programmes, hardly the image of a healthy federation. Sir Harry Gibbs, for example, has remarked that if the external affairs power's potential were realized,

"the Constitution ceases to be a federal one in point of legal theory. The States are no longer autonomous within any area of legislative power .... The Commonwealth ... can completely annihilate State power .... The States lose all legal independence .... Federalism in Australia at present therefore appears to have a political rather than a legal basis."

Former Liberal Commonwealth Attorney-General Peter Durack has similarly commented that "the power could be used to destroy the federal nature of our Constitution", although he rightly conceded that it had not yet done so; and some years earlier Professor Colin Howard had noted that

"the only effective constraint on a wholesale invasion of areas of State legislative power which have hitherto been regarded as properly within their competence is political, not legal."

However, as the Commonwealth's reluctance to employ the external affairs power to override Tasmania's laws on sexual privacy recently demonstrated, the force of political constraints should not be under-estimated. Even former Senator Durack conceded that the Hawke and Keating governments had "not made much use of the external affairs power", and he could not envisage

"a Federal Labor government pursuing a policy of deliberately using the external affairs power to the hilt in order to destroy the federal system."

Indeed, Durack abandoned his earlier proposal to amend the Constitution to confine the ambit of the power, believing restraint through "political convention" to be not only more feasible, but indeed more satisfactory.

Constitutional reform should be based upon constitutional and political realities, not exaggerated apprehension of potential, but as yet unrealized, exploitation of power. The reality is that a few causes c,lŠbres have raised the external affairs power to unwarranted prominence in Commonwealth–State relations.

Moreover, fears regarding the potential exercise of the external affairs power must be balanced against the national interest in effective Australian participation in international affairs. While it may be an exaggeration to suggest, as did Justice Murphy, that Australia would be an "international cripple" if some treaties could be implemented legislatively only by the States, Australia's capacity to conduct foreign relations would undoubtedly be impaired if that were so. This is demonstrated by the experience of Canada, where some treaties must be legislatively implemented by the Provinces, which a leading Canadian constitutional lawyer considered had "impaired Canada's capacity to play a full role in international affairs."

I lack the knowledge and expertise in international relations to assess the impact a limited legislative treaty-implementation power would have on Australia's participation in international affairs. However, Sir Anthony Mason, a former Commonwealth Solicitor-General, has expressed the opinion that

"Conduct of international affairs would be a nightmare if legislative implementation of Australia's treaty obligations were to become a matter for each State to decide."

An example of the sort of difficulty that could arise was given by the Constitutional Commission in 1988:

"A State Government may cause to have enacted legislation to implement a treaty, leading to its ratification by the Commonwealth and the creation of obligations binding on the Commonwealth. A later State Government, perhaps of a different political persuasion, might repeal the legislation. The result would be that the Commonwealth was in breach of its obligations, but without power to do anything about it."

These observations reflect the commonsense proposition that, in general, those who are empowered to undertake commitments should have the power to carry them out. Since the Commonwealth's executive power to enter into treaties on any subject (subject to constitutional limitations) is unquestioned, the Commonwealth ought to have power to ensure compliance.

Of course, this general principle is not absolute since, even on this argument, it would be the Commonwealth executive which executes treaties but the Commonwealth Parliament, including the Senate, which enacts legislation to implement them. But the Commonwealth government is effectively represented in the Senate and is generally able to secure passage of its legislative proposals. So the general principle remains applicable, and is illustrated by the converse arguments of some Canadian Provinces that, since they alone have legislative power to implement some treaties, they ought to have a correlative (executive) treaty making capacity.

Any assessment of appropriate reform of the external affairs power must weigh and balance the considerations which have been noted: on one side, the States' concerns regarding the as yet largely untapped legislative power conferred by the provision, with its potential for destroying State autonomy and thereby reducing the federal system to a mere facade; on the other, the national interest in full Australian participation in international affairs, which can only be undertaken by the Commonwealth government, which requires a government able both to undertake international commitments and to ensure that they are carried out. The resulting balance will depend upon personal political judgement influenced, no doubt, by one's general perspective on the spectrum of Commonwealth and State powers.

Moreover, constitutional reform is achieved through political action. So, while the specific subjects regulated by treaties and other forms of international co-operation are strictly irrelevant to evaluation of competing domestic constitutional considerations, they are nevertheless bound to affect attitudes toward reform of the external affairs power. So while the States must have power to be wrong as well as to be right (in other words, to implement policies of which we disapprove as well as those we support), the easy slogans "Human Rights over States' Rights" or "Environmental Rights over States' Rights" are bound to influence reform of the power. In other words, the desire of many Australians for human rights and environmental protection legislation, for example, is likely to make them unsympathetic to any proposal to restrict the external affairs power.

Finally, on the federation aspect of reform of the external affairs power, it is appropriate to note the criticism that the High Court's interpretation contradicts the intention of the framers of the Constitution, or in one critic's colourful language, "the compact which our High Court judges have been steadily tearing up". The identification of the constitutional framers, the extent to which their intention can be discerned, and its current relevance are all highly contentious issues both in Australia and the United States, but need not detain us here. Suffice it to say that, as Sir Anthony Mason has noted,

"there can be little doubt that the founders of the Constitution intended that the Parliament should have legislative power to carry into effect treaties and Conventions."

This power was expressly acknowledged by Quick and Garran in 1901 and by Harrison Moore a year later, and shortly thereafter Sir Edmund Barton, the principal drafter of the Constitution, remarked that it was "probable" that the external affairs power "includes power to legislate as to the observance of treaties between Great Britain and foreign nations."

As is well known, early drafts of section 51(xxix), including the 1891 Bill drafted principally by Sir Samuel Griffith, after whom this Society is named, had conferred on the Commonwealth Parliament power over "external affairs and treaties". The reference to treaties was dropped in 1898 in the mistaken belief that it followed from recognition that, as a self-governing British colony, the Commonwealth would not possess an independent treaty-making capacity, legislative implementation of Imperial treaties apparently being momentarily overlooked. Hence deletion of the reference to treaties in section 51(xxix) was mistakenly considered a necessary consequence of the excision of "treaties made by the Commonwealth" and "treaties of the Commonwealth" in covering clause 5. In other words, the reference to treaties was dropped from section 51(xxix) for "Imperial, rather than States' rights" reasons, the intention apparently being that the external affairs power would extend to the legislative implementation of treaties executed by the Imperial government, as Quick and Garran and Harrison Moore noted. The question whether Imperial treaties on all subjects were included appears not to have been addressed until, in 1910 in the second edition of his treatise, Harrison Moore suggested that the power was "limited to matters which in se concern external relations", a view later adopted by his student Sir Owen Dixon. Hence the evidence hardly supports a contention that the constitutional framers intended a narrow interpretation of the treaty-implementation power or, a fortiori, no Commonwealth treaty-implementation power at all. They simply never considered the question whether the treaty-implementation power should extend to treaties on all subjects.

Democratic deficit

The other major complaint regarding the external affairs power concerns the allegedly undemocratic nature of treaty-making. Treaties are made by the executive pursuant to section 61 of the Constitution, but do not have direct legal effect in the Australian domestic legal system until implemented by legislation, for otherwise the executive, not Parliament, would effectively be making law. However, treaties can have indirect domestic legal effect because it is a well-established rule of statutory interpretation that where legislation is ambiguous it should if possible be construed compatibly with treaties executed by the government, since Parliament is presumed to have "intended to legislate in conformity" with the nation's treaty obligations. This principle has been applied particularly with respect to international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), which has been employed not only to construe legislation, but also in the development of the common law.

Since ratified treaties bind Australia in international law, Parliament may feel that it has little choice but to enact implementing legislation, since Australia will otherwise be in breach of its international obligations. This will surely be a particularly significant influence on occasions when the executive has granted Australian citizens the right to complain to international bodies regarding Australian governmental conduct, as occurs pursuant to the Commonwealth government's accession to the Optional Protocol of the ICCPR.

As the Commonwealth Parliament may realistically have little choice but to pass legislation implementing treaties, it has rightly been argued that there should be broad democratic input into the treaty- making process; the treaty-implementation stage may be too late for real influence. Hence, the Commonwealth Parliament, State and Territory governments, and the general public, especially individuals and groups whose business and other interests would be affected, ought to be informed of proposed treaty- making and have the opportunity to influence Commonwealth government policy and action thereon.

Both federalism and executive accountability to the Australian community would be promoted by enabling States and Territories to influence the treaty-making process. At its Brisbane session in 1985, the Australian Constitutional Convention urged (inter alia) "full and effective" State consultation and involvement "prior to the preparation of the brief for the Australian delegation" to treaty negotiations, and recommended that the Premiers' Conference establish an Australian Treaties Council, including experts in international law and intergovernmental relations, to identify and co-ordinate State interests in treaty negotiations, provide advice on the effect of proposed treaties, and report "regularly" to State Parliaments and annually to the Premiers' Conference. This proposal was endorsed by the Constitutional Commission and two of its Advisory Committees in 1987-1988, but has not yet been implemented in its entirety.

However, the Premiers' Conference document "Principles and Procedures for Commonwealth-State Consultation on Treaties", revised in 1992, provides for the States and Territories to be informed "in all cases and at an early stage of any treaty discussions in which Australia is considering participation", for their views to be taken into account in formulating policy in regard thereto, and for State representatives to be included "in appropriate cases" in the Commonwealth delegation to conferences dealing with "State subject matters" (a concept presumably intended to be interpreted colloquially, not constitutionally, in view of the demise of the doctrine of reserved State powers in 1920). A Standing Committee of senior Commonwealth and State/Territory officers has also been established to provide assistance to the Commonwealth on the negotiation and implementation of treaties, including the identification of treaty negotiations of "particular sensitivity or importance to States", and to propose appropriate mechanisms for State involvement in the negotiations.

This would seem to represent a partial implementation of the Australian Treaties Council proposal, which the States continue to press, and which former federal Opposition Leader Alexander Downer promised to introduce if he were elected.

Commonwealth parliamentary participation in treaty-making is essential to ensure wide community involvement in what is essentially the first step in the legislative process of treaty implementation. The tabling of treaties in Parliament dates back at least to the 1920s, and in 1961 Prime Minister Sir Robert Menzies undertook to table treaties "as a general rule" at least twelve sitting days before Australia became bound by them. However, although never formally revoked, the Menzies rule is "honoured mostly in the breach", with treaties generally being tabled in bulk twice each year, frequently after Australia has become bound by them, thereby foreclosing any parliamentary participation in the treaty-making process. A government statement in October, 1994 suggested a renewed commitment to tabling treaties prior to ratification, but in a later statement the Foreign Minister refused to agree to a minimum period for tabling, confirmed that tabling would continue in twice-yearly batches, and remarked that

"Tabling treaties is not intended to be an exercise in ascertaining Parliament's views about whether or not Australia should become a party."

Tabling is, therefore, presumably intended merely to inform Members of Parliament and the general public of action already taken, which is hardly consistent with principles of executive accountability and democratic government. Recent tabling practice confirms this perspective: of 36 treaties tabled on 30 November 1994, for instance, approximately two-thirds had already come into force.

The principle of responsible government entails governmental accountability to Parliament for all executive action relating to treaty-making, not merely the final step of ratification or accession. This can be effected only if proposed treaties are laid before Parliament at the latest prior to ratification or accession. Thus former Opposition Leader Downer's promise to enact legislation requiring treaties to be tabled in Parliament prior to ratification, and to establish a Joint House Treaties Committee to consider the implications of proposed treaties is a commendable reform which it is hoped his successor will honour. But is laying before

Parliament sufficient? Should Parliament, and thus effectively the Senate, be able to veto executive ratification of treaties?

Parliamentary veto or disallowance was proposed by a former State Premier and two distinguished constitutional lawyers on the Constitutional Commission and its relevant Advisory Committee, and the Australian Democrats recently introduced a Bill in the Senate to effect it. The principal argument in its favour is that it would give "teeth" to parliamentary consultation, which could otherwise become a merely empty ritual even if tabling prior to ratification were required. However, the proposal runs counter to the political separation of powers notions in Westminster systems, under which treaty-making is a purely executive function, even if it is the first step in a process which may (but need not) eventually lead to legislative implementation. Unlike the United States, in our legal system treaties do not have domestic legal effect, as has been noted. For that to occur, they require legislative implementation, which can always be blocked by the Senate, subject to the operation of section 57 of the Constitution.

Moreover, it is conceivable that parliamentary veto of treaty-making would fall foul not merely of the political separation of powers, but the legal separation of powers as well, the argument (which I do not endorse) being that it would unconstitutionally interfere with the vesting of executive power in the government by section 61 of the Constitution. Professor Enid Campbell, for example, has queried whether Parliament "could legislate to make itself party to the treaty-making power", and remarked:

"Although the separation of the legislative and executive powers has not been enforced with the same strictness as the separation of the judicial power from the other powers, it may well be that the legislative authority of the Parliament does not extend to the making of laws under which the Parliament takes unto itself or its Houses power which is considered to be executive in character."

In any event, the significance of parliamentary veto of treaty-making should not be overrated for, while it would probably make parliamentary consultation more effective, it is unlikely greatly to reduce the range of multilateral treaties entered into by Australia. It is, for example, improbable that State or Senate consultation or even a Senate veto would have prevented ratification of at least some of the treaties upon which controversial domestic legislation has been based. Thus, the International Covenant on Civil and Political Rights would almost certainly have been ratified in any event, and the same is probably true of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage which was in issue in the Tasmanian Dam Case. On the other hand, that may not be so in respect of the ILO Conventions underpinning portions of the Industrial Relations Reform Act 1993.

2. Criteria for reform

In light of the above, the criteria for evaluating reform of the external affairs power can be stated briefly.

1. In view of the difficulty in securing the referendum majorities to amend the Constitution, and thus of correcting any ill-advised alteration, constitutional amendment should be attempted only for reforms for which a very strong case has been established; as former-Senator Peter Durack aptly noted, the amendment "may well turn out to be a lemon". So, in general, to adopt a much-quoted aphorism: If it ain't broke, don't fix it.

2. The principal motive underlying proposed reform of the power is concern regarding its effect on the federal balance of power. But that balance should be viewed organically, not statically, and thus as capable of evolution and adaptation to changing circumstances. That is essentially what has occurred in the case of the external affairs power: a power to implement treaties and enact legislation necessitated by international relations has evolved in tandem with the expansion in volume and diversity of international intercourse, including treaty-making.

However, it is not so much the present exercise of the external affairs power which appears to concern those advocating a contraction of the power, as apprehension regarding its potential future use. But the first criterion for constitutional reform suggests that only a clear and present threat to State autonomy would warrant constitutional amendment. Hence, it seems premature to undertake preventive constitutional reform which may well prove unnecessary.

3. Any contraction of the external affairs power must be balanced against the national interest in effective Australian participation in world affairs, bearing in mind that requiring the Commonwealth to rely upon the States to implement some treaties necessarily involves some impairment of its conduct of foreign relations. How much impairment is acceptable in the interest of preserving State autonomy is a matter for political judgement.

4. To prove workable, any limitation on the treaty-implementation power must define the subject-matter of treaties eligible for implementation under section 51(xxix) by reference to criteria suitable for judicial determination; in other words, by reference to issues falling within judicial expertise, and not largely dependent upon the exercise of political judgement. Limiting the treaty-implementation power to treaties involving matters of "international concern", for instance, would not satisfy this requirement, for that criterion inherently requires judgement on matters of politics and international affairs, which ought not to be the province of judges. As Chief Justice Mason has remarked:

"[I]t is impossible to enunciate a criterion by which potential for international action can be identified from topics which lack this quality.... [There are no] acceptable criteria or guidelines by which the Court can determine the `international character' of the subject-matter of a treaty."

Indeed, as he rightly noted:

"It is scarcely sensible to say that when Australia and other nations enter into a treaty the subject-matter of the treaty is not a matter of international concern – obviously it is a matter of concern to all the parties."

One limitation which would satisfy the requirement of imposing criteria suitable for judicial resolution is that adopted by Chief Justice Gibbs in 1982 in defining "a law with respect to external affairs" as one which, "whatever its subject-matter", "regulates transactions between Australia and other countries, or between residents of Australia and residents of other countries."

This criterion was essentially adopted by Liberal Senator Peter Durack in proposing a constitutional amendment in 1984, although he has since abandoned it. One may query whether this limitation would not excessively impede the conduct of Australian foreign relations.

5. The constitutional principles of federalism and representative and responsible government entail that the Commonwealth Parliament and the States be consulted on treaty-making prior to treaty ratification or accession, but a Commonwealth parliamentary veto on treaty-making would

appear to be inconsistent with the separation of powers. That inconsistency would not, of course, preclude a constitutional amendment to authorize such a veto.

3. Evaluation of Dr. Howard's proposal

Dr. Colin Howard has proposed that section 51(xxix) be amended by adding after the words "external affairs":

"Provided that no such law shall apply within the territory of a State unless:

(a) the Parliament has power to make that law otherwise than under this sub-section; or

(b) the law is made at the request or with the consent of the State; or

(c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia".

This proposed amendment would reduce the Commonwealth's independent power over external affairs to one dealing with diplomatic representation. The only treaties which the Commonwealth could implement legislatively without State consent would be those dealing with diplomatic representation or subjects otherwise within Commonwealth legislative power, thus effectively reversing the opinion of every High Court justice who has considered the power.

The proposed amendment would clearly protect State autonomy but, with respect, can hardly be considered a finely-tuned attempt to balance concerns regarding State autonomy with the effective conduct of Australian foreign relations. It is probably the narrowest view ever proposed for the power; certainly far narrower than Chief Justice Gibbs' view in Koowarta, and narrower even than the proposal of Dr John Finnis, supported by the governments of Queensland and Tasmania, which would have included power to give effect to Australia's international obligations in relation to air traffic and fugitive offenders, as well as diplomatic representation. That proposal was considered "unduly restrictive", and was therefore rejected by the Constitutional Commission and its Advisory Committee.

Moreover, the proposed amendment appears to restrict the external affairs power beyond the constraints warranted by the preservation of State autonomy for, depending upon the interpretation of the words "apply within the territory of a State", it seems that it would exclude legislation penalizing overseas conduct, which the High Court upheld in the War Crimes Act Case in 1991. It is difficult to see what purpose is served by disempowering the Commonwealth from enacting such legislation, since it would generally fall outside the legislative capacity of the States. So, in this respect at least, the proposed amendment would restrict Commonwealth power without conferring any corresponding benefit upon the States.

In conclusion, it will be apparent that I do not favour this proposed amendment. I consider it unduly restrictive of Commonwealth power, and as likely to hamper the conduct of Australian foreign relations beyond the reasonable requirements of protecting State autonomy. Moreover, it is so restrictive of Commonwealth power that no Commonwealth government – of either political party – would support it, making its prospect of adoption zero. On the other hand, I agree with former Senator Peter Durack that political constraints offer a more appropriate means for confining the operation of the power. To that end, greater participation in treaty-making and implementation by the Commonwealth Parliament, State and Territory governments, and the general public should be encouraged, and secured by institutional mechanisms established, if necessary, by Commonwealth legislation. Only if such political constraints have been given a fair trial and proven inadequate to address the States' reasonable concerns should constitutional amendment be contemplated.

of that treaty. This means that, given the presence of an appropriate treaty to which Australia is a party, the Commonwealth can legislate on subjects outside those otherwise allocated to the Commonwealth under s.51 of the Constitution, and indeed on any subject at all.

An interpretation of one head of power which is at odds with the very scheme of allocating legislative power to the Commonwealth only in limited and defined subject-matter areas must, it is said, be suspect. And this is but a consequence, it is further said, of ignoring a fundamental canon of construction of any legal document, whether it be a will, a contract, a statute or a Constitution. That canon of construction is that words or phrases should not be isolated from their context and interpreted literally, but should take their meaning from the nature and purposes of the document taken as a whole. Words are empty shells, into which meaning must be poured from the surrounding circumstances.

These impeccable principles of interpretation were invoked prior to 1920 in aid of the conclusion that the heads of Commonwealth power in s.51 of the Constitution were to be read in the light of, and subject to, the general rule that certain areas of power were "reserved" to the States. On this reasoning, it might have been held, for example, that in view of the States' traditional and important responsibility for the law and administration of title to land, the power of the Commonwealth in s.51(xxvi) of the Constitution to make laws with respect to "the people of any race" (if in those days the power had encompassed the Aboriginal people) was insufficient to support an Act in the nature of the Native Title Act 1993. However, in the landmark Engineers Case, the seventy-fifth anniversary of which falls this year, the High Court relied on equally impeccable principles of interpretation – with particular emphasis on the ordinary and natural meaning of the text and the avoidance of vague, subjective and elusive limitations implied from the nature of the polity – to deal the "reserved State powers" doctrine a blow from which it would never recover. Thus, when the eloquent minority in the Tasmanian Dam Case sought to invoke the canon of contextual constraint, they had to struggle to recreate a doctrine of "federal balance" which, although it had common roots with the doctrine of reserved powers, had somehow to be distanced from it.

It is surprising in some ways that the Engineers Case has been so sacrosanct. No doubt it suited the times – galvanised by the First World War, a more national Australian identity had begun to emerge and was soon to find expression in the developments that led to a redefinition of the relationship with Great Britain in the Statute of Westminster 1931. But its streak of literalism has had a profound effect on constitutional interpretation. Strands of this literalist thinking can be seen in major decisions on, for example, the Commonwealth's interstate and overseas trade and commerce power in s.51(i) of the Constitution and the Commonwealth's tax power in s.51(ii). The former has been held to allow the Commonwealth to achieve major environmental protection objectives, simply by making compliance with environmental requirements a precondition to export, and indeed any kind of regulation could be hung off the export power in this way. The latter can also be used to regulate any activity at all, simply by way of tax incentive or disincentive rather than by direct prohibition. In neither case is it an objection that the activity in question would otherwise fall outside the ambit of Commonwealth power.

The High Court has at times flirted with the idea of adopting a more purposive approach to those kinds of questions, in order to identify what the Commonwealth law in question is "really" about. But the abstract or literalist or textual emphasis has remained, for a variety of reasons. Not the least of these reasons is a disinclination on the part of the judges to decide questions of validity by reference to criteria that are so elusive and subjective that they are in truth more political than legal, or at least incapable of yielding any certainty or of avoiding capriciousness in their application.

This leads me to my first reason for thinking that the current interpretation of the external affairs power is appropriate. There is no alternative, narrower view, in my opinion, which offers a viable, practical and judicially workable touchstone of validity. By and large the critics of the

current interpretation have not sufficiently addressed this question, although I was interested to see that Peter Durack conceded the point in his address to the Society in 1993.

All of the proposed narrower tests of validity under the external affairs power have turned on the idea that, for a treaty to be capable of domestic implementation by the Commonwealth, the subject- matter of the treaty must itself be inherently international in character. It must derive that character from something outside the treaty, from something other than the mere existence of the treaty. This approach is not merely subjective and elusive. It also puts the Court in the invidious position of second-guessing the political judgment that has been made that the subject-matter of the treaty is a matter of significance in Australia's international relations. This is particularly and obviously so when the test of validity is put in terms of whether the matter is a matter of international "concern", the test which the Tasmanian Dam Case minority felt bound to accept after the Court's decision upholding the Racial Discrimination Act in Koowarta's Case. It may be less so on the somewhat narrower view of the Koowarta minority, who appeared to require a "relationship with countries, persons or things outside Australia", evidently implying some sort of direct physical or transactional connection. However, even that test, unless confined strictly in its application to diplomatic relations and extradition, seems open to the same criticism.

I will not pursue this point any further, except to say that if there are any amongst you who are comfortable with an activist Court determining which international treaties are appropriate for the Commonwealth to implement and which are not, and as a corollary of course striking down legislation implementing those in the latter category, then I would be interested to hear whether you are also comfortable with the Court's recent activism in the area of implied constitutional rights. The issues are not quite the same, but the parallel serves to focus attention on the broad question of what is the proper role of an unelected court in second-guessing the judgments of our elected representatives.

Perhaps partly because of these considerations, although partly also a function of resignation to the general acceptance these days of the broad view of the external affairs power, attention has turned to solving the perceived problems of the broad view either by constitutional amendment or by political arrangements. I have already said that I favour the latter course. But first let me briefly add another reason in support of the view that the High Court's current interpretation of the external affairs power is appropriate.

This reason may strike you as over-simple, but it is based on a principle of interpretation as impeccable as any that I have mentioned thus far. The power was always intended to permit the domestic implementation of international treaty obligations, and its wider ambit today is a function simply of the steady growth this century of subjects judged by the international community to be appropriate for international agreement. It is the facts that have changed, not the legal meaning of the power. Some lawyers like to think of this in terms of the difference between the "connotation" of the power and its "denotation". It is not dissimilar to the quite uncontroversial approaches to other Commonwealth powers expressed in generic terms which have resulted in, for example, the trade and commerce power extending to commercial air travel, and the "postal, telegraphic, telephonic and other like services" power extending to the electronic media, even though aircraft, radio and television were unknown to the framers of the Constitution.

It is true that Australia's involvement with international treaties before 1900 was very limited, and it is also true that Great Britain continued for some thirty years after 1900 to be mainly responsible for the conduct of Australia's international relations. But to limit the power by reference to those considerations is, I think, to confuse the particular examples for the general principle (not to mention the difficulty discussed earlier of anchoring those limits in judicially manageable criteria). The vast range of matters today the subject of international concern, discussion, negotiation and agreement was beyond the contemplation of the framers of the Constitution, but the insight that domestic legislation might be necessary to implement treaty

obligations undertaken by or on behalf of the Commonwealth was not. This was recognised by a strong majority of the High Court nearly sixty years ago in the Goya Henry Case, and, to refer again to Peter Durack's 1993 paper, I was interested to read his observation that had those judges sat on the Tasmanian Dam Case they would have come to the same conclusion, that is, they would also have upheld the validity of the World Heritage Properties Conservation Act.

As the debate has really moved on from the judicial interpretation of the external affairs power to other ways of attacking the perceived problems, I shall make only two further observations on this aspect of the matter. First, the correctness or otherwise of the High Court's current view is not entirely irrelevant to the question of constitutional amendment. Obviously, if the High Court has got it wrong, that in itself is an argument for amendment. If the High Court has got it right, that does not of course preclude amendment to achieve an arrangement perceived to be superior. But to the extent that it is said that the Constitution should be amended to correct error on the part of the High Court, then for the reasons I have given I do not agree.

Secondly, although I lapsed just now into the convenient shorthand of "right" and "wrong", I remind you, as I said at the outset, that there are no absolutes here. It is a matter of which view you find more persuasive. It would be perverse to deny that there are respectable arguments on both sides. It is of intense interest to me to inquire into why we are persuaded to one view or another. Is it an abstract judgment about the intellectual rigour of a particular argument? Is it a function of our life experience, including whether we come from a large or a small State, or from a privileged or a deprived background, or from a conventional or an alternative family? Is it related to our early childhood experiences? But these are questions of psychology. They merit further investigation, but perhaps not today.

Political constraints

In any event, the upshot of the current interpretation of the external affairs power is that there are few limits of any significance on the ability of the Commonwealth to extend its reach into almost any field of human endeavour. Perhaps partly for this reason, some of the judges have applied a fairly strict test to determine whether legislation passed in pursuance of a treaty is indeed a faithful and appropriate implementation of that treaty, or, in other words, to ensure that the treaty is not merely a peg on which to hang a law dealing indiscriminately with whatever is the general topic of the treaty. Another suggested limit, that the treaty be entered into bona fide, is generally acknowledged to be a weak reed. But the fact that there may be few if any real legal limits on the external affairs power does not mean that there are not political limits. I mentioned earlier that the tax power can be used in a similar way to regulate any field of endeavour by way of tax incentive or disincentive. This is, however, largely theoretical and impractical. The political constraints are obvious. The same might be said of tied grants to the States under s.96 of the Constitution, although that power has historically been used in ways which may reasonably be thought to be inimical to the "federal balance".

I know that it will not satisfy you merely to say that the limits to the exercise of the Commonwealth's external affairs power should be left to be worked out in the political arena. In the political arena, the powerful are likely to prevail. In the absence of legal limits, it is the Commonwealth which will make the ultimate decisions about participation in treaties and about their implementation in Australia, and it is the Commonwealth whose legislation will override that of the States. Under these circumstances, you may think that to leave it all to politics is something of a cop-out.

I think that that would be a simplistic view. In our mature, democratic society we endeavour to work through our representative institutions and to put in place sensible, balanced and rational policies after widespread consultation. The unilateral use of the external affairs power by the Commonwealth, and the unfettered power of the Commonwealth executive to undertake treaty obligations, have been intensely controversial. But these issues have also – indeed, as a consequence of the controversy – been the regular subject of public discussion and enquiry, the latest of which is the wide-ranging reference on the external affairs power to the Senate Legal

and Constitutional References Committee. The nature of the political constraints which might be imposed on the exercise of the power, at least in terms of formal mechanisms, is in a state of great fluidity, but the state of the debate is a healthy sign – if I am not being too optimistic – of our democratic institutions at work.

The political constraints that might be imposed – and I am talking here of the formal mechanisms for decision-making rather than the informal sensitivities to public opinion on particular proposals – fall broadly into two groups. The first relates to the relationship between the Commonwealth Parliament and the Commonwealth executive, and in particular to parliamentary participation in and oversight of the treaty-making process. The second relates to the relationship between the Commonwealth and States. The two are of course not entirely unrelated, particularly to the extent that the Senate – theoretically the voice of the States in the federal arena – might be given an enhanced role.

There is a strong case, in my opinion, for greater parliamentary scrutiny of treaty-making. The entering into of international agreements is, and should remain, an executive function. It is an integral part of the conduct of our foreign affairs. But given the role of Parliament in the domestic implementation of treaty obligations, and the more general arguments for enhancing Parliament's role in the interests of a healthy democracy, it would be unsatisfactory for Parliament to be first apprised of a treaty only when a Bill is introduced for its implementation. It would also be unsatisfactory for Parliament to be unaware of and uninvolved in international obligations undertaken by the executive that do not require domestic implementation. The greater the exclusion of the Parliament from the process, the greater the inconsistency with fundamental principles of accountability.

The practice in relation to the tabling of treaties in Parliament has varied over the years, as has the policy of whether that tabling is to enable Parliament to form a view on whether the treaty should be ratified or whether it is simply for information. The current practice of tabling treaties in bulk every six months is clearly not designed to allow Parliament any active role. Indeed, many of those treaties will already have been ratified. On the other hand, a list of all treaties currently under consideration is now being published regularly in the Department of Foreign Affairs and Trade's monthly magazine Insight. This is not a substitute for tabling in Parliament, but tabling can be seen as part of the wider process of community consultation.

It is, however, the purpose of the tabling which is critical. If it were a preliminary step towards enabling either or both Houses of the Parliament to approve or to disallow ratification, that would give the Parliament a more determinative role than if ratification were simply made conditional upon the treaty having lain on the table for a given period. One could of course combine these two ideas and make ratification both conditional on prior tabling and subject to subsequent approval or disallowance. But a point will eventually be reached where the retarding effect of enhanced scrutiny will seriously detract from the practical effectiveness of our participation in international affairs. It is all a matter of getting the right balance, a consideration to which I will return in a moment.

One of the difficult questions is whether restrictions in the nature of tabling as a precondition to ratification should be statutory restrictions or simply agreed practices. We could of course even attempt to elevate them to constitutional restrictions, but this would surely inject too much rigidity into an area where exceptions will sometimes be necessary and where practices evolve in the light of experience. There are legal and practical difficulties also with a statutory regime, and in this respect I commend to you the characteristically thoughtful submission of Professor Enid Campbell to the Senate Legal and Constitutional References Committee. I must say that I lean towards parliamentary participation as a matter of agreed practice rather than of binding law, but that is a matter of judgment on which reasonable minds can differ. And when it comes to disallowance, it is difficult to see, as a practical matter, a government subjecting itself to a Senate veto.

To introduce another point, there is much to be said, I think, for having a standing committee of the Commonwealth Parliament for the scrutiny of treaties. But parliamentary involvement at the Commonwealth level, although it might help to democratise the treaty-making process, does not directly meet the concerns of those who would wish to see a more significant role for the States. In this respect, there have been various proposals for an Intergovernmental Treaties Council. Again it may be debated whether such a body should be purely advisory and only informally constituted, or whether it should have a statutory basis and functions that legally constrain the power of the Commonwealth executive. Although falling well short of a broadly representative Treaties Council, it was agreed at the Special Premiers' Conference in July, 1991 that there would be an Intergovernmental Standing Committee on Treaties, and also that the pre-existing Principles and Procedures for Commonwealth- State Consultation on Treaties would be reviewed. There is also a veritable horde of Ministerial Councils and committees of officials in particular areas. But, as in the case of appointments to the High Court, we are left in no doubt that the existing mechanisms are consultative and not determinative. As Enid Campbell points out in her submission to the Senate Committee, "It would be extremely difficult to run, in tandem, a legislative regime under which both the Houses of the federal Parliament and a Treaties Council have a secured stake in the treaty-making process". This goes to the matter of balance which I touched on earlier. The treaty-making process should be democratised, and the legitimate interests of the States should also be vindicated. But at the same time the freedom of executive action should not be so constrained that, to use the words of someone who is probably not your favourite High Court judge, Australia would become an "international cripple".

The question of constitutional amendment

It is precisely because it is a matter of balance that I believe it is preferable to seek that balance within the flexibility and fluidity of political arrangements, rather than to etch it in stone by way of constitutional amendment.

Returning now to this question of constitutional amendment, we are talking here primarily about the balance between Commonwealth and State legislative power, rather than about the appropriate degree of constraint upon Commonwealth executive power, the latter debate taking place against an assumed background of unlimited Commonwealth legislative power, and indeed as an indirect way of pegging back the unlimited potential of that power. However, the arguments are similar in kind: how to balance our ability to speak internationally with a single voice, and to act decisively as a nation in international affairs, against the important benefits and values of our domestic power-sharing arrangements, which are designed to allow the input of diverse interests and perspectives, including but not limited to those represented by our groupings into communities called States.

When it comes to the balance between Commonwealth and State legislative power in the implementation of treaties, experience demonstrates that the greater the necessity or occasion for State legislation, the greater is the potential for delay, lack of uniformity, and even for action by one State to put Australia in breach of an international obligation.

You may well say that that is the price that must be paid to avoid the destruction of our federal system. It depends, I think, on whether you see the federal system primarily in terms of legally enforceable and perhaps fairly static lines of demarcation, or alternatively in terms of more fluid arrangements that can respond to changing political exigencies without necessarily denying a role to the component parts of the federation. I have made clear my own preference for preserving the current potential of the Commonwealth's legislative power in relation to external affairs, and for striving to vindicate our federal values through appropriate political arrangements: that is my preferred balance. I do not believe that this entails the destruction of our federal system. There is no single, right model for a federal system. There is just a range of widely differing systems which exist in fact.

For clarification, let me just add that I am giving here my own view of the desirable balance that the Constitution should strike in the area of foreign relations. My conclusion is that constitutional

amendment is unnecessary. But this was not a factor in my earlier defence of the appropriateness of the High Court's current interpretation of the external affairs power, although some of the judges may have appeared to invoke such a consideration. My defence of the current interpretation was based on traditional principles of interpretation and on the elusiveness and invidiousness of any narrower view, invidiousness in the sense of casting the judges into an unacceptably political role. It would be consistent with that defence to say that the end result is undesirable and that the power should be narrowed by constitutional amendment. However, that is not my view. In my view the end result is desirable. But that is (at least in this case) a separate matter from (although equally consistent with) the correctness or appropriateness of the High Court's interpretation of the power.

I have not yet commented directly on Colin Howard's proposed amendment. Clearly, I am opposed to it, irrespective of its precise form. But I would add that it appears to narrow the external affairs power to a considerably greater extent than some like-minded critics of the current situation seem to think necessary or appropriate. I keep going back to Peter Durack's 1993 paper, for although I disagree with it on some fundamental points, I also think that it contains many thoughtful and sensible observations. Senator Durack, as he then was, put forward his own suggested amendment to the external affairs power, which was somewhat broader than Colin Howard's current proposal. In the course of doing so, he observed that whereas another proposal was "too restrictive of Australia's role as a member of the international community", his proposal left "room for flexibility in its application to new and unforeseen developments in the political world, at the same time preserving a significant role for the States". Peter Durack's preferred balance is, I think, closer to the mark than Colin Howard's.

Conclusion

However, these things are somewhat subjective, and, as I said earlier, our positions on these matters may be at least partly the result of rather dimly perceived psychological factors. The Samuel Griffith Society is – and is I think proud to proclaim that it is – a conservative Society. That is, it is dedicated to conserve and defend the existing Constitution, or at least the perceived virtues of the existing Constitution such as federalism and decentralisation of power. What makes one of us a conservative, committed to the preservation of existing values, and another a radical, committed to experimentation and change? What makes one of us a centralist and another a States' righter? What makes some of us passionate about these issues and others indifferent?

I don't know. No doubt we take our respective positions because we think they are right. But none of us can be right, surely, in any absolute sense. The truth is that we differ in our values and our judgments, and probably without really understanding why. These values and judgments are of course not necessarily constants. They may yield to life experience, or even respond to the direct attempts of others to persuade. The lawyer's craft, after all, is the art of persuasion. But if we step over the line between certainty in our belief and certitude, between confidence and dogmatism, then we would not be according to each other the respect that is a precondition to dialogue. As Julius Stone used to say of the task of judges in making difficult choices, it is necessary to delicately steer a course between baseless dogmatism and paralysing doubt.

I began with Carmina Burana and my astonishing vision of the High Court on fire. Of course it was an illusion. You may think that that is also an appropriate metaphor for the High Court's interpretive techniques. But the Court's interpretation of the external affairs power has had and continues to have real consequences for the nature of the polity. I have argued that those consequences are not inappropriate, and that an acceptable balance between the need on the one hand to have the capacity to pursue a robust and incisive foreign policy, and, on the other, to involve in that process all of the relevant stakeholders, is capable of being hammered out in the political arena. I am sure that if I had only brought with me the orchestra, the choir and the fireworks from Carmina Burana, then I would certainly have persuaded you.

Reprise: Discussion by the three Contributors

1: Professor George Winterton

I want to say something about State constitutional reform, and also perhaps expand my previous comments about a few causes c,lŠbres. I do want to emphasise that, the way I see it, it is largely the potential of the power rather than its exercise that really concerns people.

If you think back on the cases that have been before the High Court on the external affairs power, we first had the Burgess Case, where a lot of what could have been done under the power effectively could have been done under the commerce power, and the same is true of the Airlines of NSW Case. Then we had the Koowarta Case, which admittedly rested on the decision there in relation to the Racial Discrimination Act s validity, which did rest on the power, and I ll highlight that point in a moment. The Franklin Dam legislation was upheld also under the corporations power – they effectively didn t need the external affairs power at all. So really, although that case of course was a critical one in determining the large ambit of the power – that the Commonwealth could implement a treaty on any topic – strictly speaking the ability of the Commonwealth to stop the building of the Franklin Dam did not rest solely on the external affairs power. It rested on it as well as the corporations power, but it could have been done under the corporations power, and the Aboriginal power also would have played a role in that.

The industrial relations legislation which is before the High Court – of course we don t know the outcome of that – rests also on other powers, and may well be upheld. It rests also on the corporations power and the arbitration power. Certainly the commerce power (the interstate and foreign commerce power), especially if it is interpreted in a more modern form as Chief Justice Mason has suggested – and I think rightly so, perhaps not necessarily going down the American path, although that itself is under review by the Supreme Court of the United States – will also support a lot of Commonwealth activity.

When I said earlier that a lot of people would oppose, even though illogically, the reform of the external affairs power on the grounds that they actually like the policy results that flow from it, I think that s an important point to be borne in mind.

It is the case, and I m sure all of you agree, as a matter of federalism, that if you think the States have the power to be right, then they have the power to be wrong. If you think the States have the power to regulate, for example, sexual relationships or criminal law, then they have the power to take action that one may not approve of, just as much as they have the power to take action one approves of. That s an obvious fact that s often omitted, lost sight of, but the fact of the matter is of course that people in voting on a constitutional amendment would take into account what policy results might flow.

Bearing in mind the ability of the Commonwealth to regulate a great deal of economic activity under the commerce power – particularly if it is interpreted in more modern form, which I think is extremely likely from the High Court at the moment – and from the corporations power and other powers, I think one could say essentially that the main area where the Commonwealth would be using the external affairs power, where people might like it to be used, is in the area of individual rights. After all, of the High Court cases I mentioned, the only one that specifically rested solely on the external affairs power was Koowarta, upholding the Racial Discrimination Act.

The other recent outcry in some quarters about the use of the external affairs power concerned the sexual privacy law, and Colin Howard earlier mentioned the Sex Discrimination Acts, Equal Opportunity Acts and so on. It s really in the area of human rights: I think one could say essentially that if one was looking at where the Australian community might resist reform of the external affairs power because they value the results, it would be in the area of human rights. And this really picks up the point that was suggested by an earlier question about individual liberty. Surely the way to head this off, if we re really trying to protect the States and also, if you

like, to make out the best political case for reforming the external affairs power, is for the States to get their own houses in order.

The State Constitutions are, by and large, an awful mess. The only State Constitution that post-dates the second World War is Victoria's, enacted in 1975. The Queensland Constitution in origin dates back to 1867, New South Wales to 1902, Western Australia has two Acts of 1889 and 1899, South Australia's to 1934, and Tasmania s to the same year. The only one that post-dates in any way, in any coherent form, the second World War is Victoria s.

The State Constitutions are rather unexplored territory. People focus solely on the Commonwealth Constitution. Perhaps I could urge this Society, one day, to devote one of its Conferences to focus on the State Constitutions. That would be a very good idea, I m sure most of you would agree with that. But practically, if the State Constitutions, for example, included substantial protection of rights, which I m sure most of you would agree with, the political case for the Commonwealth to interfere in that area, like proposing rights based on international instruments, would have a lot less political weight.

The argument that we re allowing Libya to run our human rights policy is not a popular one, and people I think are in two minds about this. On the one hand the public, if you ask them, would favour certain rights; on the other hand they certainly wouldn t particularly think that the implementation of international instruments is the ideal way to do it. As I mentioned before, it prevents the Commonwealth, for example, adopting the language for a Bill of Rights that it might think preferable. It couldn t, for example, adopt the Canadian Charter; it has to adopt the International Covenant on Civil and Political Rights, even though most people might think the Canadian Charter is preferable.

So my suggestion is really that the thing to do is to focus on rights, and to protect them in the States; and if that s done, the Commonwealth's political case for using the external affairs power to protect rights will be greatly diminished. And if in fact they insist upon interfering-as it might be seen – in imposing their own particular conception of rights, based upon some international instruments, I think public opinion will move in a much stronger way against the use of the external affairs power, and the case for reform along the lines suggested – perhaps not as narrowly as Colin Howard s amendment, but whatever the particular form – will be greatly strengthened. Thank you.

2: Professor Michael Coper

Mr Chairman, I m the most recent speaker, so there s very little that I need to add. Perhaps just very briefly I can make this point, that I think a lot of this depends on how we see ourselves. We of course group ourselves in all sorts of different ways. We might see ourselves as part of the world community; we might see ourselves as part of the Australian community, as Australians; we might see ourselves as part of a State, or as part of an even smaller local community, and all of those things are valid. Where we differ, I suppose, is at what level we think different decisions should be made, and as George mentioned earlier, it is something of a spectrum and different views are possible. But what is the Commonwealth, after all? It is only us, it s us as Australians from a national perspective, rather than from a State or local perspective. Sometimes we speak as if the Commonwealth is something else, some external foreign alien, visiting from outer space, but it s us. We are part of the Commonwealth. The question of what decisions should be made at that level as against the local level is what the debate is all about.

What I have tried to argue is that we should exercise some caution against asking too much of the judges in setting the limits about where decisions should be made, and that we should endeavour to work it out through the political process.

Now in this respect there is a lot of room to improve our representative institutions. There is a lot of room for making both the Commonwealth Parliament and the State Parliaments more representative and responsive institutions, especially the Commonwealth Parliament, where the theory of the States having a voice through the Senate has of course not been all that significant in the way things have worked out, with party politics and other things. But I think that if we

focus our attention too much on the law of the Constitution, and too much on the role the judges might play, we are not going to focus enough on working harder at the political level to vindicate our values such as federalism and sharing of power. We are not going to work hard enough at sorting those things out in the political arena. I believe it is possible, and you might think I m being too sanguine, too optimistic about this and that the Senate Committee will just be another committee report, and if you take the attitude of the present Government, for example Senator Evans statements, you don t get much comfort for those who want more parliamentary scrutiny of the executive government process, but I think these things are possible, and I think that is the arena in which I would be focusing my attention. Thank you.

3: Dr Colin Howard

While it is fresh in my mind I really would like to commend my two critics on their increasingly touching faith in politicians. It is really quite heartening. I also would like to thank Michael for the kind things he said about one of my books. I make two comments about that. By the mere process of writing a book I do not undertake to stop thinking, but rather reserve the right to change my mind. Secondly, if anything I wrote in that book has influenced what he has had to say today, I rather regret it.

I also refer to another striking observation, which I consider really splendid, namely, Michael s comment that as he and George rarely agree about anything, the fact that they agreed about this matter must increase the chances of their being right.Now without directly disagreeing with that, my own view is that equally it increases the chances of their both being wrong, which of course is exactly what has happened today.

I wonder if I might assist the further discussion by circulating copies of the proposed amendment to which I was speaking. One or two people have pointed out that there might be a difficulty in recalling exactly what it was I was proposing.

Let me draw your attention to two sentences in my proposed amendment, labelled (a) and (b). The (a) sentence reads unless the Parliament has power to make that law otherwise than under this sub- section . All that that says is that there is no intention in this amendment in any way to diminish the legislative powers of the Commonwealth under any of the other enumerated sub-sections. The significance of that is that some of the observations that my colleagues have made suggest that my amendment would greatly narrow the scope of Commonwealth legislative powers, which they also seem to feel would be a very bad thing.

The truth is that if you take the originally enumerated powers of the Commonwealth, and if you add in the very expansive principles of interpretation that the High Court has developed throughout the history of the federation, you will find that that covers an enormous amount of ground. The Commonwealth really does have enormous legislative power. And that legislative power covers a wide variety of topics, probably about half of which are very rarely used at all, or at least not challenged. In addition to that there is the back- up of s.109 over-riding State laws; now that gives an enormous amount of Commonwealth legislative power.

Now I go from there to the argument, which appears to be quite strongly pressed, that another effect of the amendment that I have proposed is that it would hamper the Commonwealth in its conduct of foreign policy. I recall, as being absolutely spot-on, the observations made by Sophie Panopoulos, in which she said she couldn t see how this in any way constrained the Commonwealth in that regard. There is no point in seeking to elaborate that point, which seems to me perfectly obvious. The Commonwealth, if it were operating under an external affairs power amended in the way I have suggested, would simply continue to conduct foreign policy in whatever mysterious way it wishes to, making plain from the outset that on certain subjects it will have to seek the consent of the States, or that other conditions will have to be met before the treaty can be ratified. Providing it makes that perfectly clear in its conduct of foreign policy, I cannot see how there can be any constraints.

The point we are trying to constrain, or that I at any rate would like to constrain, is having the Commonwealth using the fig leaf of the external affairs power, and the conduct of foreign policy, in order to acquire yet further extensions of its domestic program.

Now George in his most recent remarks gave a very good run down of the number of leading cases on the external affairs power in recent years where there was seemingly no need to invoke the external affairs power at all; and I thought that was very telling.

We are not a homogeneous country, within our own polity, either geographically or historically. We are homogeneous compared with some others, no doubt, but within ourselves we are not all that homogeneous. There is plenty of room for difference in all sorts of policies, criminal law, for example, being one. Someone has pointed out just recently, not for the first time, that we have in fact the potential in this country to conduct a continuing social laboratory, to find out how things work. We are never going to find out how things work, by contrast, if everything becomes unified and imposed from the last place in the country that seems to be likely to form a reasonably accurate view of what s going on out there.

Now the second sentence in my proposed amendment is (b), whereby the law is made at the request or with the consent of the State . Now that is directly relevant to what I have just said. There are plenty of so- called foreign policy issues which in my view should not be, in effect, determined at the whim or at the speed at which executive government today determines them. I cannot see how that can be any kind of a threat to anybody or anything.

I agree with the observations which were made by several speakers, including my two colleagues, about our tendency to disembody the Commonwealth. What the expression the Commonwealth means depends on the context. It can mean Australia as a member of the international community, it can mean the national population, it can mean some bureaucrats in Canberra, it just depends.

Similarly with the word States and the expression States rights . Just as with the word Commonwealth , they have no fixed meaning but take their meaning from the context. So, for example, the present context is not an arid and pointless effort to defend an abstraction called States rights. It is about over-authoritarian centralised government (the Commonwealth) riding roughshod over the regions which constitute most of the country (the States).

To repeat that point in another way, it is not States rights, but the whole concept of federalism, that is being undermined by misuse of the external affairs power.

One speaker this morning referred to personal liberty, personal freedom, as the ultimate conflict; the open centralisation of power in Canberra and the diminishing capacity of anyone to resist it.

The issue before us today has nothing to do with States rights. It has everything to do with decentralisation of power. Decentralisation of power is summed up in one word: federalism. And it exists precisely in order to make life difficult for central governments. That is exactly why it was put there. If that s under threat, then we are all under threat.

It is under threat from the external affairs power, not the least because that power has been interpreted by the High Court, in exactly the same way as any other power. Michael, for example, compared it to the tax power and the commerce power. It s not the same thing. Certainly there can be borderline situations, but in themselves the concepts of taxation and trade and commerce are relatively precise, relatively straightforward. But nobody knows what an external affair is. The words external affairs in the Constitution from the very beginning just sat there, as empty vessels waiting to be filled with meaning. During the first half century of federation nobody (or almost nobody) took any notice of them. You did have Burgess Case in the 1930s but you didn t have to rely on the external affairs power in that case, which related to the sensible and proper regulation of airlines. Since then of course people have been pouring whole jugfulls of meaning into it.

So I reject the general line of argument, What s so remarkable about all this, it s all part of the process of growing up, the facts change, but it s all part of the development of the law . It is a very different process from that. It is the arbitrary attribution to the words external affairs of a

meaning which subjects our domestic legislative processes to influences almost throughout the world without any noticeable constraints at all. I think that is producing a situation which it is well worth trying to do something to resist.

A lot of comments have been made by my two colleagues about how extremely narrow my own proposal would be. I don t see it as either wide or narrow. I see it as simply curbing the results which are being produced by this almost random progress of High Court interpretations, by a Court which in this area doesn t seem to have its feet on the ground at all, for the most part, plus what has now become quite open political piracy. The distance to which the present federal government has pushed this expansive interpretation is quite extraordinary. It is not so much an intention to subvert the Constitution as to increase its own power in the scheme of things. If anything gets in the way, oh well, call in external affairs .

One last thing that I wanted to comment on was that, perhaps because they didn t consider it to be serious, neither of the other speakers had regard to my point about the exposure to incompetent international bureaucrats. I happen to think that s quite a point. I had an experience recently involving a brief from New Zealand in which I had quite an extensive exposure to the sort of thing which the ILO can get up to, and it was pretty breath-taking stuff. George, you made a lot of reference to experts, in the course of explaining that you didn t know anything about external affairs. You may be interested to know that one of the most experienced, influential and incompetent bodies in the ILO calls itself the Committee of Experts.

Chapter Three

The Proper Scope of the External Affairs Power

Professor Michael Coper

Introduction

Two weeks ago, I attended the highlight of Canberra's autumn festival, an open-air, evening performance of Carl Orff's Carmina Burana. Sung by a cast of thousands and watched by even more, this "scenic cantata" was impressively staged on the foreshores of Lake Burley Griffin in front of the old Parliament House and just adjacent to the High Court. The climax was a simultaneous explosion of music and fireworks, with a huge wheel of fortune sent into a spin by exploding fireworks and left to burn as the centrepiece of a spectacular bonfire.

As the conflagration reached its peak, I looked across the heads of the crowd towards the High Court. From where I stood, the flames were reflected in the glass panelling on the west side of the Court so perfectly that it looked for all the world as if the High Court were on fire. This was an astonishing sight, made even more astonishing by the fact that, despite the duration and intensity of the fire, it left no scars whatsoever on the building – no crashing beams, no broken glass, no burning embers, nothing. The Court stood untouched and unmoved, despite the fire apparently raging inside it.

What an extraordinary metaphor! A contemporary vision, perhaps, of the burning bush, a modern symbol of the judicial commandments handed down from on high. More prosaically, a reminder that in recent times we really have had a High Court on fire – a Court reshaping the common law, a Court affirming resoundingly the existence of native title, a Court discovering constitutional rights and freedoms implicit in the concept of representative democracy, a Court breathing new life into the handful of express rights in the Constitution, and a Court taking what seems to many observers to be a somewhat robust, if not downright bullish, view of the ambit of Commonwealth power.

Many of you here will hold the view, I suspect, that the current operation of the Commonwealth's external affairs power is one of the best examples not only of the fire in the belly of the High Court, but also of a fire that needs urgently to be doused. I suspect also that you will have been unpersuaded by the High Court's reasoning in support of its current wide view of the power, a view originally established by narrow majorities but now generally accepted within the Court. If you are familiar with the music of Carmina Burana, you may think that that music has something in common with the Court's reasoning in the external affairs power cases: vigorous but simple rhythms, reiterated short motifs, and plainsong-like declamation. But that will only reinforce your view that the Court's current approach is inappropriate.

I want to put to you this morning that the High Court's current view is appropriate, in two senses. First, I hold the view that the Court's current interpretation of the external affairs power is the correct interpretation of that power under the present Constitution, or, to avoid the simplistic language of right and wrong in a subtle world of ideas with few absolutes, is an appropriate interpretation having regard to the accepted touchstones of constitutional interpretation. Secondly, when it comes to considering how the external affairs power might be amended – and there is clearly no right or wrong view in this area of policy choice – I believe that there are powerful arguments in favour of leaving the constitutional framework as it is, and of seeking ways within that framework of alleviating the concerns that you may have.

The current interpretation of the power

I recognise that it is a forbidding task to persuade this audience that the High Court should be applauded for its current interpretation of the external affairs power. John Stone in his paper to the Society last year on white ants and termites observed that the external affairs power is "the greatest flaw in our Constitution as it has evolved today". The Society itself is committed to redressing the federal balance in favour of the States. And Colin Howard has addressed you at each of your four previous conferences, in his unmistakably pungent style, consistently making the point that the record of the High Court in this and in other areas leaves (if I may rather understate the point) something to be desired.

Perhaps even more significantly, the critics from within the Court of what is now the orthodox view of the power have marshalled, powerfully and eloquently, a battery of respectable principles of interpretation which clearly sit very uncomfortably with the conclusions drawn by the majority. I remind you briefly that the now accepted view is that the Commonwealth can legislate to implement domestically any bona fide treaty obligation, whatever the subject-matter of that treaty. This means that, given the presence of an appropriate treaty to which Australia is a party, the Commonwealth can legislate on subjects outside those otherwise allocated to the Commonwealth under s.51 of the Constitution, and indeed on any subject at all.

An interpretation of one head of power which is at odds with the very scheme of allocating legislative power to the Commonwealth only in limited and defined subject-matter areas must, it is said, be suspect. And this is but a consequence, it is further said, of ignoring a fundamental canon of construction of any legal document, whether it be a will, a contract, a statute or a Constitution. That canon of construction is that words or phrases should not be isolated from their context and interpreted literally, but should take their meaning from the nature and purposes of the document taken as a whole. Words are empty shells, into which meaning must be poured from the surrounding circumstances.

These impeccable principles of interpretation were invoked prior to 1920 in aid of the conclusion that the heads of Commonwealth power in s.51 of the Constitution were to be read in the light of, and subject to, the general rule that certain areas of power were "reserved" to the States. On this reasoning, it might have been held, for example, that in view of the States' traditional and important responsibility for the law and administration of title to land, the power of the Commonwealth in s.51(xxvi) of the Constitution to make laws with respect to "the people of any race" (if in those days the power had encompassed the Aboriginal people) was insufficient to support an Act in the nature of the Native Title Act 1993. However, in the landmark Engineers Case, the seventy-fifth anniversary of which falls this year, the High Court relied on equally impeccable principles of interpretation – with particular emphasis on the ordinary and natural meaning of the text and the avoidance of vague, subjective and elusive limitations implied from the nature of the polity – to deal the "reserved State powers" doctrine a blow from which it would never recover. Thus, when the eloquent minority in the Tasmanian Dam Case sought to invoke the canon of contextual constraint, they had to struggle to recreate a doctrine of "federal balance" which, although it had common roots with the doctrine of reserved powers, had somehow to be distanced from it.

It is surprising in some ways that the Engineers Case has been so sacrosanct. No doubt it suited the times – galvanised by the First World War, a more national Australian identity had begun to emerge and was soon to find expression in the developments that led to a redefinition of the relationship with Great Britain in the Statute of Westminster 1931. But its streak of literalism has had a profound effect on constitutional interpretation. Strands of this literalist thinking can be seen in major decisions on, for example, the Commonwealth's interstate and overseas trade and commerce power in s.51(i) of the Constitution and the Commonwealth's tax power in s.51(ii). The former has been held to allow the Commonwealth to achieve major environmental protection objectives, simply by making compliance with environmental requirements a precondition to export, and indeed any kind of regulation could be hung off the export power in

this way. The latter can also be used to regulate any activity at all, simply by way of tax incentive or disincentive rather than by direct prohibition. In neither case is it an objection that the activity in question would otherwise fall outside the ambit of Commonwealth power.

The High Court has at times flirted with the idea of adopting a more purposive approach to those kinds of questions, in order to identify what the Commonwealth law in question is "really" about. But the abstract or literalist or textual emphasis has remained, for a variety of reasons. Not the least of these reasons is a disinclination on the part of the judges to decide questions of validity by reference to criteria that are so elusive and subjective that they are in truth more political than legal, or at least incapable of yielding any certainty or of avoiding capriciousness in their application.

This leads me to my first reason for thinking that the current interpretation of the external affairs power is appropriate. There is no alternative, narrower view, in my opinion, which offers a viable, practical and judicially workable touchstone of validity. By and large the critics of the current interpretation have not sufficiently addressed this question, although I was interested to see that Peter Durack conceded the point in his address to the Society in 1993.

All of the proposed narrower tests of validity under the external affairs power have turned on the idea that, for a treaty to be capable of domestic implementation by the Commonwealth, the subject- matter of the treaty must itself be inherently international in character. It must derive that character from something outside the treaty, from something other than the mere existence of the treaty. This approach is not merely subjective and elusive. It also puts the Court in the invidious position of second-guessing the political judgment that has been made that the subject-matter of the treaty is a matter of significance in Australia's international relations. This is particularly and obviously so when the test of validity is put in terms of whether the matter is a matter of international "concern", the test which the Tasmanian Dam Case minority felt bound to accept after the Court's decision upholding the Racial Discrimination Act in Koowarta's Case. It may be less so on the somewhat narrower view of the Koowarta minority, who appeared to require a "relationship with countries, persons or things outside Australia", evidently implying some sort of direct physical or transactional connection. However, even that test, unless confined strictly in its application to diplomatic relations and extradition, seems open to the same criticism.

I will not pursue this point any further, except to say that if there are any amongst you who are comfortable with an activist Court determining which international treaties are appropriate for the Commonwealth to implement and which are not, and as a corollary of course striking down legislation implementing those in the latter category, then I would be interested to hear whether you are also comfortable with the Court's recent activism in the area of implied constitutional rights. The issues are not quite the same, but the parallel serves to focus attention on the broad question of what is the proper role of an unelected court in second-guessing the judgments of our elected representatives.

Perhaps partly because of these considerations, although partly also a function of resignation to the general acceptance these days of the broad view of the external affairs power, attention has turned to solving the perceived problems of the broad view either by constitutional amendment or by political arrangements. I have already said that I favour the latter course. But first let me briefly add another reason in support of the view that the High Court's current interpretation of the external affairs power is appropriate.

This reason may strike you as over-simple, but it is based on a principle of interpretation as impeccable as any that I have mentioned thus far. The power was always intended to permit the domestic implementation of international treaty obligations, and its wider ambit today is a function simply of the steady growth this century of subjects judged by the international community to be appropriate for international agreement. It is the facts that have changed, not the legal meaning of the power. Some lawyers like to think of this in terms of the difference between the "connotation" of the power and its "denotation". It is not dissimilar to the quite

uncontroversial approaches to other Commonwealth powers expressed in generic terms which have resulted in, for example, the trade and commerce power extending to commercial air travel, and the "postal, telegraphic, telephonic and other like services" power extending to the electronic media, even though aircraft, radio and television were unknown to the framers of the Constitution.

It is true that Australia's involvement with international treaties before 1900 was very limited, and it is also true that Great Britain continued for some thirty years after 1900 to be mainly responsible for the conduct of Australia's international relations. But to limit the power by reference to those considerations is, I think, to confuse the particular examples for the general principle (not to mention the difficulty discussed earlier of anchoring those limits in judicially manageable criteria). The vast range of matters today the subject of international concern, discussion, negotiation and agreement was beyond the contemplation of the framers of the Constitution, but the insight that domestic legislation might be necessary to implement treaty obligations undertaken by or on behalf of the Commonwealth was not. This was recognised by a strong majority of the High Court nearly sixty years ago in the Goya Henry Case, and, to refer again to Peter Durack's 1993 paper, I was interested to read his observation that had those judges sat on the Tasmanian Dam Case they would have come to the same conclusion, that is, they would also have upheld the validity of the World Heritage Properties Conservation Act.

As the debate has really moved on from the judicial interpretation of the external affairs power to other ways of attacking the perceived problems, I shall make only two further observations on this aspect of the matter. First, the correctness or otherwise of the High Court's current view is not entirely irrelevant to the question of constitutional amendment. Obviously, if the High Court has got it wrong, that in itself is an argument for amendment. If the High Court has got it right, that does not of course preclude amendment to achieve an arrangement perceived to be superior. But to the extent that it is said that the Constitution should be amended to correct error on the part of the High Court, then for the reasons I have given I do not agree.

Secondly, although I lapsed just now into the convenient shorthand of "right" and "wrong", I remind you, as I said at the outset, that there are no absolutes here. It is a matter of which view you find more persuasive. It would be perverse to deny that there are respectable arguments on both sides. It is of intense interest to me to inquire into why we are persuaded to one view or another. Is it an abstract judgment about the intellectual rigour of a particular argument? Is it a function of our life experience, including whether we come from a large or a small State, or from a privileged or a deprived background, or from a conventional or an alternative family? Is it related to our early childhood experiences? But these are questions of psychology. They merit further investigation, but perhaps not today.

Political constraints

In any event, the upshot of the current interpretation of the external affairs power is that there are few limits of any significance on the ability of the Commonwealth to extend its reach into almost any field of human endeavour. Perhaps partly for this reason, some of the judges have applied a fairly strict test to determine whether legislation passed in pursuance of a treaty is indeed a faithful and appropriate implementation of that treaty, or, in other words, to ensure that the treaty is not merely a peg on which to hang a law dealing indiscriminately with whatever is the general topic of the treaty. Another suggested limit, that the treaty be entered into bona fide, is generally acknowledged to be a weak reed. But the fact that there may be few if any real legal limits on the external affairs power does not mean that there are not political limits. I mentioned earlier that the tax power can be used in a similar way to regulate any field of endeavour by way of tax incentive or disincentive. This is, however, largely theoretical and impractical. The political constraints are obvious. The same might be said of tied grants to the States under s.96 of the Constitution, although that power has historically been used in ways which may reasonably be thought to be inimical to the "federal balance".

I know that it will not satisfy you merely to say that the limits to the exercise of the Commonwealth's external affairs power should be left to be worked out in the political arena. In the political arena, the powerful are likely to prevail. In the absence of legal limits, it is the Commonwealth which will make the ultimate decisions about participation in treaties and about their implementation in Australia, and it is the Commonwealth whose legislation will override that of the States. Under these circumstances, you may think that to leave it all to politics is something of a cop-out.

I think that that would be a simplistic view. In our mature, democratic society we endeavour to work through our representative institutions and to put in place sensible, balanced and rational policies after widespread consultation. The unilateral use of the external affairs power by the Commonwealth, and the unfettered power of the Commonwealth executive to undertake treaty obligations, have been intensely controversial. But these issues have also – indeed, as a consequence of the controversy – been the regular subject of public discussion and enquiry, the latest of which is the wide-ranging reference on the external affairs power to the Senate Legal and Constitutional References Committee. The nature of the political constraints which might be imposed on the exercise of the power, at least in terms of formal mechanisms, is in a state of great fluidity, but the state of the debate is a healthy sign – if I am not being too optimistic – of our democratic institutions at work.

The political constraints that might be imposed – and I am talking here of the formal mechanisms for decision-making rather than the informal sensitivities to public opinion on particular proposals – fall broadly into two groups. The first relates to the relationship between the Commonwealth Parliament and the Commonwealth executive, and in particular to parliamentary participation in and oversight of the treaty-making process. The second relates to the relationship between the Commonwealth and States. The two are of course not entirely unrelated, particularly to the extent that the Senate – theoretically the voice of the States in the federal arena – might be given an enhanced role.

There is a strong case, in my opinion, for greater parliamentary scrutiny of treaty-making. The entering into of international agreements is, and should remain, an executive function. It is an integral part of the conduct of our foreign affairs. But given the role of Parliament in the domestic implementation of treaty obligations, and the more general arguments for enhancing Parliament's role in the interests of a healthy democracy, it would be unsatisfactory for Parliament to be first apprised of a treaty only when a Bill is introduced for its implementation. It would also be unsatisfactory for Parliament to be unaware of and uninvolved in international obligations undertaken by the executive that do not require domestic implementation. The greater the exclusion of the Parliament from the process, the greater the inconsistency with fundamental principles of accountability.

The practice in relation to the tabling of treaties in Parliament has varied over the years, as has the policy of whether that tabling is to enable Parliament to form a view on whether the treaty should be ratified or whether it is simply for information. The current practice of tabling treaties in bulk every six months is clearly not designed to allow Parliament any active role. Indeed, many of those treaties will already have been ratified. On the other hand, a list of all treaties currently under consideration is now being published regularly in the Department of Foreign Affairs and Trade's monthly magazine Insight. This is not a substitute for tabling in Parliament, but tabling can be seen as part of the wider process of community consultation.

It is, however, the purpose of the tabling which is critical. If it were a preliminary step towards enabling either or both Houses of the Parliament to approve or to disallow ratification, that would give the Parliament a more determinative role than if ratification were simply made conditional upon the treaty having lain on the table for a given period. One could of course combine these two ideas and make ratification both conditional on prior tabling and subject to subsequent approval or disallowance. But a point will eventually be reached where the retarding effect of enhanced scrutiny will seriously detract from the practical effectiveness of our

participation in international affairs. It is all a matter of getting the right balance, a consideration to which I will return in a moment.

One of the difficult questions is whether restrictions in the nature of tabling as a precondition to ratification should be statutory restrictions or simply agreed practices. We could of course even attempt to elevate them to constitutional restrictions, but this would surely inject too much rigidity into an area where exceptions will sometimes be necessary and where practices evolve in the light of experience. There are legal and practical difficulties also with a statutory regime, and in this respect I commend to you the characteristically thoughtful submission of Professor Enid Campbell to the Senate Legal and Constitutional References Committee. I must say that I lean towards parliamentary participation as a matter of agreed practice rather than of binding law, but that is a matter of judgment on which reasonable minds can differ. And when it comes to disallowance, it is difficult to see, as a practical matter, a government subjecting itself to a Senate veto.

To introduce another point, there is much to be said, I think, for having a standing committee of the Commonwealth Parliament for the scrutiny of treaties. But parliamentary involvement at the Commonwealth level, although it might help to democratise the treaty-making process, does not directly meet the concerns of those who would wish to see a more significant role for the States. In this respect, there have been various proposals for an Intergovernmental Treaties Council. Again it may be debated whether such a body should be purely advisory and only informally constituted, or whether it should have a statutory basis and functions that legally constrain the power of the Commonwealth executive. Although falling well short of a broadly representative Treaties Council, it was agreed at the Special Premiers' Conference in July, 1991 that there would be an Intergovernmental Standing Committee on Treaties, and also that the pre-existing Principles and Procedures for Commonwealth- State Consultation on Treaties would be reviewed. There is also a veritable horde of Ministerial Councils and committees of officials in particular areas. But, as in the case of appointments to the High Court, we are left in no doubt that the existing mechanisms are consultative and not determinative. As Enid Campbell points out in her submission to the Senate Committee, "It would be extremely difficult to run, in tandem, a legislative regime under which both the Houses of the federal Parliament and a Treaties Council have a secured stake in the treaty-making process". This goes to the matter of balance which I touched on earlier. The treaty-making process should be democratised, and the legitimate interests of the States should also be vindicated. But at the same time the freedom of executive action should not be so constrained that, to use the words of someone who is probably not your favourite High Court judge, Australia would become an "international cripple".

The question of constitutional amendment

It is precisely because it is a matter of balance that I believe it is preferable to seek that balance within the flexibility and fluidity of political arrangements, rather than to etch it in stone by way of constitutional amendment.

Returning now to this question of constitutional amendment, we are talking here primarily about the balance between Commonwealth and State legislative power, rather than about the appropriate degree of constraint upon Commonwealth executive power, the latter debate taking place against an assumed background of unlimited Commonwealth legislative power, and indeed as an indirect way of pegging back the unlimited potential of that power. However, the arguments are similar in kind: how to balance our ability to speak internationally with a single voice, and to act decisively as a nation in international affairs, against the important benefits and values of our domestic power-sharing arrangements, which are designed to allow the input of diverse interests and perspectives, including but not limited to those represented by our groupings into communities called States.

When it comes to the balance between Commonwealth and State legislative power in the implementation of treaties, experience demonstrates that the greater the necessity or occasion for

State legislation, the greater is the potential for delay, lack of uniformity, and even for action by one State to put Australia in breach of an international obligation.

You may well say that that is the price that must be paid to avoid the destruction of our federal system. It depends, I think, on whether you see the federal system primarily in terms of legally enforceable and perhaps fairly static lines of demarcation, or alternatively in terms of more fluid arrangements that can respond to changing political exigencies without necessarily denying a role to the component parts of the federation. I have made clear my own preference for preserving the current potential of the Commonwealth's legislative power in relation to external affairs, and for striving to vindicate our federal values through appropriate political arrangements: that is my preferred balance. I do not believe that this entails the destruction of our federal system. There is no single, right model for a federal system. There is just a range of widely differing systems which exist in fact.

For clarification, let me just add that I am giving here my own view of the desirable balance that the Constitution should strike in the area of foreign relations. My conclusion is that constitutional amendment is unnecessary. But this was not a factor in my earlier defence of the appropriateness of the High Court's current interpretation of the external affairs power, although some of the judges may have appeared to invoke such a consideration. My defence of the current interpretation was based on traditional principles of interpretation and on the elusiveness and invidiousness of any narrower view, invidiousness in the sense of casting the judges into an unacceptably political role. It would be consistent with that defence to say that the end result is undesirable and that the power should be narrowed by constitutional amendment. However, that is not my view. In my view the end result is desirable. But that is (at least in this case) a separate matter from (although equally consistent with) the correctness or appropriateness of the High Court's interpretation of the power.

I have not yet commented directly on Colin Howard's proposed amendment. Clearly, I am opposed to it, irrespective of its precise form. But I would add that it appears to narrow the external affairs power to a considerably greater extent than some like-minded critics of the current situation seem to think necessary or appropriate. I keep going back to Peter Durack's 1993 paper, for although I disagree with it on some fundamental points, I also think that it contains many thoughtful and sensible observations. Senator Durack, as he then was, put forward his own suggested amendment to the external affairs power, which was somewhat broader than Colin Howard's current proposal. In the course of doing so, he observed that whereas another proposal was "too restrictive of Australia's role as a member of the international community", his proposal left "room for flexibility in its application to new and unforeseen developments in the political world, at the same time preserving a significant role for the States". Peter Durack's preferred balance is, I think, closer to the mark than Colin Howard's.

Conclusion

However, these things are somewhat subjective, and, as I said earlier, our positions on these matters may be at least partly the result of rather dimly perceived psychological factors. The Samuel Griffith Society is – and is I think proud to proclaim that it is – a conservative Society. That is, it is dedicated to conserve and defend the existing Constitution, or at least the perceived virtues of the existing Constitution such as federalism and decentralisation of power. What makes one of us a conservative, committed to the preservation of existing values, and another a radical, committed to experimentation and change? What makes one of us a centralist and another a States' righter? What makes some of us passionate about these issues and others indifferent?

I don't know. No doubt we take our respective positions because we think they are right. But none of us can be right, surely, in any absolute sense. The truth is that we differ in our values and our judgments, and probably without really understanding why. These values and judgments are of course not necessarily constants. They may yield to life experience, or even respond to the direct attempts of others to persuade. The lawyer's craft, after all, is the art of persuasion. But if

we step over the line between certainty in our belief and certitude, between confidence and dogmatism, then we would not be according to each other the respect that is a precondition to dialogue. As Julius Stone used to say of the task of judges in making difficult choices, it is necessary to delicately steer a course between baseless dogmatism and paralysing doubt.

I began with Carmina Burana and my astonishing vision of the High Court on fire. Of course it was an illusion. You may think that that is also an appropriate metaphor for the High Court's interpretive techniques. But the Court's interpretation of the external affairs power has had and continues to have real consequences for the nature of the polity. I have argued that those consequences are not inappropriate, and that an acceptable balance between the need on the one hand to have the capacity to pursue a robust and incisive foreign policy, and, on the other, to involve in that process all of the relevant stakeholders, is capable of being hammered out in the political arena. I am sure that if I had only brought with me the orchestra, the choir and the fireworks from Carmina Burana, then I would certainly have persuaded you.

Reprise: Discussion by the three Contributors

1: Professor George Winterton

I want to say something about State constitutional reform, and also perhaps expand my previous comments about a few causes c,lŠbres. I do want to emphasise that, the way I see it, it is largely the potential of the power rather than its exercise that really concerns people.

If you think back on the cases that have been before the High Court on the external affairs power, we first had the Burgess Case, where a lot of what could have been done under the power effectively could have been done under the commerce power, and the same is true of the Airlines of NSW Case. Then we had the Koowarta Case, which admittedly rested on the decision there in relation to the Racial Discrimination Act s validity, which did rest on the power, and I ll highlight that point in a moment. The Franklin Dam legislation was upheld also under the corporations power – they effectively didn t need the external affairs power at all. So really, although that case of course was a critical one in determining the large ambit of the power – that the Commonwealth could implement a treaty on any topic – strictly speaking the ability of the Commonwealth to stop the building of the Franklin Dam did not rest solely on the external affairs power. It rested on it as well as the corporations power, but it could have been done under the corporations power, and the Aboriginal power also would have played a role in that.

The industrial relations legislation which is before the High Court – of course we don t know the outcome of that – rests also on other powers, and may well be upheld. It rests also on the corporations power and the arbitration power. Certainly the commerce power (the interstate and foreign commerce power), especially if it is interpreted in a more modern form as Chief Justice Mason has suggested – and I think rightly so, perhaps not necessarily going down the American path, although that itself is under review by the Supreme Court of the United States – will also support a lot of Commonwealth activity.

When I said earlier that a lot of people would oppose, even though illogically, the reform of the external affairs power on the grounds that they actually like the policy results that flow from it, I think that s an important point to be borne in mind.

It is the case, and I m sure all of you agree, as a matter of federalism, that if you think the States have the power to be right, then they have the power to be wrong. If you think the States have the power to regulate, for example, sexual relationships or criminal law, then they have the power to take action that one may not approve of, just as much as they have the power to take action one approves of. That s an obvious fact that s often omitted, lost sight of, but the fact of the matter is of course that people in voting on a constitutional amendment would take into account what policy results might flow.

Bearing in mind the ability of the Commonwealth to regulate a great deal of economic activity under the commerce power – particularly if it is interpreted in more modern form, which I think is extremely likely from the High Court at the moment – and from the corporations power and

other powers, I think one could say essentially that the main area where the Commonwealth would be using the external affairs power, where people might like it to be used, is in the area of individual rights. After all, of the High Court cases I mentioned, the only one that specifically rested solely on the external affairs power was Koowarta, upholding the Racial Discrimination Act.

The other recent outcry in some quarters about the use of the external affairs power concerned the sexual privacy law, and Colin Howard earlier mentioned the Sex Discrimination Acts, Equal Opportunity Acts and so on. It s really in the area of human rights: I think one could say essentially that if one was looking at where the Australian community might resist reform of the external affairs power because they value the results, it would be in the area of human rights. And this really picks up the point that was suggested by an earlier question about individual liberty. Surely the way to head this off, if we re really trying to protect the States and also, if you like, to make out the best political case for reforming the external affairs power, is for the States to get their own houses in order.

The State Constitutions are, by and large, an awful mess. The only State Constitution that post-dates the second World War is Victoria's, enacted in 1975. The Queensland Constitution in origin dates back to 1867, New South Wales to 1902, Western Australia has two Acts of 1889 and 1899, South Australia's to 1934, and Tasmania s to the same year. The only one that post-dates in any way, in any coherent form, the second World War is Victoria s.

The State Constitutions are rather unexplored territory. People focus solely on the Commonwealth Constitution. Perhaps I could urge this Society, one day, to devote one of its Conferences to focus on the State Constitutions. That would be a very good idea, I m sure most of you would agree with that. But practically, if the State Constitutions, for example, included substantial protection of rights, which I m sure most of you would agree with, the political case for the Commonwealth to interfere in that area, like proposing rights based on international instruments, would have a lot less political weight.

The argument that we re allowing Libya to run our human rights policy is not a popular one, and people I think are in two minds about this. On the one hand the public, if you ask them, would favour certain rights; on the other hand they certainly wouldn t particularly think that the implementation of international instruments is the ideal way to do it. As I mentioned before, it prevents the Commonwealth, for example, adopting the language for a Bill of Rights that it might think preferable. It couldn t, for example, adopt the Canadian Charter; it has to adopt the International Covenant on Civil and Political Rights, even though most people might think the Canadian Charter is preferable.

So my suggestion is really that the thing to do is to focus on rights, and to protect them in the States; and if that s done, the Commonwealth's political case for using the external affairs power to protect rights will be greatly diminished. And if in fact they insist upon interfering-as it might be seen – in imposing their own particular conception of rights, based upon some international instruments, I think public opinion will move in a much stronger way against the use of the external affairs power, and the case for reform along the lines suggested – perhaps not as narrowly as Colin Howard s amendment, but whatever the particular form – will be greatly strengthened. Thank you.

2: Professor Michael Coper

Mr Chairman, I m the most recent speaker, so there s very little that I need to add. Perhaps just very briefly I can make this point, that I think a lot of this depends on how we see ourselves. We of course group ourselves in all sorts of different ways. We might see ourselves as part of the world community; we might see ourselves as part of the Australian community, as Australians; we might see ourselves as part of a State, or as part of an even smaller local community, and all of those things are valid. Where we differ, I suppose, is at what level we think different decisions should be made, and as George mentioned earlier, it is something of a spectrum and different views are possible. But what is the Commonwealth, after all? It is only us, it s us as Australians

from a national perspective, rather than from a State or local perspective. Sometimes we speak as if the Commonwealth is something else, some external foreign alien, visiting from outer space, but it s us. We are part of the Commonwealth. The question of what decisions should be made at that level as against the local level is what the debate is all about.

What I have tried to argue is that we should exercise some caution against asking too much of the judges in setting the limits about where decisions should be made, and that we should endeavour to work it out through the political process.

Now in this respect there is a lot of room to improve our representative institutions. There is a lot of room for making both the Commonwealth Parliament and the State Parliaments more representative and responsive institutions, especially the Commonwealth Parliament, where the theory of the States having a voice through the Senate has of course not been all that significant in the way things have worked out, with party politics and other things. But I think that if we focus our attention too much on the law of the Constitution, and too much on the role the judges might play, we are not going to focus enough on working harder at the political level to vindicate our values such as federalism and sharing of power. We are not going to work hard enough at sorting those things out in the political arena. I believe it is possible, and you might think I m being too sanguine, too optimistic about this and that the Senate Committee will just be another committee report, and if you take the attitude of the present Government, for example Senator Evans statements, you don t get much comfort for those who want more parliamentary scrutiny of the executive government process, but I think these things are possible, and I think that is the arena in which I would be focusing my attention. Thank you.

3: Dr Colin Howard

While it is fresh in my mind I really would like to commend my two critics on their increasingly touching faith in politicians. It is really quite heartening. I also would like to thank Michael for the kind things he said about one of my books. I make two comments about that. By the mere process of writing a book I do not undertake to stop thinking, but rather reserve the right to change my mind. Secondly, if anything I wrote in that book has influenced what he has had to say today, I rather regret it.

I also refer to another striking observation, which I consider really splendid, namely, Michael s comment that as he and George rarely agree about anything, the fact that they agreed about this matter must increase the chances of their being right.Now without directly disagreeing with that, my own view is that equally it increases the chances of their both being wrong, which of course is exactly what has happened today.

I wonder if I might assist the further discussion by circulating copies of the proposed amendment to which I was speaking. One or two people have pointed out that there might be a difficulty in recalling exactly what it was I was proposing.

Let me draw your attention to two sentences in my proposed amendment, labelled (a) and (b). The (a) sentence reads unless the Parliament has power to make that law otherwise than under this sub- section . All that that says is that there is no intention in this amendment in any way to diminish the legislative powers of the Commonwealth under any of the other enumerated sub-sections. The significance of that is that some of the observations that my colleagues have made suggest that my amendment would greatly narrow the scope of Commonwealth legislative powers, which they also seem to feel would be a very bad thing.

The truth is that if you take the originally enumerated powers of the Commonwealth, and if you add in the very expansive principles of interpretation that the High Court has developed throughout the history of the federation, you will find that that covers an enormous amount of ground. The Commonwealth really does have enormous legislative power. And that legislative power covers a wide variety of topics, probably about half of which are very rarely used at all, or at least not challenged. In addition to that there is the back- up of s.109 over-riding State laws; now that gives an enormous amount of Commonwealth legislative power.

Now I go from there to the argument, which appears to be quite strongly pressed, that another effect of the amendment that I have proposed is that it would hamper the Commonwealth in its conduct of foreign policy. I recall, as being absolutely spot-on, the observations made by Sophie Panopoulos, in which she said she couldn t see how this in any way constrained the Commonwealth in that regard. There is no point in seeking to elaborate that point, which seems to me perfectly obvious. The Commonwealth, if it were operating under an external affairs power amended in the way I have suggested, would simply continue to conduct foreign policy in whatever mysterious way it wishes to, making plain from the outset that on certain subjects it will have to seek the consent of the States, or that other conditions will have to be met before the treaty can be ratified. Providing it makes that perfectly clear in its conduct of foreign policy, I cannot see how there can be any constraints.

The point we are trying to constrain, or that I at any rate would like to constrain, is having the Commonwealth using the fig leaf of the external affairs power, and the conduct of foreign policy, in order to acquire yet further extensions of its domestic program.

Now George in his most recent remarks gave a very good run down of the number of leading cases on the external affairs power in recent years where there was seemingly no need to invoke the external affairs power at all; and I thought that was very telling.

We are not a homogeneous country, within our own polity, either geographically or historically. We are homogeneous compared with some others, no doubt, but within ourselves we are not all that homogeneous. There is plenty of room for difference in all sorts of policies, criminal law, for example, being one. Someone has pointed out just recently, not for the first time, that we have in fact the potential in this country to conduct a continuing social laboratory, to find out how things work. We are never going to find out how things work, by contrast, if everything becomes unified and imposed from the last place in the country that seems to be likely to form a reasonably accurate view of what s going on out there.

Now the second sentence in my proposed amendment is (b), whereby the law is made at the request or with the consent of the State . Now that is directly relevant to what I have just said. There are plenty of so- called foreign policy issues which in my view should not be, in effect, determined at the whim or at the speed at which executive government today determines them. I cannot see how that can be any kind of a threat to anybody or anything.

I agree with the observations which were made by several speakers, including my two colleagues, about our tendency to disembody the Commonwealth. What the expression the Commonwealth means depends on the context. It can mean Australia as a member of the international community, it can mean the national population, it can mean some bureaucrats in Canberra, it just depends.

Similarly with the word States and the expression States rights . Just as with the word Commonwealth , they have no fixed meaning but take their meaning from the context. So, for example, the present context is not an arid and pointless effort to defend an abstraction called States rights. It is about over-authoritarian centralised government (the Commonwealth) riding roughshod over the regions which constitute most of the country (the States).

To repeat that point in another way, it is not States rights, but the whole concept of federalism, that is being undermined by misuse of the external affairs power.

One speaker this morning referred to personal liberty, personal freedom, as the ultimate conflict; the open centralisation of power in Canberra and the diminishing capacity of anyone to resist it.

The issue before us today has nothing to do with States rights. It has everything to do with decentralisation of power. Decentralisation of power is summed up in one word: federalism. And it exists precisely in order to make life difficult for central governments. That is exactly why it was put there. If that s under threat, then we are all under threat.

It is under threat from the external affairs power, not the least because that power has been interpreted by the High Court, in exactly the same way as any other power. Michael, for example, compared it to the tax power and the commerce power. It s not the same thing.

Certainly there can be borderline situations, but in themselves the concepts of taxation and trade and commerce are relatively precise, relatively straightforward. But nobody knows what an external affair is. The words external affairs in the Constitution from the very beginning just sat there, as empty vessels waiting to be filled with meaning. During the first half century of federation nobody (or almost nobody) took any notice of them. You did have Burgess Case in the 1930s but you didn t have to rely on the external affairs power in that case, which related to the sensible and proper regulation of airlines. Since then of course people have been pouring whole jugfulls of meaning into it.

So I reject the general line of argument, What s so remarkable about all this, it s all part of the process of growing up, the facts change, but it s all part of the development of the law . It is a very different process from that. It is the arbitrary attribution to the words external affairs of a meaning which subjects our domestic legislative processes to influences almost throughout the world without any noticeable constraints at all. I think that is producing a situation which it is well worth trying to do something to resist.

A lot of comments have been made by my two colleagues about how extremely narrow my own proposal would be. I don t see it as either wide or narrow. I see it as simply curbing the results which are being produced by this almost random progress of High Court interpretations, by a Court which in this area doesn t seem to have its feet on the ground at all, for the most part, plus what has now become quite open political piracy. The distance to which the present federal government has pushed this expansive interpretation is quite extraordinary. It is not so much an intention to subvert the Constitution as to increase its own power in the scheme of things. If anything gets in the way, oh well, call in external affairs .

One last thing that I wanted to comment on was that, perhaps because they didn t consider it to be serious, neither of the other speakers had regard to my point about the exposure to incompetent international bureaucrats. I happen to think that s quite a point. I had an experience recently involving a brief from New Zealand in which I had quite an extensive exposure to the sort of thing which the ILO can get up to, and it was pretty breath-taking stuff. George, you made a lot of reference to experts, in the course of explaining that you didn t know anything about external affairs. You may be interested to know that one of the most experienced, influential and incompetent bodies in the ILO calls itself the Committee of Experts.

Chapter Four

Stuart Macintyre and Samuel Griffith: The Report of the Civics Expert Group

John Hirst

The Keating Labor government has recently embraced one of the aims of The Samuel Griffith Society. The government wants, in the words of your articles of association, "to encourage a wider understanding of Australia's Constitution and the nation's achievements under the Constitution". To that end it appointed a Civics Expert Group, chaired by Professor Stuart Macintyre, to advise it on education in civics and citizenship. I expect that members of The Samuel Griffith Society will have mixed feelings about one of its purposes being taken up by such a champion as Paul Keating.

For most of its history the Australian Labor Party has viewed the Commonwealth Constitution with hostility. When it was being drawn up in the 1890s, representatives of the new Labor Party objected to there being a strong Senate and to the States having equal representation in it. Within ten years of the inauguration of the Constitution, the Labor Party in office made the first of many attempts to gain larger powers for the Commonwealth at the expense of the States. For many years the Labor Party was officially committed to the abolition of the Senate and the creation of a unitary state. Ideologically, the party could see little virtue in federalism, though ironically it was itself organised in a federal way which assisted in the preservation of powers to the States.

If the party was naturally disposed to be centralist, the decisions of the High Court confirmed it in this view. The corporations power and the freedom of interstate trade were interpreted in such a way as to frustrate the implementation of the Labor program.

Since it saw the Constitution as a barrier to its great design, the Labor Party came to view its framers as bourgeois conspirators. Just as the labour movement was gathering its strength in the 1890s, the class enemies had created a Constitution which protected private enterprise: the Constitution had established a true national economy, but had denied the Commonwealth power to control or socialise it.

There was no conspiracy, of course, but much of the historywriting on federation has taken its tone from this Labor view of the Constitution. Federation has been depicted as a business deal, arousing little popular interest, and which was brought to fruition by horse-trading among hard-bitten colonial politicians.

It is remarkable that this was and is the predominant view, because the process of constitution-making in Australia was more open and democratic than that of any of the other great democracies. The framers of the Constitution were elected by the citizens at large, and their handiwork was referred to the citizens for approval at referendum. The Australian Constitution, much more than the American, is entitled to begin with the words `We the people'. This remarkable exercise in popular sovereignty is not highlighted or celebrated in the standard accounts of federation.

It was highlighted in the first account written by Quick and Garran, who had been participators in the federal movement. Their history of federation formed part of that amazing compendium, the Annotated Constitution of the Australian Commonwealth, which was published in 1900. After recording the figures at the second referendum in 1898, Quick and Garran wrote:

"These figures are a striking proof of the extent and sincerity of the national sentiment throughout the whole of Eastern Australia; and they are also a unique testimony to the high political capacity of the Australian people. Never before have a group of self-governing, practically independent communities, without external pressure or foreign complications of any kind, deliberately chosen of their own free will to put aside their provincial jealousies and come together as one people, from a simple intellectual and sentimental conviction of the folly of

disunion and the advantages of nationhood. The States of America, of Switzerland, of Germany, were drawn together under the shadows of war. Even the Canadian provinces were forced to unite by the neighbourhood of a great foreign power. But the Australian Commonwealth, the fifth great Federation of the world, came into voluntary being through a deep conviction of national unity. We may well be proud of the statesmen who constructed a Constitution which – whatever may be its faults and its shortcomings – has proved acceptable to a large majority of the people of five great communities [Western Australia had not yet joined] scattered over a continent; and proud of a people who, without the compulsion of war or the fear of conquest, have succeeded in agreeing upon the terms of a binding and indissoluble Social Compact."

This, as I say, is not the way federation is judged in the accounts which take their tone from the Labor view of Constitution making. The involvement of the people in electing the convention and approving the Constitution can of course not be omitted, but this aspect of the movement is harmonised with the general interpretation by noticing that the delegates elected were the existing politicians, and that the people voted at the referendums according to whether federation was to assist or harm their economic interests. In these accounts there is no acknowledgment of the imagination necessary to conceive the Commonwealth, nor of the dedication necessary to realise it.

The Labor Party's long quarrel with the Constitution has now come to an end. Labor no longer wants to control and socialise the economy as it once did, and for those matters it does want to control from the centre it now generally finds the Constitution to be no barrier. Labor made formal its peace with the Constitution when, in 1993, Paul Keating visited the River Murray town of Corowa to celebrate the 100th anniversary of the federation conference which first proposed that the people be directly involved in Constitution making.

At that 1893 conference there was no member of the Labor Party present, and the few radicals who proposed that Australia should become a republic were ruled out of order; and yet the Prime Minister attended the celebrations to pay his tribute to the burghers of the Federation Leagues in the border towns, and young men of the Australian Natives Association, who took up the cause of federation after the failure of the 1891 Constitution, and who hit on the method which carried the second movement to success. But Paul Keating at Corowa will give you no joy. You will say: he's only willing to celebrate the origins of the federal Constitution because it has ceased to be federal.

This may be so – but I am pleased that a Labor Prime Minister and the people who advise him are now speaking positively about the founders of our Constitution. For a long time the founders were viewed on the left as no better than bourgeois plotters; then, more recently, they were discovered to be even more seriously flawed – they were male. To describe the founding fathers as Anglo-Celtic males with beards and top hats was enough to render them figures of fun. This is the stereotyping for which there is no penalty. To imagine that such a group could produce anything of value was laughable.

That this view is being officially contested was first evident last year in the report produced by Joan Kirner on how Australia should celebrate the centenary of federation. Mrs Kirner was very impressed by the method of Constitution-making in the 1890s. This was an "unprecedented participatory process", well worthy of celebration. She wants school children to be provided, as soon as possible, with the story of federation in an exciting way. Her committee recommended that each child be provided with a high-tech medallion to mark the anniversary; "a shining golden disc packed with information on our history and achievement; a CD of the federation story". (p.13)

The Macintyre Report on civics and citizenship education takes up and extends this theme. Civics used to be taught in association with history, and Macintyre wants to re-establish the connection. His report recommends that children learn in a coherent way the outline of Australia's constitutional development, from military government to colonial self-rule to the establishment of the Commonwealth and its evolution in this century.

It is an indictment of our education system that such a recommendation is necessary. For the last 40 years Australian history has had a prominent place in the curriculum, and yet Macintyre's committee reports that students who have just left school are the worst informed group on the Constitution and its history. A lot of Australian history has been taught, but in a "progressive" way – that is, there is little concern for coherence, for seeing things happening in sequence. Instead, there are projects and assignments on scattered topics which it is hoped will catch a child's interest: politics is thought a priori to be uninteresting; social history is preferred; the challenge so to present politics as to make it interesting is refused. Here as elsewhere in the curriculum, the emphasis is on developing skills rather than mastering the subject matter. Children don't need to know; they only need to know where to find information when they need it. Behold the modern school child. "What's your name, boy?", says the new teacher. "I don't know, Sir, but I know how to find out".

I welcome the Kirner and Macintyre reports because they blow the whistle on progressive education. They both assert that there are some things which children in a democracy plainly should know, among them the Constitution under which they live and how it came into being. Joan Kirner reports, "There is considerable disquiet about the shortcomings in the teaching of political and constitutional history" (p.12). That's putting the matter very politely – there is virtually no teaching of political and constitutional history. Stuart Macintyre quietly rejects much of current teaching practice when he writes: "Australian history should have its basis in narrative, so that students will gain a sense of change over time" (p.52).

I don't want to make light of the difficulties teachers face. It is hard to make our constitutional history interesting, partly because it has been a quiet, undramatic history. The real drama happened before Australia began. The key elements in our Constitution were settled in 17th century England in armed conflict between Kings and Parliament.

Until the Second World War, primary school children in Australia were introduced to these battles. Now students can leave university having studied history and politics and know nothing about them. What better way is there to get to the bedrock of our Constitution than to see Hampden refusing to pay a tax not authorised by Parliament, and to hear the Speaker of the House of Commons refusing to tell Charles I where the leaders of the Opposition were: "I have neither eyes to see nor tongue to speak in this place but as this House shall direct me"?

It would be a dull teacher indeed who couldn't make these stories interesting. The difficulty of course is that this is not Australian history. When we quite properly moved to include more Australian studies in our curriculum, we were foolish to imagine that these alone could provide an adequate understanding of our culture. We are part of European civilisation, and our politics have their origin in England and can't be understood without a knowledge of English history. The Macintyre Report does not want the study of politics and constitutional history to be limited to Australia. It recommends comparative studies of other countries' practices, now and in the past, but it gives no priority to English history. It does endorse the views of David Malouf who, in a paper to the Sydney Institute last year, called for a new appreciation in the school curriculum of Australian landscape, culture, language, history and government. Malouf wrote:

"A study of the development of our system of government, of course, would involve our students with the study of a good deal of English history: we ought not be afraid of that. It will not hurt young Australians to discover much of what is best in our system we did not make ourselves". (p.25)

I hope to see a republican Australia, but I say amen to that.

Kirner and Macintyre set themselves at odds with current orthodoxy in another way. They want to call a halt to the widespread practice of denigrating our past. In the academy over the last few decades – and the schools have caught the infection – our history has frequently been taught as mainly a catalogue of sins, of commission and omission. It has become a tale of oppression, exclusion and exploitation.

It is no discovery to find that Australian society in the past did not meet the standards we set ourselves today. The test of historical imagination is to discover what were the concerns and ideals of a past society; they will necessarily not be identical with our own. Sometimes we will find past behaviour of which we are ashamed. There are countries which have to condemn whole periods in their past, but that I believe is not our situation. Nor do Kirner and Macintyre believe this. They both think our democratic constitutional history should be a matter of pride. Their tone is positively celebratory. They could be quoting from your own articles of association. Listen to Macintyre:

"As we approach the centenary of the Commonwealth, Australians are able to look back on a remarkably successful record of democratic self-government. The public institutions created in the closing years of the last century have proved flexible and resilient. The outcomes of the democratic process enjoy popular acceptance – in contrast to the experience of most other countries, we have seldom experienced a challenge to the legitimacy of our civic order or resort to violence. The political process has operated peaceably. A broad measure of freedoms has been maintained and extended. The rule of law operates. There is a high level of tolerance and acceptance." (p. 13)

Both these reports recognise the importance of cultivating in the young a due pride in their country. It is as important in my view as cultivating individual self-esteem, a matter which we now take very seriously. A couple of generations ago teachers used to hit and humiliate students while they taught them the wisdom of the British Constitution and the glories of its Empire. Now teachers carefully nurture the self-esteem of their pupils while they tell them their country is shit. This should now stop, say Kirner and Macintyre.

The Kirner Report notes: "There is an increasing equation of Australian history with self-criticism, to the extent that it may be undermining an appropriate pride in Australian achievement". (p.2) Macintyre writes: "The Federal Fathers might indeed have worked with views and standards which are not ours. But to simply condemn them is to reinforce the pessimism about public life. The approaching centenary of federation provides an opportunity for a new appreciation of their legacy". (p.17)

Neither of these reports is looking for a sanitised or uncritical history. What they don't want is a portrait that's all warts. Certainly students should learn about the oppression and exclusion of the Aborigines, but they should also learn of the processes by which rights were restored and wrongs were redressed. They should be aware of the exclusion of women from the first colonial democracies, and then learn of the campaigns by which women secured the vote. The racism of the white Australia policy should be balanced by a knowledge of the movement which abolished it.

Beyond these strategies, Macintyre wants to inspire the young by presenting exemplary public figures from our past; Kirner wants to do the same, and does not baulk at the words heroes and heroines. It is not long ago that these were dirty words. If there were heroes, their reputation should be destroyed. Now the Macintyre Report is concerned that most young Australians could not name six great Australians in the arts, science or politics. You must be delighted. With Labor sponsorship, Sam Griffith is on the point of being promoted to the Australian pantheon.

I am not giving a full account of these Reports. I am highlighting those elements which seem to me to indicate a change in the cultural mood. There is a new readiness among those whose ideas matter to speak of pride in the Australian achievement. I am not sure what has caused this change. I think the struggles of the newly liberated nations of Europe to establish a democratic polity, and the eruptions there of ethnic and national tensions, have something to do with it. They remind us that democracy and social peace are achieved things, not natural happenings. With the massive migration program since World War II, Australia has faced a new challenge in maintaining social peace. We have people from almost every other nation on earth, people who elsewhere are sworn enemies, and yet still there is social peace. The intelligentsia not so long since used to castigate Australia as the most intolerant and racist nation on earth. Ethnic

cleansing in Yugoslavia, and burning of Turks in German hostels, have spoiled that claim. The new pride comes in part from an awareness of how well we have managed multicultural Australia.

What explains this success? The Prime Minister has given the answer, which is quoted in Macintyre's report:

"It is important to remember that the [multicultural] achievement was built on traditional democratic strengths of Australian society – and these should never be neglected. That is one reason why the Government is keen to see far greater understanding of our institutions, history and traditions." (p.23)

The Macintyre Report endorses multiculturalism, but imposes a limit on it. It declares:

"Australians seem to have a better appreciation of the benefits of diversity and a better grasp of the ethics of tolerance than of the public institutions they share. Citizenship should be the mortar that holds together the bricks of our contemporary, multicultural Australia." (summary, pp.4-5)

To make Australians better informed and committed citizens, the Macintyre Report suggests a wide range of studies and activities in the schools and in the wider community. Civics involves more than a study of the Constitution. However, the Constitution must finally be the centre-piece of any education in civics. The Macintyre group commissioned a survey which has again revealed an appalling level of ignorance about the Constitution among the Australian people.

"Only 18 per cent know something about the content of the Constitution. Only 40 per cent can name the two federal Houses of Parliament, and only 24 per cent know that Senators are elected on a Statewide basis. Sixty per cent have a total lack of knowledge about how the Constitution can be changed, despite having voted in referendums". (summary, p.6)

Since the Prime Minister is committed to a republican Constitution, many people feared that any committee he established on civics would seek to incline the people to republicanism while they were being educated on the Constitution. I see no sign of this in the report or its recommendations. Bruce Knox might have a better nose for this than I. I thought the committee showed remarkable self-restraint in not reporting that one of the biggest obstacles to a sound civic awareness in this country is the Constitution itself. It does not come remotely near to describing how our system of government actually operates; it did not do so in 1901 when the Commonwealth began; now it is so far from reality that it is positively misleading.

Part of the republican agenda is to rewrite the Constitution so that it does catch up with practice. On this matter, republicans should be able to count on the support of monarchists. In defending the Queen as our Head of State, monarchists explain that she is a mere figurehead, that she does not interfere in our government, that we are a fully independent sovereign state. Her only constitutional task is to appoint the Governor-General, and in this she is guided solely by her Australian Prime Minister. We are in effect a crowned republic.

Let's accept this and look at the Constitution. Section 1 declares that the Federal Parliament shall consist of the Queen, a Senate and a House of Representatives. That the Queen's role in Parliament is not merely decorative is made clear later – her Governor-General, acting on her behalf, can refuse assent to any bill (section 58). It is further provided that any law, even one assented to by the Governor-General, can be disallowed by the Queen herself within one year of its passage (section 59). By the letter of the Constitution, the Queen is obviously very powerful. She and her Governor-General, to whom she can issue instructions, can veto all legislation. In those two personages the Constitution also vests full executive authority (section 61). There are to be Ministers, but they come and go at the Governor-General's pleasure. There is no requirement that they possess the confidence of the House of Representatives. There is no requirement that the Governor-General must take their advice. Ministers are not even mentioned in regard to the command of the armed forces. The command is vested in the Governor-General without any limitation (section 68).

Of course the Constitution does not operate like this. These written provisions are interpreted according to the conventions of the Westminster system; some of them are explicitly over-ruled

by the Statute of Westminster Adoption Act of 1942 and the Australia Act 1986. In short, you need to be a constitutional lawyer to understand our written Constitution.

Does this matter? Yes, it does. There is a particular need for the Australian Constitution on its face to be intelligible, because the people themselves have to understand it if they are responsibly to fulfil their constitutional role of determining whether it is to be amended or not.

When republicans complain that the Constitution is such a poor guide to practice, we are derided as novices in constitutional law. No Constitution, we are told, operates as it is written. There are always conventions and understandings which will determine how a written document is interpreted. That is so. But it would be hard to find a liberal democracy whose Constitution is so far from practice as the Australian. It makes such a full obeisance to the sovereignty of the Crown that the lineaments of a liberal democracy are almost totally obscured.

We republicans plan a Constitution which will provide that the Head of State normally acts on advice of Ministers, that when advised by Ministers to sign a bill into law, the Head of State will have no discretion to refuse, and that the Head of State can choose only those Ministers who enjoy the confidence of the House of Representatives. And of course the monarchical veto will go – it is to our shame that it is still there in the written Constitution. In all this I trust we can look to monarchists for support.

Republicans of course go further. They propose to replace the British monarch with an Australian Head of State. We do this not because we are dissatisfied with the Constitution as it operates; we believe the British monarch can no longer symbolise the Australian nation. We consider that the civic commitment of the people will strengthen when they again acquire a Head of State who enjoys wide-spread support.

But I don't want to press this point. I want in conclusion to return to common ground. The Samuel Griffith Society and Stuart Macintyre's Civics Expert Group both wish to see the Australian people well informed about their Constitution. The present ignorance is a scandal. If the people are ignorant, let's encourage the reading of the Constitution. But if the people were actually to read the Constitution they would be more ignorant of our system of government than they are now. That's the dilemma facing any programme for civics education. Stuart Macintyre discreetly passed over it; I hope The Samuel Griffith Society will be prepared to confront it.

Chapter Five

The Singers, not the Song: The Civics Expert Group Report

Bruce Knox

In a moment I shall state some rather prosaic "facts", to confirm the physical existence of this Report. But first, I should perhaps explain my published title, though it is merely a tag. It derives from the title of a film made some years ago, which involved an evil-doer who was much impressed by the abilities, the character, and the achievements of a certain priest, while maintaining, even unto death, an adamantine disbelief in religion and morality. In short, the singer was held to have performed well, but singing an impossible song.

The Civics Expert Group (CEG) Report which is the subject of my paper is in like case. The authors have done well what they had to do; but their work and their subject matter impress this observer far less than they deserve, begun and produced as they were in seriously untoward circumstances.

To the Report then. The Foreword, by Professor Stuart Macintyre, on behalf of his colleagues, is dated 30 November, 1994, in strict conformity with the delivery date specified in the Terms of Reference from the Prime Minister. The total length of the Report is 249 pages (including Terms of Reference and Foreword). There are eight chapters, occupying 108 pages; these contain the text of the Report proper. They are:

1. The Task of the Civics Expert Group.
2. Why educate Australians for Citizenship?
3. Civics, Citizenship and Australian School Practice.
4. Proposals for Civics Education in School.
5. Proposals ... in Other Education Sectors.
6. Citizenship Education and the Wider Community.
7. What Next?
8. The Plan: Recommendations of the CEG.

Then there are Appendices, totalling 135 pages, including:

1. Lists of submissions & consultations, occupying 13 pages.

None of these submissions is reproduced, but quotations from some of them are scattered in boxes at appropriate points throughout the text.

2. A 32 page Executive Summary of an Australian National Opinion Polls (ANOP) Survey of Civics Knowledge.

3. Three consultancy papers, some 28 pages altogether. These are different from the "consultations", and provide some of the most interesting reading in the whole document; the Report pays tribute to them, incorporating their findings in Chapters 3.1, 3.2 and 5.1.

4. An Example of a Draft Syllabus (54 pages). This is for me the most daunting part of the document, for the reason (amongst others) that it elaborates what is foreshadowed in Chapter 3.3, "Curriculum Development in Australia", in which it is plainly stated:

"The language of curriculum development in schools is technical and specialised. In describing highly complex processes it uses terms with meanings that are unfamiliar to those outside the education profession."

It would appear that I at least do not qualify for "the education profession". I most certainly needed the brief assistance offered by the educationists for "non-initiates". I have something to say about this "sample", but less perhaps than such an aspect of the report deserves, because of the difficulty I've had in understanding the boxes, arrows, categories, levels, outcomes, etc., which so much veil the substance of the document. If and when a "sample" becomes a firm proposal, it is to be hoped it is couched in language understanded of the people.

If this beginning conveys an impression that my paper is not without criticisms of the CEG Report, I can only say that the impression is correct. My major criticism is not, however, to do with the Report's contents per se or its authors. It is rather of the fact of its very existence. Again, that is not to say that an inquiry into the possibility of "Civics Education" is unjustified in principle. The ANOP National Civics Survey (Appendix 3) presents ample evidence of a "high level of community ignorance about Australia s system of government and its origins"; or, as it puts it also, that "knowledge about governmental, constitutional, citizenship and civics issues is generally very low." In that sense, as far as it goes, there would appear to be every reason why an effort should be made to find ways of supplying what would seem to be a deplorable deficiency.

Nor is it only the deficiency in "knowledge" which is to be deplored, but also the fact that (as Dr Julian Thomas shows in one of his valuable consultancy papers) there has been practically no serious attempt made for many years past to bring school children into contact with such courses of study or learning which would equip them with even the most basic knowledge, let alone understanding, of political and constitutional institutions and processes, or of what we (and the authors of the Report) are pleased to refer to as "values" underpinning (or what we might wish were underpinning) those institutions and processes.

To make at once a controversial point, it seems to me now, as then, appalling the extent to which, in November, 1975 and subsequent months, persons even of very considerable eminence and accomplishment in various fields lacked even the remotest comprehension of the circumstances and rationale of the constitutional crisis involving both Houses of Parliament, the Prime Minister, and the Governor-General.

It was even possible for a bevy of distinguished academics to subscribe to a newspaper advertisement which compared the dismissal of Mr Whitlam, and the installation of Mr Fraser as Prime Minister, with the coming to power of Adolf Hitler in Weimar Germany in 1933.

Nothing could have saved the events of 1975 from being violently controversial, but that such ignorance of Australian political and constitutional history and organisation could exist in such quarters was, well, appalling. If, then, the CEG s labours can have the ultimate result of spreading some enlightenment, if not amongst the present adult population, at least in future generations, then they are worthwhile.

I have, however, the most serious doubts whether this can be so, at least in the rationally foreseeable future. There are, it is true, shortcomings in the Report itself to which I must refer. But I return to my statement that my major criticism of the Report was the fact that it exists at all. The fault lies, not in itself, but in its stars, given the task the Group was set, at the time it was set, and by whom it was set.

One cannot but recall that the Prime Minister earlier appointed a Republic Advisory Committee, with distinguished membership, for the sole and explicit purpose of pressing forward his scheme for constitutional transformation. The CEG had no such ostensible purpose, but I suggest below that it is hardly possible to suppose that that purpose was not intended. It is to the credit of Professor Macintyre and his colleagues that they have transcended this intention. But that does not dispose of the spirit of Keating, which inevitably broods over his creation.

In the light of this, it is difficult to see how, at this time, or for long in the future, any programme of civics education can be organised or implemented in this country. In terms of the sorts of things which one might expect to find a place in such a programme, we are a seriously divided community. This applies to the two components of "civics" as handled in the CEG Report, viz., institutions and systems of government, and the "values" which are essential to "citizenship" (which is expressly, but unnecessarily, differentiated from the status of "subject"). The latter, the "values" are difficult to deal with in any circumstances, but particularly at present, as can be seen almost any day in the Press.

Perhaps the most striking instance in recent months is the controversy over a proposed Racial Vilification Bill, for this involves judgments not only on the potential for wickedness, or for

suffering on the part of individuals and groups, but on no less than the capacity of the law to deal with such phenomena.

Again, the Report takes to be an essential part of any civics education programme, an emphasis on the merits of "diversity", which it describes as one of the strengths of the country. Yet it feels bound to mention that there are aspects of "multiculturalism" which might work against civic unity – and there are those who would be prepared to be much more critical of the role of multiculturalism and its values in our polity and society.

Values are also involved in the question of how large a part "the family" must play in our lives and living, and what constitutes a family; it is perhaps hardly surprising that the Group have avoided any mention of such values. As has become terribly obvious during the last week, there is a vast gulf between the values of those who advocate the legalisation of euthanasia, and those who abhor it. Are we to say that values involved in such a matter do not act upon the notion of good citizenship? It is a matter in which both cannot be right, save in a theoretical sense.

However, unsurprisingly, the values which most engage the CEG are those of democracy . I look in vain in the Report for a clear statement of those values which are not platitudinous or nearly so. Perhaps there are those with skills to translate generalities into practice; but I'm troubled even so, for I sometimes wonder whether many of the political ills which beset us are not the result of laying upon "democracy" a burden too great. We might need to make clear that the institutions and systems, and some of the fundamental values, of which we think so highly, are wholly pre-democratic in origin, and that democracy is, in a way, a gloss upon them in one sense, and restrained by them in another. For instance, it was not democracy to which we owe the general idea of parliamentary government, the answerability of Ministers to Parliament; representative institutions were not the creation of democracy, nor was democracy responsible for the establishment of the rule of law; the "liberties of Englishmen" which colonists in America believed to be under threat in the 1760s, and which they attempted later to secure by rebellion leading to what they seem to have hoped to be a purified English Constitution, were pre-democratic.

Meanwhile, if we are to deal in precepts, it is difficult to see that what this Report urges upon us as "democratic values" are not covered by that concise "Golden Rule", of "Do unto others as you would that they should do unto you." Nor am I convinced that desirable values, if indeed they can be agreed upon, should require a specific programme or curriculum called "Civics . The whole experience of education ought surely to involve them.

Both the Group as a whole, and the educationists who have drawn up a "sample" curriculum, seem to agree that the most obvious component of "Civics" is that which deals with the way we are governed. The ANOP National Civics Survey was exclusively to do with knowledge of the Constitution and associated matters, and this is the source of most disquiet about public ignorance. Civics", then, must involve teaching the educationists make much of the words "discussion", "analysis", "investigation": these avoid any suggestion of instruction, partly, perhaps, because the Report is most anxious that any curriculum shall avoid the appearance of "indoctrination" – the elements at least of our constitutional and political system or systems.

Here is the most troublesome matter. Our constitutional and political system might well be thought to lack stability at present, not indeed in its operation, but because it is subject to unprecedented attack, striking at its legitimacy as well as its character. Such is the intensity of public dispute – I do not use the word "debate", for matters have gone well beyond that – on various, including fundamental, aspects of our constitutional system, that it might well be said that we are rendered uncertain of what our system of government actually is, and insofar as we know it to some extent, how far or how long it is to remain in place.

This, of course, brings me into a realm which might be better avoided in itself, but which is so obvious that it must come out. Two and a half years ago I gave a paper to the inaugural meeting of this Society, on the subject of the Australian Republican Agenda. I expressed disapproval, contempt, and alarm at both the motivation and the objectives of the push.

Lest there be any apprehension on the point, I ve no intention of recapping my remarks, or introducing those which have occurred to me since. The point is that the campaign to abolish the monarchy and substitute some kind of republic has engendered in Australia a political atmosphere and circumstances inimical to attempts to spread knowledge or, more, understanding about the Constitution. Part of the blame for this must lie with the progenitors of the Australian Republican Movement (ARM); but I leave them out of it as far as possible, for every subject of the Crown, or "citizen", has a clear right to question the usefulness or reasonableness of even the most august institution: a theme which, incidentally, ought to form a major part of any attempt to teach political and constitutional "values", as well as "processes", in schools or anywhere else.

The ARM can be left to the attention of those who have organised defensive works against it, notably Australians for Constitutional Monarchy (ACM). Doubtless there would be a problem affecting "civics" even so. But by far the greater trouble arises from the fact that the campaign is not merely one of a curiously assorted bevy of persons. The assault on the Constitution is led, or driven, by the Prime Minister of Australia. It may be that before too long there might be some public disquiet at the spectacle of a Government adopting a settled policy of constitutional subversion, abrogation of oaths taken, public – indeed international – expression of contempt for the system of government, of repudiation of immense swathes of past experience, of denigration of most of the generations of Australians before the present one, all this having been undertaken gratuitously, not in response to some massive groundswell of public dissatisfaction, which alone could justify a government in essaying profound constitutional change.

But, bizarre though the spectacle is, that too is not quite to the present point. The Keatingite Government has given notice that it intends eventually to provide for a referendum on the Constitution. This is its policy, not something to be considered. Yet a referendum would, or will, be bitterly contested, probably on party political lines as well as any other. Existing divisions would be intensified and entrenched, no matter what the outcome. Meanwhile, the Government has long since begun its campaign for acceptance of the change and, unwilling to await a favourable outcome (if it should happen), has used legislative and executive power to put a number of measures in place which would be consequential upon the establishment of a republic. A fine lesson in constitutional behaviour, to be sure.

For this Government and this Prime Minister the issue is cut and dried. What anti-republicans and the Liberal and National Parties are invited to do is to join in the process of implementing what the ALP and the ARM prescribe: the option they are offered is limited to helping to decide the form of a republic, not to consider whether there ought to be one. And it is to be recalled that, at the time of the appointment of the CEG, the Prime Minister stated his hope that teaching the Constitution in schools will cause children to question the present system. We can hardly doubt that he doesn t mean academic questioning, but the sort which will serve his purpose. In this operation, in which the word education has long since been routinely used, Mr Keating has had the active co-operation of the print and television media, whose attitude is remarkable.

Where stands, then, any attempt to inform school children or the public? The ANOP survey reports that the people generally find television to be their best source of information. It must be added that the CEG makes no suggestion for supplying the ignorance of all those recent immigrants (presuming they are naturalized, and naturalized now in a ceremony which deliberately contrives to prevent new citizens from acknowledging their Sovereign) from countries and cultures to which our constitutional arrangements are alien, usually to a greater rather than a less degree.

Here indeed is exhibited a need for civics education, without which it seems quite improper to require – for we are not merely invited, but compelled, to vote – a decision by referendum to transform the character of the Australian Constitution. But is it at all likely that a curriculum or programme, financed by a Keatingite Government which is asked by the CEG to provide $30 million for such purposes over the next mere five years, will fail to lean heavily towards the need for change, rather than explication of the existing, functioning system?

It is not, of course, just the Monarchy which is at stake; and this brings me to another aspect of the present climate, which again makes it difficult to see how we can arrange education for citizenship, including understanding of institutions of government. We heard much, until recently, of a "minimalist" republican innovation. That apparently now exists in very few imaginations. More commonly there is heard advocacy of wide-ranging changes to the Constitution. Not least there is what I might call the "Barry Jones syndrome"; for the ALP s President and quiz-kid has frequently urged, as a matter of perhaps chief priority, that the Constitution must have written into it a description of certain functional elements, notably the Cabinet and the office of Prime Minister. He would appear to wish to have the Constitution spell out the meaning of parliamentary, responsible government. There are severe practical objections to such a course, for it would tend at least to ossify, to cast in the aspic of the present, what is meant by a political system which so far has exhibited, amongst other things, a capacity for change and adaptation; and it would extend the area of what might be justiciable in an age which seems to wish increasingly to resort to such processes.

But we are here concerned with civics education. Mr Jones is a man who knows a great deal. Can it be that he does not comprehend his information? It is hard to believe that he does not know that these vital aspects of our political existence found their way into the Australian constitutional fabric long before 1901, and are not spelled out in the Constitution of that year precisely because there was no need for it. They are the rational yet unplanned and unphilosophical products of practice and experience, for which no amount of theorizing or codification can be sufficient replacement.

True, some people are fond of playing parlour games with constitutional documents – for example, whiting-out "Queen", "Crown", "Governor-General", to replace them with "President"; or re-writing the whole Constitution, especially the preamble, in a style or fashion which would not only inspire but instruct the citizenry. But there is a reason why Mr Jones and others might well be reluctant to explain rather than codify "responsible government": such explanation must necessarily involve ideas indicating the British and imperial dimensions of our polity. This might cause Mr Keating to be displeased with his initiative, for he has given ample evidence of Anglophobic motives. These stand in distinct contrast to the dictum of David Malouf, the distinguished novelist, to the effect that an increased dissemination of things Australian would require teaching "a good deal of English history", and that "we should not be afraid of that."

The CEG, to its credit, gives some prominence to David Malouf's remarks. Perhaps then, it is but little affected by the "Barry Jones syndrome". Yet the prospects for historical explanation of our institutions of government in a civics curriculum are not wholly auspicious. This conclusion is prompted by the "sample" provided in the Report, and by the text of the Report, which speaks perhaps too simply of a system of government which was put in place only in 1900: the self-government of colonies before federation does not seem much considered by the CEG. On the other hand, thanks no doubt to the chairman of the CEG, a distinguished historian, it is stated (p. 52) that history is "an essential foundation for Australian citizenship" and that it "should be a core element" of the school civics curriculum.

Alas, there is a complication. In the same page, the Report says:

"While it is essential that all young people have a thorough knowledge and deep appreciation of the occupation of Australia by the indigenous peoples and of growth of the nation since 1788, it is important that they also have an understanding of the history and culture of the countries from which so many of their parents have recently come."

This is a statement with very considerable implications and, as the "sample" curriculum shows, likely consequences. It renders the task of conveying information and understanding very complex indeed, and – which is more troublesome – probably misleading. We find that "Australian history" is interpreted as "history of Australians"; and this is evidently related (as the chapter on Civics in Higher Education has it) to changes in the modes in which history is commonly studied by its professional practitioners. Let me quote from the Report (p. 74):

"The radicalism of the 1960s ushered in changes to the methodology and epistemology of history that hastened the decline of political and diplomatic history. The nation continued to define the boundaries of much historical research, but whereas before it had served to highlight the exploits of an elite few, it was now more commonly in the service of those who were alienated and disadvantaged. The history of empires, nations and political institutions the stuff of a traditional civics education was supplanted by the history of women, blacks, indigenous peoples and other groups that had been hitherto neglected."

This is dismayingly so. The Report goes on to note the emergence of "cultural studies", affecting history (for example) as well as English. Despite this, the CEG very properly welcomes signs of "a renewed interest in civics education". This observer, however, wonders what exactly might be the implications of having this interest manifested in the activities of "scholars questioning how contemporary Australian society can best be reflected (my emphasis) in our political conventions and institutions", with a prominent reference to Donald Horne's "concern with citizenship as a key component in developing a republican public sphere".

Moreover, the comparative element is heavily present in what seems to be contemplated in Chapter 4 (Proposals for Civics Education in School), as though learning about one s own polity is less important than observing that (a) it is but one polity amongst many (which is a perfectly legitimate operation, if not taken to excess); and (b) that it might be necessary to learn a lot from others, including the institutions and methods of government of Aboriginal Australians (which might or might not be a sensible operation).

There comes to me from all this a strong suggestion that Australian civic values and organisation which developed in the years up to some 30 or so ago, were insufficiently robust, and that the real Australia has only emerged since that time. It follows that the political and constitutional institutions which might be regarded as native to the country, having developed since their importation in the years after 1788, were never complete or authentic to an extent which entitles them to absorb later influences, rather than be remade in a new image. This is a kind of civics education which, I suggest, we can do without.

Incorporating Aboriginal experience into the constitutional story is another task evidently envisaged by the Group. There are ways of doing this, perhaps, and it certainly should be attempted, but care must be taken not to fall into a mode of presenting the Australian State as somehow illegitimate; there are modes of approaching Australian history which at least tend to present this appearance of illegitimacy.

And what of multi-culturalism? The Report gives cause for some apprehension on this score, with its adulation of diversity . The federative formula super-imposed in 1901 upon the separate responsible government colonies has one or two exotic sources. But could there be any temptation to suggest that the Constitution otherwise – something beyond the mere document so titled – is not of purely British origin?

In regard to such matters, there was always a danger that the CEG might have to produce the proverbial camel: we know what happened to the horse designed by a committee. The Terms of Reference gave them (to mix metaphors) a hard row to hoe. Worse, the atmosphere of division, dispute and controversy, which so much surrounds the Group's endeavours, just might cause the animal to make a mess in classrooms. Far from being edified and informed, school children would be in danger of ending up in a kind of chaos of the tribal, ideological, cultural, religious and other divisions to which the republican push has given life or a renewed lease of life. Perhaps this explains why the Report leans towards such complexity.

What, however, if it were possible to establish a rather less extravagant mode of approaching civics through history (and I beg to be forgiven if I say that I think there is no other satisfactory way of doing it)? What if we were indeed to re-introduce the study of political and constitutional history?

Even then we are not out of trouble. I say but briefly that, although John Hirst and I (to take but a convenient contrast) largely agree on what constitutes bad history, we profoundly disagree about

what has been called the "logic" of Australian history. We work from much, though not identically, the same data.

His view appears to be that each accretion of local self-government and autonomy distanced the Australian colonies and the Commonwealth of Australia that much further from the Crown, and that the logical end is the removal of all connection, the elimination of any institution, not domiciled in Australia, which might be called British.

In contrast, I hold that the process involved the piecemeal removal of the authority of the British State as exercised by its government, and not the distancing but the entrenchment, in the local polity, of the Crown as the embodiment of the autochthonous State.

It is, unfortunately, more than an arcane academic trifle. Our different perspectives or perceptions account for the fact that he is Victorian convenor of the ARM and I am a member of the Victorian Council of ACM. Even good history, in short, might contribute to a serious confusion in school education; and there is no telling how far the personal predilections of school teachers – to the training of whom the Report gives some consideration (p. 76) – might end in the kind of indoctrination which the CEG is so anxious to avoid. But above all, the political campaign to which I have referred renders it difficult, if not impossible, to envisage a reconciliation of diametrically opposed assessments of the nature of the Australian State and its institutions, to the detriment of programmes of education, whether in schools or in the general community.

Appendix:

The Group's Summary of its Terms of Reference

Under the Terms of Reference, the Group was asked to develop a strategic plan for a non-partisan program of public education and information on the Australian system of government, the Australian Constitution, Australian citizenship and other civics issues. The expressed goal was to ensure that Australians can participate fully in civic decision-making processes.

The following specific objectives were set out:

- to educate and inform the public about governmental, constitutional, citizenship and civics issues in Australia.
- to help Australians understand their rights and responsibilities as citizens and to promote good citizenship.
- to enhance Australians capacity to participate fully in decision-making processes affecting these issues.

The Terms of Reference specifically required the Group to ensure that any initiatives it might recommend would be non-partisan and likely to attract wide public acceptance.

Chapter Six

"A Hateful Tax"? Section 90 of the Constitution

The Rt. Hon. Sir Harry Gibbs, GCMG, AC, KBE

Section 90 of the Constitution includes the following provision: "On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise and to grant bounties on the production or export of goods, shall become exclusive."

One effect of this provision, of course, is to put it beyond the power of the States to impose duties of excise. The current view of the majority of the High Court is that any tax in respect of goods at any step in their production or distribution before they reach the point of consumption is an excise. That definition may appear clear, but in fact it has caused persistent uncertainty resulting in frequent litigation, in the course of which the courts have drawn fine distinctions and reached anomalous results.

What is even worse, this interpretation of s.90 has so restricted the taxing powers of the States that they are forced to resort to methods of taxation which are inefficient and which have an adverse effect on the economy.

In addition, the inability of the States to impose duties of excise, widely defined in this way, has contributed to the severe imbalance between the revenues and the expenditures of the Commonwealth and of the States. The Commonwealth raises far more than it needs to meet its responsibilities, whereas the revenues raised by the States are quite inadequate to meet their needs. At the same time this restriction on the power of the States confers no practical benefit on the Commonwealth. The constitutional ban on the imposition of excise duties by the States, as interpreted by the High Court, is both unnecessary and harmful.

These criticisms may appear to be so dogmatic as to suggest that they provide an example of "the full immunity from doubt of the judicial mind", but they are neither novel nor idiosyncratic. Many commentators, economists as well as lawyers, have pointed out the unsatisfactory results of the interpretation of the section. Professor Coper has said that the interpretation of s.90 is "a complete mess". Even some whose views generally are strongly in favour of increased central power have been unable to suggest any good reason why the States should not be able to impose duties of excise.

As long ago as 1929 a Royal Commission on the Constitution recommended that s.90 be amended so that the power of the Commonwealth to impose duties of excise should not be exclusive in respect of goods "not for the time being the subject of customs duties". Again in 1988 the Constitutional Commission recommended that the words "of excise" be omitted from s.90 so that the States would be empowered to impose excise duties of any sort. The fact that no action has been taken on these recommendations may provide a reason for supporting the suggestion that the States should have power to initiate the procedure for amending the Constitution by referendum, but as things stand, the prospect that s.90 will be amended by referendum seems somewhat remote.

The reason for revisiting this issue is certainly not to criticise the decisions of the High Court, some of which are of long standing. However, some judgments in the latest case in which the question has been considered give reason for hope that the High Court may in future revert to a narrower and less restrictive test of what is a duty of excise. The object of this paper is to suggest that every argument of legal principle and political and economic convenience is in favour of the realisation of that hope.

"Excise", like many other words in the English language, can bear a variety of meanings. It is wide enough to include any tax. Dr Johnson in his Dictionary defined the term to mean "a hateful tax levied upon commodities, and adjudged not by the common judges of property but wretches

hired by those to whom excise is paid." This definition has been said by the Privy Council to be "distinguished by acerbity rather than precision", but it reflects the rather irrational unpopularity that seems to be the fate of some taxes on goods. William Blackstone, in his Commentaries on the Laws of England, said that excise "from its first original to the present time has been odious to the people of England". A century earlier the poet Andrew Marvell had described excise as having more teeth than a shark and as feeding on all trades like a cassowary, which in those days was regarded as a bird of prey. In recent times, in Australia, a proposed Goods and Services Tax has been reviled with similar hyperbole. However, in spite of the ambiguity of the term "excise" its common meaning, and some would say its fundamental meaning, is "a duty charged on home goods, either in the process of their manufacture or before their sale to the home consumers".

In the Australian colonies before 1901 the term seems to have been generally understood to mean a tax on the local manufacture or production of goods. Although the debates of the Constitutional Conventions contain little enlightening discussion about the purpose for which duties of excise were to be put beyond the powers of the States, they do show that influential members, such as Messrs Isaacs and Barton, intended excise, in the Constitution, to mean "a duty chargeable on the manufacture and production of commodities". Subsequently, all five members of the Conventions who later became members of the High Court – Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ. – held in their judgments that an excise is a tax on local production or manufacture, i.e. a tax on articles produced or manufactured in the country imposing the tax. In the earliest case on the subject, Sir Samuel Griffith said that, whenever the expression "duties of excise" is used in the Constitution," it is intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax".

If this decision had been followed in later cases some of the difficulties that have since arisen would have been avoided, but not all. However, critical elements of this definition of "duties of excise" have been whittled away and the field of taxation from which the States are excluded has grown wider and wider. First the meaning of excise was significantly expanded in 1938 by the decision that the expression was not restricted to duties calculated directly on the quantity or value of the goods. Then, in 1949, the Court held that it was not necessary that the tax should be levied on the producer or manufacturer, and that any tax on goods before they reached the hands of the consumer is an excise. It was said that a tax on the sale or distribution of goods before they reach the consumer produces the same effect as a tax on the production or manufacture of the goods. This reasoning is open to criticism. If it were correct, the same thing could be said of any tax on producers and manufacturers, including land tax and payroll tax, and also of taxes on consumption. In other words, on the reasoning which the Court accepted, excise duties would include a much wider range of taxes than have so far been suggested to be forbidden to the States. Nevertheless, this reasoning is still accepted by the majority of the Court.

Subsequently an attempt was made to limit this wide view of s.90 by holding that a tax is a duty of excise only if it is directly imposed on goods, and that whether a tax is directly imposed depends on the form of the statute imposing it. This test seemed to have secured majority support, but it was soon rejected, and the Court now has regard to substance rather than form, and looks at the practical operation of the statute. This gives s.90 an even wider effect, and probably a less certain one. Finally, the majority of the Court in the most recent decision has taken a further step; it has rejected the view, which previously had considerable support, that the goods the subject of a duty of excise must be of local production or manufacture. Thus the restriction on the taxing power of the States has grown more and more severe.

The Court has, however, given the States a grain of comfort; it has left undisturbed some of the earlier decisions that allowed the States to exact licence or franchise fees from vendors of alcohol or tobacco where the fees are calculated by reference to the quantity or value of goods sold or purchased during a period preceding the licence, although the Court obviously thought those decisions to be wrong in principle. This small concession does not alter the fact that the

States cannot impose a general sales tax, and since for practical purposes they have also been prevented from imposing an income tax, they have no significant area of growth tax available to them.

It is essential to the nature of a true federation that the States should have under their independent control financial resources sufficient to perform their functions. The way in which s.90 has been interpreted is one of the factors which have contributed to the instability of federation in Australia.

However, as I shall mention shortly, three members of the High Court have expressed an opinion very different from that of the majority as to what constitutes a duty of excise. When I sat on the Court, I felt bound by previous authority to hold that a tax directly related to goods was an excise even though the person taxed was not the producer or manufacturer. If a similar attitude to precedent prevailed today the judgments of judges in the minority might be merely of historical interest. Nowadays, however, the High Court allows itself more latitude in its treatment of earlier authorities. If the High Court, which reconsidered 140 earlier decisions in reformulating the meaning of s.92 of the Constitution, were to feel itself unable to depart from the comparatively few decisions on s.90, notwithstanding that it thought them to be wrong, it could surely be said that it had strained at a gnat, having swallowed a camel.

It may therefore be useful to consider the effect that should be given to s.90 if it were free from authority, and to compare that result with the judgments of the minority in the most recent decision.

The words of any provision in the Constitution should obviously be interpreted having regard to the context in which they appear and the purpose for which they were apparently designed. In s.90 duties of excise are closely linked with duties of customs and bounties on the production or export of goods. The provisions of that section were declared to come into effect only when uniform duties of customs had been imposed.

There could hardly be a plainer indication that exclusive power was given to the Commonwealth to impose duties of excise and to grant bounties on production or export for a purpose related to customs. It is well known that as a matter of history one important aim of those who supported federation and took part in framing the Constitution was to do away with the customs barriers that had been erected by the Australian colonies. For this purpose the Commonwealth was given exclusive power to impose duties on the exportation or importation of goods. The inclusion of excises and bounties in the area forbidden to the States was obviously intended to make effective the Commonwealth's control of its tariff policy.

If the Commonwealth were to adopt a free trade policy and to decide that the importation of a particular commodity should be free of duty, a State could have negated that policy by granting bounties on the local production of that commodity. On the other hand, if the Commonwealth were to adopt a policy of protection, and to impose a customs tariff with a view to favouring Australian manufacturers, a State could have defeated that policy by imposing an excise duty on local manufacturers.

It seems rather unlikely that a State would have wished to undo the benefits which a protective tariff would have given to manufacturers and producers within that State, and the justification for prohibiting the States from imposing duties of excise seems to have been largely theoretical, although in unusual circumstances, which could not be foreseen, the prohibition might prove to have practical value. It is unlikely that the prohibition was intended to prevent one State from imposing a tax on production or manufacture in another State, since a tax of that kind would probably have been regarded as a duty of customs rather than as a duty of excise. Even if it was over cautious to include a mention of excise duties in s.90, the logical attraction of protecting Commonwealth tariff policy by denying the States the power to impose excise duties as well as the power to grant bounties is obvious enough.

Some judgments of the High Court have however suggested other purposes which the prohibition of State excise duties was intended to serve. One view that has been expressed is that

s.90 was intended to give the Commonwealth Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action. There is nothing in the words of s.90 to support this theory and if it had been intended to give the Commonwealth the exclusive power to tax commodities it would have been very easy to say so.

An even broader constitutional purpose has been suggested, namely that the section was intended to give the Commonwealth Parliament the control of the economy as a unit which knows no State boundaries. Again, with all respect, there is nothing in the words of the section to suggest that this was intended, and if it had been the intention the section would have fallen far short of effecting it. There are many other ways in which the exercise of power by the States can affect the ability of the Commonwealth to control the economy. The States may impose taxes which affect the price of commodities but which are not excises; payroll tax and land tax are examples. The States can discourage the production and manufacture of particular goods by fixing quotas or they can forbid production or manufacture altogether. On the other hand, the States can encourage producers and manufacturers by reducing taxes and charges and by providing them with special facilities and other assistance. The restriction on State power effected by s.90 is inadequate for the purpose of giving the Commonwealth control of the economy and the words of the section do not suggest that it was intended to do so.

It is impossible to believe that if the framers of the Constitution had intended s.90 to serve wide purposes of these kinds, they would have hidden their intentions by the use of words which were quite inappropriate. If the question is not what the Constitution was intended to mean, but what meaning would best be given to it now, it is difficult to see why s.90 should be understood to impose restrictions which fall far short of giving the Commonwealth complete control over economic policy even in relation to goods, but at the same time seriously and capriciously limit the taxing powers of the States. There is nothing incompatible with the effective working of a federal system in allowing the regional governments to impose sales taxes and similar taxes. Everyone who has been to the United States knows that there sales taxes vary from State to State, but the economy of that nation has not been brought to its knees by allowing the States and even local authorities to impose sales taxes.

The ban imposed by s.90 extends far beyond sales taxes, and it is easy to give examples of taxes which the Court has held invalid but which one would have thought could not possibly affect the ability of the Commonwealth to control the economy. In one case, a levy imposed on the owners of stock used for production, and intended to provide funds for animal husbandry, was held to be an excise. In the most recent decision, which I have already mentioned, the Capital Duplicators Case, an Act of the Australian Capital Territory required persons selling "X" rated videos to have licences for which fees were payable, and this, the Court held, invalidly imposed a duty of excise. These two taxes fall within the words of the test which the Court accepted, but surely there was no good reason of policy for holding them to be beyond power.

Even before the Capital Duplicators Case there were some members of the High Court who were prepared to depart from the view which the authority of the decisions seemed to require. In 1960 Fullagar J. held that the character of a duty of excise is that the taxpayer is taxed by reason of, and by reference to, his production or manufacture of the goods and that once goods have entered into general circulation in the community a tax on them is no longer an excise. At that time his was a voice crying in the wilderness. From 1977 to 1985 Murphy J., in a number of cases, expounded the view that excise duties are taxes on goods produced or manufactured in a State, and that taxes imposed without regard to the place of production or manufacture are neither duties of customs nor duties of excise. In his opinion s.90 prohibits State taxation which discriminates between goods produced in the State and those produced outside the State. His views were at the time regarded as heterodox. However, in the most recent case – the Capital Duplicators Case – three Justices have returned to the notion that an excise is a tax on local production or manufacture. In that case, Dawson J. accepted that the primary constitutional

purpose of s.90 was to secure a customs union binding the States by ensuring a uniform policy with respect to external tariffs. He said that a tax should be characterised as an excise duty if it imposed a different level of tax on goods produced overseas and home produced goods. He concluded that an excise duty is a tax which falls selectively on the local production or manufacture of goods. Such a tax may be imposed on a step subsequent to production or manufacture, for example, a selective tax on the first sale after production may be an excise. However, a tax upon all sales is not an excise, and such a tax could not have an adverse effect on tariff policy, because the effect of the sales tax on the price of the goods would be indiscriminate and would not depend on whether the goods were imported or produced locally.

The other members of the minority, Toohey and Gaudron JJ., said that the purpose of s.90 is to give the Commonwealth power to effectuate economic policy with regard to Australian exports and imports. To secure that purpose, it is enough to deny to each State the power to levy duties of customs on goods entering that State from overseas, the power to levy duties of excise on goods locally produced or manufactured and the power to grant bounties on goods produced or manufactured in that State. They accepted the view of Murphy J. that a tax imposed without regard to the place of production or manufacture is neither a duty of customs nor a duty of excise. They did not agree however that an excise is limited to a tax on production or manufacture within a State. They said that if a State tax on goods produced outside the State did not infringe s.90, one or more States could combine to defeat Federal Government policy by imposing a sales tax or consumption tax which would frustrate Commonwealth tariffs. They therefore concluded that s.90 strikes down State taxation measures which discriminate against goods manufactured or produced in Australia. Dawson J. had left open the question whether an excise duty is confined to a tax upon production within the relevant State or includes a tax on production anywhere in Australia.

All three of the minority Justices in the Capital Duplicators Case have rejected the wider views which have been expressed in the authorities as to the purpose of s.90. In spite of some differences in language, their opinion is, I think, in substance the same as that which I have suggested, namely that s.90 is intended to give the Commonwealth effective control of tariff policy. The question whether s.90 strikes down State taxation measures which discriminate against goods produced or manufactured in Australia, or only those which discriminate against goods produced or manufactured in the State imposing the tax, seems to be of no great importance, since a discriminatory tax imposed by one State on goods produced or manufactured in another would be a customs duty if it were not an excise, and invalid on either view. The practical effect of both judgments would appear to be the same. Both would allow the States to impose sales taxes, and other taxes on goods, provided the taxes were applied without discrimination based on the place of production or manufacture.

If the minority view comes to be accepted as the true doctrine, there will still remain restrictions on the taxation policy of the States which would seem to achieve no sensible purpose. For example, Dawson J. suggested that the inability of a State to impose levies on locally produced goods might still result in the invalidation of a levy on the ownership of stock, or on a fee for the operation of a pipeline. The minority judgments do not go as far as the original definition formulated by Sir Samuel Griffith to limit the scope of s.90. Only an amendment of the Constitution could entirely remove the dead hand of that section. Nevertheless, the adoption of the view of the three minority Justices in the Capital Duplicators Case would significantly increase the taxing power of the States without in any way diminishing the power of the Commonwealth.

It is a matter for regret that it should be thought, as some appear to have thought, that the debate as to the meaning of s.90 concerns the width or efficacy of the power of the central government as compared with that of the States. Murphy J. did not fall into that error. He was not notable as a defender of State rights, but he saw no reason to expand the scope of s.90. On any view of the effect of s.90, central power is not threatened by the ability of the States to impose excise duties.

On the other hand, State finances, Commonwealth–State financial relations and the efficiency of the economy generally are all impaired by giving s.90 an effect that forbids the States to impose taxes on the sale or distribution of goods and requires them to resort to less satisfactory measures.

Whether or not taxpayers share Dr Johnson's view that a tax on goods is hateful, there is no reason why even the most ardent supporter of Commonwealth supremacy should object to taxes of that kind being imposed by the States. No valid constitutional purpose is served by extending the meaning of "duties of excise" in s.90 beyond the narrowest meaning of which the words are capable.

The prohibition on the imposition of excise duties by the States has been so detrimental in its effects, that one might well say that it is the reference to the tax in the Constitution, rather than the tax itself, that is hateful. The words of the section must of course be given some effect, however much one may regret their presence, but the High Court can, consistently with principle, so construe them that they cause the least harm. Convenience will be served, and an obstacle to fiscal rationality will be removed, if the words of s.90 are confined at least to the extent suggested by the three Justices in the minority in the latest decision of the High Court.

Chapter Seven

The 1975 Dismissal: Setting the Record Straight

Sir David Smith, KCVO, AO

Australians are constantly being told that our Constitution is a "horse and buggy" document badly in need of reform. The chief purpose of The Samuel Griffith Society is to ensure that, if any alterations are to be made, they do not occur without the closest study. As we know only too well, amendment in accordance with s.128 is not the only way to alter our Constitution, and this Society has done a sterling job in drawing attention to the way in which this nation's founding document has been subverted by political and administrative action, and by imaginative judicial interpretation. There is also another way of subverting our Constitution, and that is by misrepresenting the meaning and the significance of action taken in accordance with its provisions. It is about this method that I wish to speak tonight.

The accurate recording of history requires objective detachment. As I said at the time of Sir John Kerr's death in March 1991, history should be written by those "who were not personally affected by the events or their consequences, and who can do as historians down the ages have done, and look objectively and dispassionately at the events and the circumstances – the behaviour, the conditions, the attitudes of all of the participants in that event."

Mind you, not everyone who writes long after an event, and who has available accurate contemporary accounts, will necessarily produce a fair and accurate account, for, in addition to careless or inadequate research, we may be dealing with poetic licence or simple error on the one hand, or bias, prejudice or even malice on the other. But if one did want to write a fair and accurate account of this country's greatest constitutional crisis, what primary and secondary sources would be available to such an historian?

The most obvious sources are participants or eye-witnesses. Sir John Kerr, Gough Whitlam and Sir Garfield Barwick have recorded their accounts. But what of their contemporaries? How accurate their knowledge? How accurate their understanding? How accurate their memories? And most importantly, how accurately did they place on record their knowledge, their understanding and their recollections?

Let me try to answer my own questions by giving just three examples which I recorded shortly after Sir John's death. Each example involved an experienced parliamentarian who had held office as a Minister in the Whitlam Labor Government. I shall not mention names, for my purpose is merely to make my point, and not to point the finger.

My first example concerns the former Minister who greeted the formation of the Australian Republican Movement in 1991 with the comment that, come the Republic, there would be no more Supply crises. He had obviously forgotten that, just a year earlier, in 1990, the United States Congress had at first refused to pass President George Bush's Appropriation Bill and federal government had ground to a halt; and in the same year President Ghulam Ishaq Khan of Pakistan had dismissed Prime Minister Benazir Bhutto and had ordered an early election. So much for accurate knowledge.

My second example concerns a former Minister who wrote, at the time of Sir John Kerr's death, that he couldn't understand why Sir John, in 1975, in insisting on calling an election, hadn't allowed Gough Whitlam to go into that election as Prime Minister. After many years in Parliament and as a Minister and member of the Federal Executive Council, he still didn't know that, under our system of constitutional government, a Governor-General requires ministerial advice to dissolve Parliament and to issue writs for an election. That was the whole point and purpose of the 1975 dismissal, for Mr Whitlam had refused to give that advice, yet here was an experienced parliamentarian and Minister of the Crown who had been directly affected by the

dismissal who had never cottoned on to just why it had happened. So much for accurate understanding.

My third example concerns another former Minister who, along with his fellow Ministers, was photographed at Government House, Canberra, in 1973, with The Queen, just after she had presided over a meeting of the Federal Executive Council. The photograph was reproduced, with names underneath, in the Australian Labor Party's centenary history published in 1991. The National Library of Australia was preparing a copy of the photograph for a display to mark the publication of the history, when one of the staff noticed an error. The official standing at one end of the back row of Ministers was identified as the Official Secretary to the Governor-General, but it certainly was not I. It was, in fact, my successor as Secretary to the Federal Executive Council, and the National Library started telephoning to try and identify him. They eventually got on to me, and I was able to tell them who it was, but before that they tried Gough Whitlam. He could tell them that it was not I, but he didn't know who it was. Next they tried one of his Ministers – one with a reputation for a long memory. "Yes", he said, "that's a young David Smith." And then, no doubt to give some verisimilitude to his assertion, he added, "I can remember him pushing his way into the photograph." As I have said, it was not I, nor had my colleague pushed himself into the photograph: he stood well back while the Ministers took their places, and then quietly moved to one end of the back row. So much for accurate recall.

Well, if future historians can't rely on the memories, or the utterances, of old men, where else do they turn for their basic information? If there is one thing which my time in retirement, while doing some work at the Australian National University, has taught me, it is the extent to which students and scholars rely on the contemporary media for much of their information – on newspapers and journals, and on television and radio transcripts. My experience over 37 years as a Commonwealth public servant taught me that these sources can be as unreliable as old men's memories.

Derek Parker's book, The Courtesans, about the Parlia- mentary Press Gallery, should be compulsory reading for all contemporary historians. Parker deals mainly with journalists who write the way they do because of inherent bias and prejudice, and a jaundiced view of their role. His evidence of the poor quality of much of today's political journalism provides a salutary lesson for those who would place any reliance on it. There are also many journalists, sad to say, whose writings are suspect because they lack the ability to do any better.

The late Philip Graham, former publisher of Newsweek and The Washington Post, said that good journalism should aim to be "the first rough draft of history." On the other hand, Thomas Jefferson once said that "a man who never looks into a newspaper is better informed than he who reads them; inasmuch as he who knows nothing is nearer to truth than he whose mind is filled with falsehoods and errors." When one looks at the media in Australia today, one would have to conclude that Jefferson was closer to the mark than Graham.

Let me give a couple of examples from my own experience of what an incompetent journalist can do to the truth. I am regularly described as "the man who announced Gough Whitlam's sacking in 1975." Having put up with the inaccuracy for so many years, I finally decided to take up the issue when, shortly after I had retired in August 1990, the Australian Broadcasting Corporation used the description in a totally unrelated story about the tabling in Parliament of my final annual report as Official Secretary to the Governor-General. I wrote a polite letter to the ABC, pointing out that the description was inaccurate and untrue, as what I had announced from the steps of Parliament House in 1975 was not the sacking of Prime Minister Whitlam, but the Governor-General's proclamation dissolving both Houses of the Parliament on the advice of Prime Minister Fraser, for the purpose of holding a general election.

I received an equally polite reply, conceding only that their description of what I had done merely verged on over-simplification that did not convey precisely my role in the events of 1975. What was clearly untrue, wrong, false, inaccurate, call it what you will, was considered by the national broadcaster to be only "verging on over-simplification" or "lacking in precision," thus

giving new meaning to those words as well. After another letter in which I pressed my point, I received a grudging assurance that the inaccurate description would not be repeated, though the ABC's parting shot was that its news executives were a little surprised at my view on the wording about which I had complained.

My second example of the standards of accuracy, if one could use that word, employed by the media today arises from my recent contribution to the monarchy/republic debate. On 29 March, 1993 I wrote to the editors of four newspapers – The Australian, The Canberra Times, The Age, and The Sydney Morning Herald. I suggested that the Prime Minister could let the Australian people see a trial run of his proposal that Parliament should choose our Presidents by forgoing his right to nominate the next Governor-General and instead inviting Parliament to choose Mr Hayden's successor. In the event, Mr Hayden was invited to continue in office for another two years.

On 9 March,1995 I sent another letter to the same four newspapers, saying that it was timely that I renewed my earlier suggestion, particularly as the Australian people had made it clear that they would want to choose any Presidents and not entrust the task to Parliament. As we now know, the Prime Minister has rejected the proposal, even though it was publicly supported by some of his Ministers. Clearly he doesn't have the stomach to impose on himself what he is prepared to inflict on future Prime Ministers, namely, an elected rather than an appointed incumbent at Yarralumla. But that is another story. Let us see what the media did with my proposal.

My letter was published in The Canberra Times on 13 March, and in The Age on 14 March. Later that morning I was interviewed on my letter by ABC Radio, and soon after Sir Zelman Cowen telephoned me to talk with me about my proposal. On 15 March, 1995 The Australian reported my ABC Radio interview, and quoted accurately from that interview, in which I repeated my suggestion that Parliament should be invited by the Prime Minister to choose the next Governor-General.

However, what I had said on radio, though accurately quoted in The Australian so far as it went, apparently could not be allowed to stand on its own. As seems to be the custom with so many journalists these days, my own words had to be preceded by a summary of what I would be reported as saying in the very next paragraph, no doubt to help ignorant readers the better to understand what was to follow. Unfortunately, that summary lost some of its accuracy in the abbreviation.

That afternoon, in a public debate with Mr Barry Jones, Sir Zelman Cowen spoke in support of my proposal, and on the following day, 16 March, The Age reported the Cowen/Jones debate. Although that paper had published my letter two days earlier, my proposal was now described as Sir Zelman's proposal. In an obvious repetition of the previous day's inaccurate sentence in The Australian, Sir Zelman's proposal was contrasted by The Age reporter with my, by now, very different proposal. Sir Zelman was reported as suggesting that Parliament should nominate the next Governor-General, and I was credited, if that's the right word, with having proposed that Parliament should elect the next Head of State. On 17 March The Age, in its editorial, again very clearly contrasted these two very different proposals. And The Weekend Australian of 19 March wrote of the novel proposal put forward by Sir Zelman, although that paper had now somewhat belatedly published my letter on the previous day. On 21 March I managed to correct the record with a letter to the editor of The Age, but it is the incorrect front page story and editorial that will be remembered and repeated.

I have no concern that Sir Zelman's name has become attached to my idea; after all, he and I have worked together before. Indeed, I rather hoped that Sir Zelman's name might have made the proposal more palatable to the Prime Minister. Of far greater significance is the fact that, in a matter of only five days, one journalist's sloppy use of words was incestuously plagiarised by other journalists, without any attempt to check sources, as a result of which the Australian public was misinformed on an issue of public importance. To make matters worse, this staunch

constitutional monarchist was grievously misrepresented as proposing that his Sovereign be replaced by an elected Head of State!

Well, so much for the state of the media in the 1990s. Let me now go back to 1975 and look at what the future historian might find in the contemporary accounts of those days. Underlying those writings was the widely-held view that the Governor-General and the Senate had acted improperly, or illegally, or both. To set the scene for these impressions, everything associated with their actions had to be presented in some evil light.

The campaign began with Malcolm Fraser's early arrival at Government House on that fateful day in November, 1975 before, and not after, Gough Whitlam, as the Governor-General had instructed. That was due to a simple error by someone on Fraser's staff, but was presented as the beginning of the Vice-Regal conspiracy.

It was alleged that Fraser was closeted in a room at Government House with the blinds drawn. Not so: he waited with me in a room next to the State Entrance, a room which at that time was used as a waiting room for visitors who had arrived early, and the blinds were not drawn.

It was alleged that Fraser's car was hidden round the back, out of sight. It was not. His car dropped him off at the State Entrance, and then drove around to one of the three "front of house" parking areas used by visitors. The driver chose the one which suited him best – the one which gave him the clearest view of the State Entrance, so he could see when to drive forward to pick up his passenger, and also the one which provided the best shade from overhanging trees on a warm November day. Unfortunately, that put the car on the inside curve of that part of the main drive which leads to the Private Entrance.

It is one of the traditional courtesies extended to a Prime Minister at Government House that he comes and goes via the Private Entrance, so called because it is used by the GovernorGeneral and his family, rather than via the State Entrance, which is used by all other callers on the Governor-General. The duty Aide-de- Camp for that day had been told to expect the Prime Minister and the Leader of the Opposition, and their estimated times of arrival, but nothing more. He knew from experience that the Prime Minister's convoy, consisting of the Prime Minister's car and the police security car which followed it, always travelled very fast, even within the grounds of Government House. He could see that Fraser's car, having arrived out of sequence, was now parked where it posed, at best, an inconvenience, and at worst, a serious hazard, to the Prime Minister's car as it swept around the bend.

The Aide-de-Camp used his own judgment, made a decision in the interests of safety, and asked the driver to move his car to the parking area outside the Official Secretary's office, and right next to the State Entrance, but on the other side of it. The car was not hidden around the back, but was in fact moved even closer to the front of the building and to the State Entrance than it had been. The Aide-de-Camp did not consult either the Governor-General or the Official Secretary, nor did he need to: the three Aides-de-Camp were responsible for the smooth and efficient arrival and departure of all visitors to Government House, and were constantly directing vehicles in the interests of safety and convenience. The first that either the Governor-General or I knew of what had happened to Fraser's car was when we read the press reports next day alleging some devious conspiracy to conceal it.

It was a measure of the man that Sir John refused me permission then to correct that story. The Aide- de-Camp had acted properly and in good faith, and Sir John would allow nothing to be done or said which suggested otherwise, even by implication.

The next pair of myths grew out of my reading of the Governor-General's proclamation from the steps of Parliament House. First it was alleged that I had come through the kitchens and, as the immediate past Prime Minister so elegantly put it, up the back passage; next that I had been spirited in through a side entrance. Both cannot be right, and in fact neither is right. I came, as always, to the front entrance. Far from arriving inconspicuously, as if on some furtive mission, I drove up to the front steps in a big, black Government House car, clearly identified as such by the traditional Crowns where number plates would normally be. I wore full morning dress, so I

could hardly have been mistaken for one of the mob that had gathered around the front steps. I was met by a Senate Officer and escorted into Parliament House via Kings Hall, far removed from the kitchens or side entrance.

The second allegation was that my reading of the proclamation was an unnecessary provocation on the part of the Governor-General. Not true. The practice of reading the Governor-General's proclamation dissolving the House of Representatives, or the House of Representatives and the Senate in the case of a double dissolution, was begun in 1963. When dissolution takes place, and the Governor-General subsequently, and usually on the same day, issues writs for the holding of ensuing elections, it is necessary that the people be aware that the dissolution proclamation has been issued and published, that members of the Parliament and its officials know at what time dissolution occurred, and that the order of the events on the day be able to be clearly established.

In 1963 the Attorney-General of the day gave advice that a public reading of the proclamation from the steps of Parliament House by the Governor-General's Official Secretary, in the presence of the Clerks of the Chamber or Chambers being dissolved, would meet all of these requirements, and so the practice was begun. The first public proclamation reading in 1963 was followed by similar public readings in 1966, 1969, 1972, and 1974, before we came to the 1975 reading, and there have so far been eight more since then. My first reading was in 1974, when Sir Paul Hasluck dissolved both Houses of the Parliament on the advice of Prime Minister Whitlam.

In furtherance of the 1975 mythology, what was correct in 1974 was branded incorrect in 1975: that which had become necessary and routine on five occasions between 1963 and 1974 was suddenly denounced as unnecessary and provocative on the sixth occasion in 1975.

So far I have dealt only with minor events which preceded the main game: each was not greatly significant by itself, yet together they helped establish an atmosphere designed to taint the public's perceptions of what was to follow. They suggested an aura of irregularity or impropriety emanating from Government House, which the critics then sought to transfer to the major events of the day.

The original attack, of course, had been on the Senate's refusal to pass the Government's Budget. The Government's view was that the Constitution and its associated conventions vested control over the supply of money to the Government in the lower House, and that the actions of the upper House in threatening to block that supply of money were a gross violation of the roles of the respective Houses of the Parliament in relation to the appropriation of moneys.

This view of the respective roles of the Houses of the Parliament had not always been the view of those who were now in government, and particularly of their leaders. Back in 1957, Senator Lionel Murphy, then Leader of the Opposition in the Senate, had this to say about the upper House and money bills: "There is no tradition, as has been suggested, that the Senate will not use its constitutional powers, whenever it considers it necessary or desirable to do so, in the public interest. There are no limitations on the Senate in the use of its constitutional powers except the limits self-imposed by discretion and reason. There is no tradition in the Australian Labor Party that we will not oppose in the Senate any tax or money Bill, or what might be described as a financial measure."

In 1970, the then Leader of the Opposition, Gough Whitlam, had this to say:

"The Prime Minister's assertion that the rejection of this measure does not affect the Commonwealth has no substance in logic or fact... The Labor Party believes that the crisis which would be caused by such a rejection should lead to a long term solution. Any Government which is defeated by the Parliament on a major taxation Bill should resign... This Bill will be defeated in another place. The Government should then resign."

When that same Bill reached the Senate, this is what Senator Lionel Murphy, Leader of the Opposition in the Senate, had to say: "For what we conceive to be simple but adequate reasons, the Opposition will oppose these measures. In doing this the Opposition is pursuing a tradition which is well established, but in view of some doubt recently cast on it in this chamber, perhaps I should restate the position. The Senate is entitled and expected to exercise resolutely but with

discretion its power to refuse its concurrence to any financial measure, including a tax Bill. There are no limitations on the Senate in the use of its constitutional powers, except the limitations imposed by discretion and reason. The Australian Labor Party has acted consistently in accordance with the tradition that we will oppose in the Senate any tax or money Bill or other financial measure whenever necessary to carry out our principles and policies. The Opposition has done this over the years, and in order to illustrate the tradition which has been established, with the concurrence of honourable Senators I shall incorporate in Hansard at the end of my speech a list of the measures of an economic or financial nature, including taxation and appropriation Bills, which have been opposed by this Opposition in whole or in part by a vote in the Senate since 1950."

At the end of his speech Senator Murphy tabled a list of 169 occasions when Labor Oppositions had attempted to do, unsuccessfully, what the Liberal/National Party Opposition were to succeed in doing five years later.

Two months later, on 25 August, 1970 the Labor Opposition launched its 170th attempt since 1950. On that occasion, Gough Whitlam had this to say:

"Let me make it clear at the outset that our opposition to this Budget is no mere formality. We intend to press our opposition by all available means on all related measures in both Houses. If the motion is defeated, we will vote against the Bills here and in the Senate. Our purpose is to destroy this Budget and to destroy the Government which has sponsored it."

As Jack Kane, one-time Federal Secretary of the Australian Democratic Labor Party and former DLP Senator for New South Wales, wrote in 1988:

"There is no difference whatsoever between what Whitlam proposed in August, 1970 and what Malcolm Fraser did in November, l975, except that Whitlam failed – the Budget being carried by a bare majority of twenty-four to twenty-two. Senator Murphy, for Whitlam, sought the votes of the DLP Senators, unsuccessfully. That is the only reason why Whitlam did not defeat the 1970 Budget in the Senate and thus fulfil his declared aim to destroy the Gorton Government."

So much for the Senate's actions in l975 being a gross violation of its proper role. Of course, we are all accustomed to politicians who have one view when in Opposition and a different view when in Government. But I know of only one journalist in only one newspaper – Wallace Brown in The (Brisbane) Courier-Mail – who reminded the community, during l975 or since, of the views held and expressed by Whitlam and Murphy in 1967 and 1970. What is even worse, students studying Australian politics at school and at university are still taught that the Senate's actions in l975 were unprecedented and improper, but they are not told that what it did then was so clearly and forcefully and repeatedly enunciated by Lionel Murphy and reinforced by Gough Whitlam, years earlier, and attempted on so many previous occasions by their side of politics.

I can imagine some of you thinking that it's not really surprising to find politicians changing their views as they move from one side of Parliament to the other. Well, let's see if we can find higher authority to dispel the myth that the blocking of Supply by the Senate, under the present provisions of the Constitution, is the violation of its role that it was claimed to be during the debates of October and November, 1975.

On 30 September, 1975 the High Court handed down its judgement in Victoria v The Commonwealth. Four of the learned Justices expressed opinions which supported the view that, except for the constitutional limitation on the power of the Senate to initiate or amend a money Bill, the Senate was equal with the House of Representatives as a part of the Parliament, and could reject any proposed law, even one which it could not amend. The judges who expressed these opinions were Sir Garfield Barwick, the then Chief Justice; Sir Harry Gibbs and Sir Anthony Mason, who each, in turn, became Chief Justice; and Sir Ninian Stephen, who later became Governor-General.

It is true that Commonwealth Law Reports are not widely read, but the relevant parts of these judgments were incorporated in Hansard on 30 October, 1975. Yet still the media, and particularly the Parliamentary Press Gallery, except for Wallace Brown, kept silent on this issue.

As a result, many adult Australians still believe, and many young Australians are still taught, that the Senate has no right to block Supply.

The next major myth which was developed at the time had two stages. The first stage was that the Governor-General could act constitutionally only on the advice of his Ministers, or more particularly at the time, on the advice of his Prime Minister, and then only in accordance with that advice. The second stage, once the phrase "reserve powers" began to gain currency, said that the reserve powers of the Crown had long since lapsed into desuetude. The politicians and the commentators forgot, if they ever knew, that Lord Casey, as Governor-General, as recently as 19 December, 1967, had exercised the reserve powers following the disappearance of Prime Minister Harold Holt. Without ministerial advice, for there was no-one who legally could give it, the Governor-General revoked Holt's appointment as Prime Minister, in accordance with s.64 of the Constitution, exactly as Sir John Kerr did with Whitlam's appointment, and chose John McEwen to be the next Prime Minister, exactly as Sir John Kerr did with Fraser's appointment.

Notwithstanding the fact that Whitlam was constantly reminding the Governor-General, both privately and publicly, that he could act constitutionally only on the advice of his Prime Minister, the existence of the reserve powers would have been, or should have been, well known in Labor circles. One of the most definitive and scholarly works on the subject, entitled The King and His Dominion Governors, had been written in 1936 by H.V. Evatt, then a Justice of the High Court, later to become a member of the House of Representatives and Leader of the Parliamentary Labor Party. Evatt believed that the reserve powers exercisable by The King (at that time) or by his representative in a Commonwealth country needed to be more precisely defined, and that the principles upon which they would be exercised should be settled and stated as clearly as possible. But whether they remain undefined and unregulated or not, the reserve powers of the Crown do exist, as Evatt acknowledged all those years ago, and they are exercisable by a Governor-General.

And lest 1936 be too far back in time for the modern-day politician or the modern-day political journalist, let us come forward and look at the 1951 double dissolution which Prime Minister Menzies recommended to Governor-General Sir William McKell. On that occasion the Governor-General did in fact accept the advice of the Prime Minister, supported by the opinions of the Attorney-General and the Solicitor- General, that the Senate's failure to pass a Bill which had twice been passed by the House of Representatives satisfied the requirements of s.57 of the Constitution and allowed the Prime Minister to recommend a double dissolution. Significantly, nowhere in the documents submitted to the Governor-General in 1951 by Prime Minister Menzies was there any reference to any obligation or supposed obligation on the Governor-General's part to accept the ministerial advice. On the contrary, the Prime Minister advised the Governor-General that he was entitled to satisfy himself and to make up his own mind on the matters submitted to him.

Interestingly enough, and especially so in the light of the Labor view in 1975, the Labor view in 1951 was that the Governor-General was not obliged to accept the Prime Minister's advice, and indeed should not accept it; that he should not accept the advice of his Law Officers, and should instead seek independent legal advice; and that he should seek it from the Chief Justice of Australia, Sir John Latham.

This 1951 view held by the Labor Party that the Governor-General should consult the Chief Justice brings me to what was probably one of the biggest canards put about after 11 November, 1975 – the views expressed by so many politicians, academics and journalists that Sir John Kerr, in consulting the Chief Justice, and Sir Garfield Barwick, in responding to that request, had acted improperly and unconstitutionally, and almost without precedent.

May I interpolate here that, in describing this as one of the biggest canards of l975, I am of course reserving the label of biggest canard of all for the assertion that the United States Central Intelligence Agency was involved in the dismissal or in events leading to it. Such an assertion is totally untrue, no evidence in support of it has ever been produced, and there is no evidence that

even those who spread the story ever believed it themselves. I therefore propose not to dignify it by making any further reference to it.

Well, back to the question of advice from the Chief Justice. The attacks, when they came, were two- fold, and sought to discredit both the Governor-General and the Chief Justice. Once again, as in the case of the blocking of Supply by the Senate, there is considerable anecdotal evidence that many Australians believe, and that many students have been taught, that they acted improperly, unconstitutionally and without precedent.

In fact, we know of at least three Chief Justices who have given advice to Governors-General on the exercise of their Vice-Regal powers. They were Sir Samuel Griffith, Sir Owen Dixon and Sir Garfield Barwick. They gave their advice, when it was asked for, to no less than seven, or to one-third, of our twenty- one Governors-General since Federation. They were Lord Northcote, Lord Dudley, Lord Denman, Sir Ronald Munro-Ferguson, Lord Casey, Sir Paul Hasluck and Sir John Kerr. The research into these consultations was done by Dr Ron Markwell, formerly an Australian Rhodes Scholar, Visiting Fellow in Politics at the University of Western Australia, and Junior Dean at Trinity College, Oxford, and currently Fellow and Tutor in Politics at Merton College, Oxford.

Markwell also concludes that at least one other Chief Justice, Sir John Latham, and four Justices of the High Court, Sir Edmund Barton, Sir Keith Aickin, Richard O'Connor and Dr H.V. Evatt, would have agreed with the proposition that such consultation was permissible. There are also many examples of State Governors consulting a Chief Justice, but I need not go into details here. The Whitlam myth that "only one Governor-General, Sir Ronald Munro-Ferguson, had consulted with a Chief Justice..." has been finally laid to rest.

The final myth or legend which I want to deal with is the one which presented Sir John Kerr in retirement as an exile and a recluse. He had asked The Queen that he might be allowed to retire early, and he stepped down in December, 1977 after only three and a half years in office, in order that a successor might set about healing the national wounds. He had withstood the public protests and demonstrations of 1976, and had a further year, 1977, virtually free of such annoyances. He had asserted his right, as was also his duty, to go about his public engagements throughout Australia without let or hindrance, and the overwhelming majority of his fellow Australians continued to welcome him warmly.

Nevertheless, he felt that the fairest thing he could do for his successor would be to remove himself from the local scene for a few years. Living and travelling in the United Kingdom and Europe was no exile for Sir John, and those who attended his memorial service will have heard one of his more recent friends, a young Australian scholar at Oxford, speak of his time in England. This was Don Markwell, to whom I have already referred.

The friendship began in 1982 when Don Markwell was one of a group of Australian students who invited Sir John to speak at an Australian dinner in Oxford. Of their first meeting Markwell said:

"... we were pretty nervous about entertaining so great a figure. But all went well. There was immediate warmth between us, all reserve vanished, and an enduring friendship began."

Some nine years later, at Sir John's memorial service, Markwell was able to say:

"The man I knew was a man who enjoyed life – a serious-minded man, certainly, with a strong sense of duty, and a man of industry and achievement; but one whose seriousness was balanced by a buoyant sense of humour and of fun; a man who rejoiced in the joy of life. He was no exile, no embittered recluse."

To be the personal representative of his Sovereign and to be the de facto Head of State of his country was the high point in Sir John's career, but, if history is to deal with him accurately and fairly, he deserves to be remembered for more than that. In the words of Sir Anthony Mason, Chief Justice of Australia, who also spoke at the memorial service:

"John Kerr's record of achievement speaks for itself. Behind the record was a distinguished lawyer with wide-ranging interests in law reform, politics, administration and public and

international affairs. His vision of the law extended well beyond the preoccupation of a technical, professional lawyer. He was conscious of the intricacy of the relationship between law, government and society. These are all values which modern legal education seeks to foster in future generations of Australian lawyers."

Back in May, 1976 Geoffrey Sawer, Emeritus Professor of Law at the Australian National University, in the course of reviewing two books on the fall of the Whitlam Government, and commenting on a third which had been published earlier, noted that all three books, which had been written within a few months of the event, predicted that the actions of the Senate were likely to produce lasting instability in Federal politics. I only hope that any future historian who refers to those and to other writings penned early in 1976 will also look at later writings. In the almost 20 years that have elapsed – not a long time in the course of history – perspectives have already mellowed, even for those who were themselves close observers of the constitutional crisis and its participants, and I doubt that even the authors of the books reviewed by Professor Sawer would hold the same view today. Certainly we have seen no evidence of the lasting instability which they predicted.

Writing in 1991 immediately after Sir John Kerr's death, Peter Bowers, political correspondent for The Sydney Morning Herald in 1975, had this to say about the event:

"November 11, 1975 changed the way a lot of Australians thought about politics but did it really change our lives? I think not. And perhaps that is the real, the reassuring lesson of that day".

The next day, Michelle Grattan, political correspondent for The Age in 1975, and until recently the Editor of The Canberra Times, had this to say about the man:

"However, the historians will probably be kinder to Sir John than the contemporary commentators, for two reasons. Time will produce cooler assessments, that will take greater note of his dilemma and be less swayed by Whitlam's case. And the apparent absence of enduring harm will count in Kerr's favour."

I don't think that either of those distinguished journalists could have written those words 20 years ago. But they were able to write them 16 years later, demonstrating just how quickly perceptions of people and events can mellow and change with the passage of the years. Unfortunately, most of the books about 1975 were written in the years immediately following, and by political journalists at that. Many of these journalists were committed to the Labor Party's view of events, or found it easier to accept the Labor view rather than do their own research.

Thus the history of l975 has so far been written, not by the victors, as is usually the case with the writing of history, but by the vanquished. That is why I said at the beginning of this address that our Constitution was not only at risk from political and administrative action, and imaginative judicial interpretation, but that it was also possible to subvert it by misrepresenting the meaning and the significance of action taken in accordance with its provisions. This, I believe, is yet another area in which members of The Samuel Griffith Society must take an interest if we are to achieve the purposes for which this Society of ours came into existence.

Chapter Eight

Beyond Representative Government

Ted Mack, MHR

I would like to formally thank the Society for the opportunity to take part in this Conference.
My subject today is "Beyond Representative Government", and I hope to cover some of the principles behind the resurgence of public interest in direct democracy.
I will also outline some of the developments towards that ideal which occurred at local government level in North Sydney in the 1980s.
In 1994 Liberal frontbencher Peter Reith, Democrat Leader Cheryl Kernot and I held a seminar in Canberra to promote the concept of allowing the public to put questions to referendum, as opposed to the executive government's monopoly of the initiation of referendum questions that now exists.
This idea, known as Citizens Initiative Referendum, is hardly new.
It is part of the movement towards direct democracy, as opposed to representative democracy.
It was seriously discussed and almost incorporated into the Australian Constitution in the 1890s.
The Australian Labor Party at that time incorporated it into its platform, where it remained until 1963.
By a nice irony, it was raised in the Federal Parliament by a former member for North Sydney some 76 years ago.
It is one of the main planks of the Swiss system of government.
It is utilised in a number of countries, particularly in about 100 local and 24 State governments in the United States, and commenced around 1900.
Nowhere where it has been used has there been any move by the public to discard the system.
There is an extensive literature on the subject around the world, and the definitive work in Australia is The People's Law by Professor Geoffrey de Q Walker, Dean of the Faculty of Law at the University of Queensland.
Professor Walker's book succinctly sets out the philosophical, historical and legal framework for the concept.
It is therefore hardly a radical idea, and is firmly rooted in the democratic concept that a decision made by the people as a whole will be right more often than a decision made by any elite group no matter how wise.
It is fully in line with our legal system and the Constitution, which vests ultimate sovereignty in the people, in spite of the recent efforts of the High Court, or for that matter successive executive governments.
The creation of a mechanism to allow the people, through private interest groups or local and State Governments, to initiate national referendum questions in addition to the present exclusive right of federal executive governments, would be a relatively minor addition to our political system allowing the public to have a role in setting the political agenda.
The historical record of the referendum in Australia shows that extreme measures will never be carried.
Any measure attempting to centralise power is also usually rejected.
However, the record does show that majorities will not trample minority rights, and that publicity and money will not affect decisions that people feel strongly about.
Witness the failure of the `Yes' cases in the 1916 and 1917 Conscription referendums at the height of jingoism, or the 1951 "Ban the Communists" referendum at the height of the Cold War, or the overwhelming vote of support for the Aboriginal people in 1967.

Following the Canberra seminar on Citizens Initiative Referendum, and a National Press Club launch, the reaction to the idea of asking the public if they wanted the right to initiate referendums, from the holders of power, and those who believe in elitist theories of government, bordered on the hysterical.

It was as if they were touched with a red hot poker.

Alexander Downer, then the Leader of the Opposition, immediately jumped into the centralist bed with Keating.

He applied the gag to Peter Reith – so much for liberalism and free speech!

Tim Fischer, leader of the Nationals, had apoplexy.

Well he might, being the leader of the most successful minority group in the country, having over many years exercised political power far beyond that party's eight to ten per cent national support.

Any thought of the public as a whole being able to participate in the political agenda, majority rule and one-vote-one-value, is obviously a menace to all minority groups exercising dis-proportionate power.

Elitists in the media and the bureaucracy who claim the right to know what's best for us poured forth a deluge of abuse and character assassination arguments.

Anyone who supported referendums initiated by the public, not by them or the Government, is a "loopy populist", "a political eunuch", or a right-wing fanatic, they howled.

Why, "It would give power to rich, powerful interest groups which could control the media", they claimed, as if that isn't already the case.

"The public doesn't know what's good for it", they roared, in a deluge of political correctness.

It was postulated that such a move would interfere with "consistent national policy formation".

Presumably they were referring to the consistent policies such as those adopted by executive government for pay-TV and the media, privatisation, airports and air safety, uranium, multiculturalism, or the policies that brought one million unemployed.

A senior Canberra journalist, Laurie Oakes, in The Bulletin, summoned up all his considerable powers of ridicule at the very idea of people having the right to vote on a specific issue.

The sky will fall.

All those "right-wing extremists" and "well-endowed interest groups" would "hijack the system", was Oakes' opinion of the majority view of the Australian public in a majority of States.

He, like most of the Canberra entourage, intoned, in effect, that democracy properly consists of people being permitted to choose a "representative" offered by the 'Laberal Party" every three years or so.

The Sydney Morning Herald editorial of 20 July, 1994 reinforced this view, and fulminated that the public might even "challenge unpopular government". The swine! The ungrateful wretches!

Geoffrey Barker in the Financial Review, after character assassinating proponents of Citizens Initiative Referendum, offered the view that "a high degree of apathy may be essential to the efficient functioning of a modern democracy".

Sounds like Brave New World revisited, where the Government hands out pacifiers to keep the citizenry in a state of euphoria.

Barker goes on to suggest that anyone with any participatory urges can join political parties.

Presumably applauding leaders at functions, and handing out how-to-vote cards at elections, will satisfy them, but if they do have political views they can be relegated to a minority party faction and shut out of pre- selection ballots.

Underlying the opposition to direct democracy and the Citizens Initiative Referendum are the recurrent themes – a basic distrust and fear of the public, a refusal to relinquish any political power or agenda setting, and a strong elitist approach.

The paucity of the arguments is shown by the need to use epithets like "single issue loonies", "populists" and "eunuchs", rather than deal with the issues.

In any case, the arguments put forward by proponents of direct democracy from an incredibly wide political spectrum, such as writers Bryce Courtenay, Morris West, Tom Keneally; academics such as Professor of Law at Queensland University Geoffrey Walker, Professor Cheryl Saunders, deputy chair of the Constitutional Centenary Foundation and Professor of Law at the University of Melbourne, Dr Elaine Thompson of the School of Political Science at the University of New South Wales; political figures such as Peter Reith, Senator Cheryl Kernot, Russell Cooper and Frank Walker; and the well reasoned analyses recently published by journalists PP McGuinness and Humphrey McQueen, cannot be dismissed by abuse.

Neither can arguments carry any weight based on guilt by association.

It is true that extreme right wing groups support Citizens Initiative Referendum, but Hitler's support for the Volkswagen was irrelevant to the fact that it was the most successful vehicle in automotive history.

If the arguments put forward by the critics of direct democracy are accepted you would logically remove any right to vote.

If the public cannot be trusted to vote on a single issue following a focused public debate, how can it vote in a general election, with a multiplicity of issues obscured by media concentration on personalities and massive negative advertising campaigns which have become the dominant feature of modern elections?

Democracy is relatively new in its modern forms.

It has developed over the last century to a faintly acceptable level in about 40 of the world's 200-odd nation states.

It must evolve.

It cannot remain fixed in the face of accelerating change in all other aspects of society.

The arguments opposing Citizens Initiative Referendum and any form of direct democracy, defending the status quo, are extremely hollow, given the huge and increasing levels of public antipathy to politicians and governments at all levels.

In all western democracies there are high levels of dissatisfaction, and the current revival of interest in Citizens Initiative Referendum is only a small symptom of a much deeper malaise.

People everywhere seem to want to push the bounds of democracy further than their governments will allow.

Both Prime Minister Major in the UK and President Clinton in the USA lead incredibly unpopular governments.

In Canada, recent elections saw 150 Government seats reduced to two.

In New Zealand a disgusted public, by a referendum, changed the whole voting system in spite of the opposition of both major parties. Much the same happened in Italy.

In Australia, a huge number of people cast their votes negatively at the 1993 federal election, as they did in the recent New South Wales State election.

It is no accident that the non-major party vote in the New South Wales Legislative Council has gone from 7.8 per cent in 1978, to 24.7 per cent last week.

In 1990 we saw a Federal Government take office with 39.2 per cent of the primary vote – the most minority government since Federation.

In 1992 only four Houses of Parliament out of fifteen Houses in Australia were controlled by majority governments – an unprecedented situation in modern political history.

The dissatisfaction with governments in Australia stems from such things as the steady slide in social, economic and environmental conditions in the past 20 years; the increasingly overt nepotism, careerism, cronyism and corruption in our political system, highlighted by the revelations of the Fitzgerald Inquiry in Queensland, the Independent Commission Against Corruption in New South Wales, and the Royal Commissions in South Australia, Tasmania and Western Australia.

It is fuelled by public revulsion at the cynical multi-million dollar advertising campaigns; the blatant centralisation of public decision-making; the dominance of big business, big unions, big

government; the flaunting of wealth by entrepreneurs in the 1980s; the officially sanctioned tax rorts; unemployment; bigger salaries for politicians, free cars all round, more overseas trips with increasing retinues at five-star hotels, while the general public is told they are living beyond their means, and that they have to work harder and tighten their belts to compete with Asia.

The public is also recognising the structural defects of the political system.

The centralisation of power within the major parties, the overwhelming of parliamentary government by the rigid party system, the negativism and personal abuse inherent in adversary partisan politics, the domination of public decision-making by small elites, major party collusion depriving the public of choice, the now institutionalised "broken promise syndrome", the failure of governments to be able to handle organised minority groups, and undemocratic electoral systems where only by chance, or usually in spite of devious manipulation, does the resulting government reflect the will of the people.

If it were not for the fact that the grossly unfair single member electorate system is generally used in Australia, there would be few if any majority governments, which most assume are necessary for satisfactory governance.

In other words, that leaves the unsatisfactory and indeed untenable position that for our current political system to work, that is to achieve a majority government, an unfair voting system which distorts the will of the people is required.

The single-member electorate system, besides being open to boundary manipulation is, at best, a winner-take-all system, where it is theoretically possible to win 100 per cent of parliamentary seats with substantially less than 50 per cent of the vote.

Every vote for a losing candidate, or a winning candidate in excess of 50 per cent, has no effect, and is wasted.

It is an extremely weak foundation for a democratic system.

The Carr government in New South Wales is just the latest example.

With just over 40 per cent of the primary vote, and only 48 per cent after preference distribution, it will have 100 per cent of the say in the Lower House.

It is an axiom of democracy that "the majority can only govern with the consent of the minority".

It is also true that the minority cannot govern effectively or legitimately in a democracy.

It is to the eternal discredit of this country that we have persisted with single member electorate systems for so long, particularly when we have had the example of the world's best democratic electoral system – the Hare-Clark system of Tasmania – for some 90 years.

This is underlined by the fact that on the only occasion the public have been asked to choose a voting system, they chose Hare-Clark.

That was by referendum in the Australian Capital Territory.

The ACT voters even more wisely entrenched the system by a further referendum, thus stamping on the sticky fingers of party "spin doctors" who were already attempting to corrupt the system.

The fact is that political parties can never consider electoral matters except in terms of partisan advantage.

The reason the major parties have quarantined Hare-Clark in Tasmania for so long is that its general adoption would weaken the twin-airline political duopoly that the major parties enjoy.

The fact that they have let it exist for so long even in that State is because of the electoral revulsion which would ensue if any move were made against it.

Underlying the alienation and powerlessness people feel with the political system is the accelerating rate of change since the 1960s – the information revolution, the forces of globalisation and the growth of the ethic of participation.

The ethic of participation is now a well established principle in Australia, and is rapidly spreading throughout the world.

That ethic is that people whose lives are affected by a decision must be part of the process of arriving at that decision.

The rise of the consumer movement, shareholder activism, worker participation and interest groups of a wide variety is evidence of this trend.
The basis on which representative government has long operated, the view so well enunciated in 1774 by Edmund Burke, is no longer acceptable to a vast number of people.
That view, to the effect that representatives are elected to govern, and should exercise their superior wisdom and judgment irrespective of the wishes of the electorate, aided by an elitist private and not public service, with the implication that the public will always reject the "necessary hard decisions", is still propounded by elitist editorialists, bureaucrats and many in the political parties.
In its crude form, it means handing over all rights and power to an individual or group, then rewarding or punishing them at an election every three or four years.
The attempt to maintain this Edmund Burke view of democracy leads to increasing frustration, aggression and ultimately violence.
Nowhere does this phenomenon show up more than at local government level, which is closer to the people and more accessible.
For example, it is futile to take revenge against a councillor some years later if a high rise building was approved removing your sun and privacy, or if the Council has allowed a private organisation to construct a facility in your local park.
Many local government bodies around the country have been under siege in the last decade.
Some have attempted to maintain the traditional position of representative democracy and suffered endless controversy.
Others have responded by moving to much more open and participatory methods.
The North Sydney area was the "future shock" capital of Australia in the 1960s and '70s.
By that I mean the rate of change was extreme, and it exposed the failure of traditional representative government.
Over a fifteen-year period in a small ten square kilometre area, Australia's third largest Central Business District developed.
At the same time about 10,000 new dwellings were constructed in what was already a dense residential area.
Through much of this massive upheaval some 60,000 people worked there and 50,000 lived there, with over a quarter of a million cars driving through the chaos each day.
As might be expected this had major social, economic and political ramifications.
It surprisingly led to the most advanced model of open and participatory government in Australia, with an unheard of record of environmental and economic success and public approval.
The Council itself became the leading entrepreneur of the area, initiating new standards of urban design, a deluge of capital works, and at the same time reducing debt and taxes.
An independent review of all local government bodies in the Sydney region in 1987 named North Sydney as the most financially successful Council.
All this was not achieved without much acrimony, and many mistakes were made, yet in the final analysis the public endorsed the seven year long process at the 1987 election by an unprecedented 90 per cent of the vote – something which has probably never previously occurred in a democratic election.
Politically the major parties were rejected at local, State and federal levels of government.
I joined North Sydney Council in 1974, and was Mayor from 1980 to 1988, becoming the first Independent member of State Parliament from the Sydney region in 1981, and the then first Independent for over half a century in federal Parliament in 1990.
The foundation of all this was a rejection of partisan politics, and the development of an open government system where everyone in the community could involve themselves in the decision-making process.

From 1980 to about 1985, a transformation from traditional representative government towards direct democracy occurred.
It went through three phases.
First, the development of an open government system.
Second, the creation of systems to enable people to participate.
And third, a substantial transition to direct democracy, where people made the decisions for themselves with the Council's role tending to reduce to that of a facilitator and largely administration.
Before people can have access to the decision-making process they must have access to information, and hence a policy of full open government was adopted by the Council in 1980.
All files were made available to the public, excluding legal advice.
All meetings were opened to the press and public.
In fact no closed meetings of any sort were held over an eight year period.
Public tenders, senior staff appointments, legal matters were all discussed and debated in open meetings.
Instead of the usual mistrust of government, justice was seen to be done and even unpopular decisions were accepted.
In particular, future planning changes were widely advertised prior to formulation to prevent the various forms of "insider trading" that have characterised local government since land zoning was created.
All agendas and reports of senior officers were made available to the public before they were considered by Council.
A complete public notification system of applications to the Council, giving a 21 day notice, developed and extensive coverage was established through the local media and a large system of public notice boards.
Automatic recording of all councillors' voting was instituted, as well as an extensive declaration of interests procedure and disclosure register far beyond any statutory requirement at the time.
There are many arguments against open government at all levels, but secrecy is a formula for corruption and all too often provides for avoidance of responsibility and accountability.
Openness is the only real defence.
Corruption scandals are regular occurrences in governments throughout the world, and secrecy is always the essential ingredient.
There is in fact no such thing as a closed meeting or secret decision-making.
The "smart money" always finds out.
Only the public is kept in the dark.
The growth of bureaucracy in Australia over the last 30 years has made this a particular problem.
Witness the recent scandal over the awarding of a $400 million Civil Aviation Authority contract, where senior bureaucrats even tried to prevent the Federal Parliament Public Works Committee from examining tender information.
Secrecy unfortunately creates a market.
Again witness the recent controversies over public servants in many departments selling information.
It is all too easy for elected representatives or bureaucrats to assume that a mantle of wisdom descends on them once they have attained office.
It is easy to serve the private rather than the public interest when donning the shroud of secrecy and avoiding accountability.
History gives abundant proof.
I do not pretend that no problems emerged from the fully open system of North Sydney.
There were difficulties of privacy in legal and financial matters, but they were minuscule compared to previous problems of the traditional closed approach.

Following the establishment of access to information, methods were then pursued to encourage public participation to the maximum extent that people wanted.
Public meetings were held on virtually all matters of dispute, of change and of policy.
Admittedly this was onerous.
Over an eight year period some 4,000 meetings, ranging from small groups to major public meetings, were held but the improvement in dispute resolution and the public satisfaction with decision-making was remarkable.
A formal system of resident groups called precincts was set up – some 25 precincts in the relatively small council area.
These meetings could be attended by anyone who lived, worked or owned property in the area and met generally monthly.
They were sent all matters affecting their neighbourhood or the municipality as a whole for their decision before the Council considered the item.
While they were a structural part of the Council they were encouraged to act independently, and often dealt directly with State and sometimes federal authorities.
The precincts ensured that everyone who wished, could be part of the decision-making process.
Along with open access to all meetings, members of the public could also address meetings of Council without notice.
It had always been considered unthinkable to allow such a procedure and that meetings would never end.
In fact the very reverse occurred and meetings became consistently shorter.
Over a five year period some forty referenda were held.
They were held together with local elections to minimise costs and up to 16 questions at a time were asked.
Voting was not compulsory, but some 90 per cent of those who voted in the compulsory general election voted for the referendum questions.
The procedure solved many issues, some of which had been fought over for years in the Council chambers.
Virtually all of the referenda resulted in sane and sensible decisions which were then formally adopted by the Council.
It empowered the Council to take decisions which in some cases it had previously been reluctant to take.
Some of the initial questions related to the process itself.
In response to the question, "Do you want this referendum procedure?", the answer was overwhelmingly "Yes".
The response to a question to adopt Citizens Initiative Referendum was also "Yes", admittedly by a lesser percentage.
However, in a sense the Council went past Citizens Initiative Referendum by being prepared to put any question on the ballot paper that anyone required.
What all of this achieved is that the Council obtained the trust and confidence of the community – something which is rare at any level of government.
It therefore accelerated the administrative processes, enabling a rapid rate of decision-making and implementation without all the protest groups, inquiries and frustrations which normally hamstring governments.
Much of this program has penetrated to local government bodies around Australia, and some of the policies have been incorporated into the recent new Local Government Act in New South Wales.
However, nothing is perfect; the enormous level of contentment eventually bred apathy to some extent and the current North Sydney Council has slipped back.
Nevertheless it has not reverted to pre-1980.

State and federal governments are vastly more complex than local government; however they could learn much from studying the North Sydney experience.

Most worthwhile movements come from the bottom up rather than the top down, and the principles of openness and decentralisation of decision-making apply universally.

Chapter Nine

Policy from the People : Recent Developments in the USA and Canada

Philip Ayres

Most Australians have some familiarity with the American experience of direct democracy as expressed through citizen-initiated referenda (CIR), which have become a regular feature of Federal and State elections in the United States. Less familiar is the growing tendency of the American Republican Party and Canada's new Reform Party to refer their general formation of policy to the court of public opinion – to make representative democracy live up to its name in the policy sphere. It is this tendency in particular which I wish to examine here.

The mood of American politics has become very anti-Washington over recent years. The political centre is perceived by a majority of voters as a fountainhead of false values where career politicians give effect to elite agendas, and as the preserve of minorities and special interest groups. This reaction against a Washington whose policies have consistently flown in the face of the will of the majority of electors largely explains the recourse at the State level to citizen-initiated referenda. Issues which have moved from Washington, which did not want to know about them, to the States, where they have gone onto the ballot through the CIR process, include term limits, which I will consider below, property rights, parental rights, and eliminating reverse racial discrimination. According to Grover Norquist, chairman of Americans for Tax Reform, a conservative group which employs the initiative process to undermine tax-and-spend policies, "All of these are issues where you have 70 per cent to 80 per cent support of the people and almost no support among political elites."

It is thus not difficult to understand why the Republicans, in the run-up to the mid-term elections of last November, made such a point of dissociating themselves from Washington and identifying instead with popular sentiment on such issues. The dividends of defining Washington as the source of false values are seen in the results of the elections, which gave the Republicans control of both the House and the Senate.

In the months preceding these elections, the House Republican leadership under the direction of Newt Gingrich developed their "Contract with America", a promise to introduce, in the first ninety days of a Republican-dominated House and Senate, a set of ten bills based on their careful reading of what a majority of Americans were signalling they wanted.

We might remind ourselves of what these ten putative bills stipulated. They provided for: (i) a mandatory balanced budget (this has recently failed to pass the Senate, and a related bill, offering the President a line-item veto on Congressional money bills, has also run into Senatorial opposition); (ii) Congressional term limits (this has now run into some trouble in the House, where there seems little agreement on a precise formula); (iii) an attack on burgeoning crime through measures including truth-in- sentencing, making punishment severe enough to deter criminals, requiring convicted criminals to make restitution to their victims, taking the distribution of federal law-enforcement funds away from Washington bureaucrats and putting it in the hands of local law-enforcement officials, and streamlining the deportation of criminals who are aliens; (iv) a "Personal Responsibility Act" ending payments to unwed mothers under 18 (and under 21 if each State so elects), and requiring welfare-recipients to work an average 35 hours per week or enter a work-training programme; (v) tax incentives for child-adoption, and the strengthening of parents' rights in their children's education; (vi) a middle-class tax cut; (vii) a credible anti-ballistic missile system; (viii) prohibition of foreign command of U.S. forces; (ix) drastic cuts in capital gains taxes and other incentives to business; and (x) assorted legal reforms such as "loser pays" to discourage the wantonly litigious.

For the first time, a victorious Republican Party came in to Congress with a highly specific and immediate legislative programme. Though it has since become clear that far more than 90 days will be needed to give it legislative effect, there is little doubt that many of its provisions will become law over the next two years. One might note here that un-funded federal mandates, while not a specific target of the Contract, seem to be on their way out – another sign of the steady whittling away of Washington's power over the States.

The Contract with America, then, was simply a series of policy pledges. Several weeks before the election it was signed by 300 House Republicans in the most public place in America, on the steps of the Capitol building before the cameras of the television networks. What I think is most interesting about it, however, is the way in which it had been developed and refined over the preceding months by close reference to the views and opinions of ordinary Americans across the nation's heartland. It was the first time the Republicans had sourced their policies at the grass roots.

For instance, the proposal to limit the number of terms a Senator or Member of the House can serve in Congress – essentially a drive to create citizen-legislators in place of career politicians – reflects the results of numerous recent citizen-initiated referenda on the issue in a swathe of States which have voted to limit the tenure of their federal representatives.

Just in these last elections, a further six States had CIR initiatives mandating federal term limits on their ballots, and every one of them was passed, most by wide margins of around two-to-one (Nevada went 70%– 30%; Massachusetts, liberal home of that archetypal career politician, Edward Kennedy, voted the measure very narrowly). If Washington is seen by most Americans as a club of self-serving career politicians and bureaucrats with unrepresentative agendas, then the obvious cure is short-term citizen-legislators who will make policy reflect the democratic will of the people who elect them. As Gingrich has put it, "The long experiment in professional politicians and professional government is over, and it failed".

One might note here that term limits have also been voted in numerous States to limit the length of time county and State executive officials can serve, and around half of American cities with populations above 250,000 now have term limitations on their mayors and city councils. Public opinion polls have shown that over two-thirds of Americans nation-wide, and in some States up to 80 per cent, support term limits on elected representatives. According to one study of the trend:

"It is not terribly difficult to explain the widespread popularity of term limits. The current wave of interest in term limitation began in the late 1980s as voter frustration with the nation's legislatures escalated and as term limitations gained heightened visibility in the national media. The seemingly endless tales of corruption, scandal, neglect, and malfeasance coming out of the United States Congress and a variety of State legislatures fuelled the popular demand to impose term limits so that legislative careerists can be replaced with `citizen-legislators' and end the stalemate of `permanent government'".

The Contract's gestation involved tapping into popular sentiment on this and other key policy issues, and included polling and focus groups as well as mutual consultation among Republican constituencies across the fifty States. One of the movers behind it was Tom De Lay from Texas, who has pointed out that the issues were chosen on the basis of their power "to energise Republican voters", and deliberately excluded divisive issues such as abortion. Then the ideas were trialled on candidates and American voters through the summer months of 1994 to establish which ones had the greatest public appeal. One of the Republican pollsters employed was Ed Goeas. From the polling he did, he says, "The one thing that jumped out was that voters were looking for a mechanism to hold elected officials more accountable. The most important thing about the Contract is the accountability of signing a pledge."

As well as polling ordinary voters, the Republicans polled their own candidates, who were asked to rank issues according to whether they liked each idea and whether its inclusion would help or hurt their own election prospects. Working groups then sifted out the issues of least concern, put

those of most concern into legislative language, and carried out further consultation with business and trade associations, mostly Republican in sympathy – as DeLay says, "Anybody who was interested. Ralph Nader was not there."

The message of the Republicans throughout the campaign was essentially "Power to the People", a phrase John Lennon never intended to be used by conservatives. Gingrich told one rally, "Our liberal friends place their trust in the government to reshape the people. We're prepared to place our trust in the people to reshape the government". This neatly encapsulates the mood of an electorate fed up with being tutored by a political establishment bent on making them over rather than representing them.

In this election, the Republicans were closely in tune with prominent conservative media personalities like Russ Limbaugh, a no-holds-barred, technically brilliant and aggressively comic articulator of anti- Washington, anti-elite, pro-mainstream sentiment who appears nightly on national television, and Pat Buchanan, a Congressman and television and radio personality who takes the conservative side on the nightly verbal sparring match, "Crossfire". More significantly, the Republicans tapped into the nation's religious heartland, gaining the overt support of the powerful Christian groupings which make up the Christian Coalition. The Coalition, while mainly evangelical, embraces a wide spectrum of the devout from Pat Robertson, founder of the Christian Broadcasting Network, to prominent traditionalist Catholics. According to Ralph Reed, Christian Coalition's executive director, "One of every three voters was someone who attends church regularly, who is socially conservative". The Democrats, according to Reed, "badly miscalculated how to handle" this important segment of the electorate, and tried to 'marginalize and stereotype these voters and their leaders".

On November 11, three days after the election, Newt Gingrich addressed the Washington Research Group Symposium and reiterated a central theme of the campaign: "It is impossible to maintain civilization with 12-year-olds having babies, with 15-year-olds killing each other, with 17-year-olds dying of AIDS, and with 18-year-olds ending up with diplomas they can't even read." He made the point that "those who argued for counter-culture values, bigger government, redistributionist economics and bureaucracies deciding how you should spend your money were on the losing end in virtually every part of the country." He defined his preferred leadership model in four words:

"They're not a hierarchy, all the words are equally important, but there's a sequence that matters. It's a very direct sequence: Listen, learn, help, and lead. You listen to the American people, you learn from the American people, you help the American people; and in a rational society, if people know you'll listen to them, learn from them and help them, they want you to lead them."

This is no mere old-fashioned political hyperbole, but a radically new philosophy on how policy should be sourced and developed.

Recent Canadian experience confirms the trend to direct democracy as a North American rather than merely a United States phenomenon. Through the seventies and eighties, Ottawa dutifully followed Washington in legislating elite agendas and taking care of special interest lobbies, tutoring its hard-taxed citizens in the expensive civics of the welfare-state and the multicultural society. The politicians and the bureaucrats knew what was best, and the electors took their medicine without much grumbling. Up to the present day, Canadians have had a grand total of three national referenda referred to them in the course of their entire history.

But in the early nineties the national mood began to change, rapidly. By the end of 1993 the political landscape had been fundamentally altered. The national elections of late October that year were a watershed. The ruling Progressive Conservative Party, which together with the Liberal Party represented the political establishment, the Ottawa-knows-best mentality, was reduced from 155 seats to just two seats in the House of Commons. The reasons included their hated consumption tax and a growing middle-class tax revolt, anti- NAFTA feeling, the perception that the Progressive Conservatives were moribund, and above all, the fact that there was a new conservative alternative, the Reform Party, which presented itself as decisively anti-

Ottawa establishment. The Liberals (centre-left) won with 178 seats (formerly 79), benefiting from the division of the small conservative vote, much of which went over to the new Reform Party. The official Opposition is now the Bloc Quebecois with 54 seats (formerly 8). The Bloc's interests, however, are focused on Quebec and the securing of some form of sovereignty for that province. The "real" opposition party, in the sense of a party with a national basis and focus, is the Reform Party with 52 seats (formerly 1).

Reform is a mass-base party (110,000 active members, 1993, and rapidly rising) of social conservatives led by an evangelical Christian, Preston Manning, who carefully avoids importing religion into his speeches. It "draws people who feel they've been marginalised by a chattering class of intellectuals and bureaucrats", as one observer put it, and it has a policy of avoiding any linkage to special interest groups.

The party was formed in Winnipeg in October, 1986, at a convention of dissatisfied members of the Progressive Conservative Party and others, each of the 301 delegates paying a C$200 registration fee to give the new party a modest financial base. Its greatest strength is in the resource-rich West and mid-West, where it draws on a tradition of regionalist protest against Ottawa which, under Canada's system of fiscal transfer (or "equalisation") of revenues, takes from these provinces far more than it returns to them. Manning's father, Ernest Manning, was Alberta's second Social Credit premier, from 1943 to 1968, but the Reform Party's ideological roots go back to the old Progressive Party, which enjoyed Federal Opposition status in the 1920s on a platform advocating a more direct democracy, free trade, and the nationalization of railways.

Unlike that party, Reform advocates reducing state participation in the economy to the very minimum, and unlike Social Credit, Reform does not challenge the present financial system. As a social-conservative party, Reform supports humanitarian concerns but wants to see most activities in this area re-financed. Part of its appeal is to anti-Quebecois sentiment – "let Quebec either secede", Reform says in effect, "or, preferably, stay in Canada but without any of the special privileges it seeks." Outside Quebec this message is extremely popular. It might be noted that Reform did not bother to run candidates in Quebec.

Having a clear critical dynamic, focused on the corrupt Ottawa establishment, was of the first importance to Reform's recent success. In this, as in so many other ways, this party has a similar focus to the United States Republican Party in its present mood. And like the Republican Party, Reform developed its policies by close monitoring of the national mood and of majority feeling on all of the key policy issues. The Party conducts referenda amongst its own membership before embarking on major new initiatives, such as its expansion eastwards into Ontario in 1991. And before policies are accepted by the Party they are debated and voted on by Party members.

The resulting policies, which gave Reform its electoral appeal, include the following:

A draconian attitude to the deficit and the national debt. Manning advocates cutting the deficit to zero in three years, which would involve reducing government spending by C$19 billion over that period as the result of measures outlined below. Once the deficit had been eliminated there would be tax cuts. One may compare the policy of the Republicans to introduce a constitutional amendment mandating balanced budgets. Frugal housekeeping has strong electoral appeal. Since the election Reform has constantly challenged the Government to cut its spending programmes ever more deeply, rather than, as in some other democracies, crying foul every time the Government proposes cutting some item of government-funded assistance. During the campaign the party promised that while it remained in Opposition, it would raise four questions every time a money bill was put to Parliament: "Is it necessary? How much is it going to cost? Where are you going to get the money? and, Why don't we spend less?"

Giving over to the private sector as many functions as possible (including Petro Canada and Canada Post, for example). Government would manage any remaining publicly-funded enterprises, but not operate them. It would cut at least 25 per cent off subsidies to Crown

corporations like the Canadian Broadcasting Service. The government should have no role in job-creation apart from clearing obstacles for the private sector.

Shifting the remaining state power wherever possible from Ottawa to the provinces. Until now, in Canada, as in Australia, Federal powers have always been on the increase, a tendency backed in our case by the High Court. Again one notes the affinity with the current Republican programme to take power from the centre and bring it closer to the electorate.

Changing the rules to allow Government backbenchers to vote with Opposition MPs to defeat spending bills without triggering an election. Manning sees this as an insurance policy for voters: "We think Canadians have reservations about giving anybody, especially a traditional party, a blank cheque", he says. Removing the no-confidence element from parliamentary voting would allow MPs to vote according to the feelings of those they represent, rather than always having to vote according to the party line. Parliamentary votes would more closely reflect the mood of the electorate on the matters under debate. According to Manning:

"The treatment of every motion in most of our legislatures and Parliaments as confidence motions . . . is a convention which could be changed simply by a policy statement by the Prime Minister, Premiers and most of the legislatures at the beginning of the session."

Giving voters the right to recall their MP if the MP fails to represent their views adequately. "So you don't trust politicians?", Manning asked during the campaign. "Here is our money-back guarantee: we'll put the power in your hands to fire your elected MP." Recall is the Party's single most popular policy plank, according to its direct-mail surveys, and certainly its most constitutionally radical, and one may expect it to be implemented should Reform win the next Canadian elections. As the Party says in its advertising literature, "Recall will obligate MPs to listen to their constituents between elections."

Cancelling government subsidies for special-interest groups. This policy goes straight to the heart of voter sentiment, which is in revolt against the power and influence of unrepresentative groups who have learned to regard Ottawa as their milch-cow.

Pulling the government out of unemployment insurance, and letting employers and employees fund it themselves. This policy reflects that same concern shown by the Republicans for making people more responsible for themselves.

In general, allowing each person to be the major provider of his or her own basic needs, including most social services and medicare. This means, in effect, that more social services should be user-pay, and that relatives and private charities should bear more of the welfare burden.

In view of massive unemployment, slashing immigration from 250,000 a year to somewhere between 100,000 and 150,000, the size of the intake being based on economic needs, and the policy to be racially neutral.

Putting certain tough issues, like capital punishment, perhaps, and possibly abortion, to referendum.

Not giving any government seal of approval to homosexuals, abortion-on-demand, and political correctness generally. "Reform", Manning told one rally, "refuses, and continues to refuse, to be intimidated by the extremists of political correctness".

In addition, Reform would abolish the policy of official bilingualism.

Several of these policies reflect a strong anti-Ottawa sentiment, and in this lies the real secret of Reform's appeal. In view of the popularity of the anti-Washington and anti-Ottawa planks in the Republican and Reform platforms, it seems extraordinary that in Australia the Liberal Party, until now, has not even contemplated presenting itself as anything but an integral part of the Canberra establishment.

That in the run-up to the elections Reform was continually attacked by individuals and groups clearly associated in the public mind with the Ottawa establishment probably helped boost the party's vote. At the same time Manning frustrated the desperate "extremist" charges of his foes by cutting the party's ties with those two or three members who came out with statements which

could be viewed as extreme. As a result of this, and the impression of reasonableness Manning projects, scare campaigns waged against Reform in the media by politically-correct newspaper editors, television commentators and special interest groups turned out to be counter-productive.

Since their entry into the Canadian House of Commons, Reform have taken the opportunity to assail the Liberal Government on any issue where that Government's legislative programme seems to run in the face of public opinion. On election night, Preston Manning made a promise on national television that "Whenever the government proposes any major public policy initiative, we will act as the democratic conscience of Parliament, asking: Were the people truly consulted? What do the people think? Do the people approve or disapprove of this course of action?"

More generally, the Reform Party's MPs have made it their business in the current Parliamentary session to initiate a continuing debate on the whole theory of political representation. The terms of this debate were succinctly put by Preston Manning in a recent article in the Canadian Parliamentary Review, titled "Obstacles and Opportunities for Parliamentary Reform."

"Some people will say that they want their MP to represent their views on a particular issue in the Parliament, particularly when there is a consensus in the riding as to what that view should be. This is the so- called `delegate view of representation.' The other thing people say is that they expect politicians to keep their promises and implement the program on which they sought public support in the first place.... This is the so- called `mandate theory of representation'.... The third thing people say is that they expect you to use your judgement on the issues that come up in the Parliament, particularly on issues that were not anticipated during the election – the so called `trusteeship theory of representation.'....

"Now it seems to me that the challenge for modern democratic parties and institutions is to integrate these three into one coherent theory of representation and develop guidelines for voting in caucus and voting in Parliament in accordance with that model.

"Reformers in the 35th Parliament have been asking questions of the Prime Minister and others, as to what their view is of representation in Parliament. It is clear from the answers that are given that there is no coherent, comprehensive, single theory of representation, even among the members of the same party. But in the theories that are held, the party line and the judgement of the individual member are given much more weight, in most cases, than the views of the constituent....

"Nobody is talking about government by referendum, but we are talking about more frequent consultation of the public through this mechanism than we have done in the past.... If you propose recall mechanisms, you are accused of advocating virtual anarchy, as if Members are going to be recalled every month.... I say, `No, you are talking about a mechanism that has threshold levels, and protective devices.' It would be used essentially in extreme cases and is mainly used as a threat.... If you mention freer votes, you are often accused of wanting to undermine the whole concept of Cabinet responsibility and responsible government [whereas] you are just talking about a little more freedom for Members to vote their constituents' wishes, particularly when that happens to conflict with the party line or with their personal position."

In its most recent thinking on the referendum issue, the Reform Party seems to be inclining to two distinct types, the binding and the advisory. Referenda would coincide with national elections and might also be held on some fixed mid-term date. There would be the minimum of restrictions on `educational campaigns' to do with referendum issues, double-majority decisions would be required on most referendum questions, and the current preference seems to be for a 3 per cent minimum of electors' signatures to initiate a referendum. The Party is working hard to develop a mechanism for recall which is proof against abuse. Within the Parliament, the Party has developed the practice of forming "cluster groups" of MPs, each group assigned to probe a particular area of policy and formulate strategic guidelines upon it.

Interestingly, unlike so many Western political parties, Reform is not dominated by lawyers. In fact, of its 52 MPs, only one is a lawyer. They come from a wide, very representative range of

professions and occupations, including farmers, foresters, fishermen, physicians, businessmen, realtors, economists, professors and teachers, broadcasters, accountants, retired military officers, and so on.

One Canadian political scientist describes Reform as "the politics of post-modernism". Unlike most forms of post-modernism, which is always associated with the aesthetics of the left, and with cultural elites, the Canadian politics of post-modernism are conservative and radically democratic. They contrast with the modernist politics of the elite, of centralism, the welfare state and the multicultural society which still dominate Australia, but which in Canada "no longer seem viable to a large number of voters".

Chapter Ten

Parliamentary Democracy in Australia

The Rt. Hon. Sir Garfield Barwick, AK, GCMG

This paper will dwell upon aspects of parliamentary democracy for which the written federal Constitution of the Commonwealth provides, upon its essentials and its mechanisms for democratic government. The impact which the operation of the party political system has had upon it since the turn of the century but particularly during the past thirty years will be pointed out. A comparison will be made between parliamentary democracy and the constitutional arrangements of the United States of America. In that connection, reference will be made to recent decisions of the High Court of Australia. Finally, the substance of the paper will be related to the suggestion that the Constitution of the Commonwealth be amended to remove the monarchy and substitute a President.

`Democracy', a word frequently misused, describes a system of government under which a community manages and controls the whole of its affairs without exception.

Only in numerically small communities occupying a relatively small territory can the community directly manage and control its affairs either in general meeting or by referenda. In general the management of its affairs must be effected through some representative institution. In the case of parliamentary democracy the Parliament is the representative and responsible institution by which the community manages and controls all its own affairs.

The Westminster system of parliamentary democracy is thought by many to be the best system of government yet devised by humans. It is the result of a long historical and practical process driven by a love of personal freedom by which the English people converted an absolute monarchy claiming to rule by divine right into a constitutional monarchy owing its place to an act of Parliament and having the rules of succession fixed by the Parliament. The place of the monarch in that system is best understood in the light of English history.

As each Australian colony was afforded self-government it inherited the rule of law and parliamentary democracy with a constitutional monarch upon the Westminster pattern. It was natural therefore when, in the latter part of last century, the colonists decided to federate under a written Constitution, that they should accept the rule of law and provide for a parliamentary democracy.

When the Constitution of the Commonwealth was framed it was for a colony within the British Empire. The initiative for federation and the drafting of the federal Constitution was wholly by the colonists without intervention by the imperial government, except as to the terms on which appeals might be taken from Australian courts to the Judicial Committee of the Privy Council (the `Privy Council'). Whilst the colonists would have preferred there to be no such appeal, the imperial government was not prepared to leave what may be imperial interests to the Australian courts; hence s.74 of the Constitution under which the appeal to the Privy Council remains, except in a case involving a question as to relative constitutional powers of the Commonwealth and the States or as to such powers between the States, in s.74 described as a question `inter se'. In other words, the decision of those constitutional questions was left entirely to the Australian courts.

The colonists were drafting a Constitution for a colony within the British Empire. But the emergence of independence of Australia could not then have been regarded as remote. Accordingly, the powers given to the imperial monarchy and its government were limited to what we might call imperial concerns. Thus the only powers given to the imperial monarch by the Constitution were:

1. to appoint and instruct the Governor-General;

2. to withhold assent to Commonwealth bills in case the Governor-General reserved that matter for the imperial monarch; and
3. to disallow a statute of the Commonwealth within two years of its passage.
In respect of the exercise of each of these powers the imperial monarch would rely upon the advice of the imperial government.
But the powers to summon, prorogue and dissolve the House of Representatives and, if the conditions of s.57 were satisfied, the Parliament (both House and Senate simultaneously), and to appoint the federal ministry, were expressly vested exclusively in the Governor-General personally. Although he is the representative of the monarch in Australia, he derives none of the abovementioned powers, nor indeed any power, from his vice-regal position.
When as a matter of fact Australia became independent, the territory of Australia was excised from the British realm, and thereupon the imperial monarchy and its government lost all legal authority to interfere in any way in the affairs of the Commonwealth. The imperial monarchy and its government could only exercise such authority within the British realm which now did not include Australia.
But a new monarchy emerged, an Australian monarchy, separate and distinct from that of Great Britain just as today it is separate and distinct from the monarchy of New Zealand or that of Canada. Further, the word `Queen' in s.1 of the Constitution, which formerly referred to the imperial monarchy, now referred, and referred exclusively, to the Queen of Australia.
The Queen of Australia can only exercise the powers originally given to the Queen of Great Britain by the Constitution upon and in accordance with the advice of the Australian ministry, communicated by its Prime Minister.
Thus on the emergence of Australian independence the Australian monarch became bound to appoint as Governor-General the person nominated for that office by the Australian ministry, and could only give such instructions to the Governor-General as that ministry advised. The power to withhold assent to legislation and to disallow a statute could only be exercised upon the advice of that ministry. In other words, the Australian monarch became a powerless figurehead, and Australia gained all the advantages of a republic, except of course its description as such.
The fundamental basis of parliamentary democracy as under the Constitution of the Commonwealth is that the community itself is capable of managing and controlling the whole of its affairs without exception, and that the majority of those elected to Parliament will act in government for the benefit of the whole community. In other words, that government will be truly democratic.
It must follow that the representative Parliament must be fully sovereign as to all matters committed to it by the Constitution. Any limitation on that sovereignty is a limitation on the democratic control by the community of the whole of its affairs.
Both chambers of the Parliament (House and Senate) are elected on the same universal suffrage. Members of the House of Representatives are elected to represent a constituency, an area thought to have common interests. The Senators are elected by a State, voting as one constituency.
No revenue can be raised or money borrowed or money spent out of the Consolidated Revenue Fund, into which all receipts are paid, without the approval of the Parliament. The annual presentation by the ministry of a Budget covering both income and expenditure enables the Parliament to control those receipts and expenditures. If the Parliament refuses or fails to approve that Budget, and to appropriate funds to implement it, clearly the ministry does not have the confidence and support of the Parliament, and its tenure of office must be terminated and the community consulted.
The Constitution provides for the separation of powers, vesting the executive power in substance in the ministry (formally described as the Governor-General in Council), legislative power exclusively in the Parliament, and the judicial power exclusively in the federal courts.
The members of the ministry are not elected as such; they are appointed, in his discretion, by the Governor-General. The Governor-General must choose as his ministers members of the

Parliament who in his opinion would command the confidence and support of the Parliament. Consequently a ministry is responsible to the Parliament, and through it to the community, for the advice it gives and the acts taken upon it. The ministry is not appointed for a fixed term, in particular not for the term of the Parliament. It is appointed to hold office during the Governor-General's pleasure. This does not mean during his personal pleasure. It means in substance for so long as the ministry retains the confidence and support of the Parliament. If that confidence and support is not obtained or is withdrawn, what has arisen is then in truth a deadlock between the ministry and the Parliament, as the Governor-General cannot retain in office a ministry which does not have the confidence and support of the Parliament. In such an event the tenure of the ministry must be terminated and the community consulted. The deadlock will thus be resolved. This will be done by the holding of a general election. That is a prime example of democracy in action.

The mechanism by which this reference of the deadlock to the community is secured is by the dismissal of the ministry if it does not resign or advise a dissolution. At that time, if there is no other group of members of Parliament who could command its confidence and support, the Governor-General must dissolve the House of Representatives, or if the necessary conditions exist, perhaps both Chambers of the Parliament simultaneously, and the deadlock resolved.

Thus the mechanisms of the democratic control of the community of its own affairs consist of the election of a representative and responsible Parliament, the appointment of a ministry responsible to the Parliament to hold office so long as it commands the confidence and support of the Parliament, and the termination of the ministry's office and dissolution at least of the House of Representatives whenever that confidence is not obtained or is withdrawn.

It is evident from this description of the working of the Constitution that the essence of parliamentary democracy is that the Parliament is in control of the ministry at all times and independent of it.

Perhaps it is worth mentioning that the Constitution, being that of a federation, provides for a Senate, a Chamber of the Parliament. The legislative power of the Commonwealth is vested in both of the Chambers, with the exception that the Senate may not initiate or amend a money bill, but the Senate must be a concurring party to all legislations, including all appropriation bills.

The paper now deals with the question of the impact upon parliamentary democracy which the party political system has had. The party system has tended to provide stability in government and activity in opposition. It is natural in a political party that a leader should emerge who will tend to give unity of purpose and of activity to that party.

Consequently when the party secures a majority in the House of Representatives, the leader is certain to be chosen by the Governor-General as the Prime Minister, whose advice will be accepted in the selection of the other members of the ministry.

Since the appellation of `Prime Minister' emerged this century there has been a tendency to afford the Prime Minister presidential status, and in some cases presidential authority. This tended to mask the fact that in truth the Prime Minister is but the chairman and spokesman of the ministry which shares responsibility for all the acts of government. As he is the spokesman of the ministry it is understandable that he should become prominent in public perception and identified with the activities of government. None of this requires that the Prime Minister should have presidental status or presidential executive authority. If he is accorded these attributes it is likely that autocracy rather than democracy will become operative.

But this aspect of the impact of the party system on parliamentary democracy is not the major consideration in this paper. What can and does happen is that when a party achieves a majority in a general election, there is a distinct tendency that the Members of Parliament who are members of that party may become merely representatives in the Parliament of their party, rather than representatives of a constituency having obligations to the whole of the community. The party's view on a matter before the Parliament will be endorsed automatically, rather than the concerns of the constituency as a whole being independently considered.

Members of the party are required to vote for every proposal of the executive government under threat of personal disadvantage should they not do so. The disadvantage usually takes the form of the withdrawal of endorsement by the party when next they face the electorate.

Incidentally, to threaten or visit a Member with a personal disadvantage because of the way the Member votes or otherwise acts as a Member of the Parliament is itself a breach of parliamentary privilege, jealously guarded by Parliament in asserting its independence of the executive. Members of Parliament should be free to exercise their own judgment without fear of disadvantage in casting a vote or otherwise acting in the Parliament. A Parliament alert to maintaining its independence should see that its committee of privileges acts to prevent such a breach of privilege.

If a parliamentary party is allowed by any means to compel those Members of Parliament who are also members of the party to vote according to the prescription of the executive government, the role of Parliament and its relation to the executive as designed in parliamentary democracy is reversed. Instead of the Parliament in its independent judgment controlling the executive, the executive controls the Parliament and the community has lost the democratic control of its affairs.

One further aspect of this impact of the operation of the party system on parliamentary democracy is that, as things stand, a governing party discusses and frames proposed legislation in the secrecy of its party meeting. What attitude the Members of Parliament take in that secret discussion is therefore unknown to the constituency. When the proposal is presented to the Parliament as a bill those Members will vote for it, come what may. Not only is the constituency deprived of the knowledge of the attitude its representative has taken in the party room, but the Parliament itself is denied the benefit of the Members' independent judgment.

The impact therefore of the party system is that the Parliament is virtually turned into a rubber stamp in the hands of the executive. Thus, whilst the party system may have provided some stability in government, it has on the other hand drastically altered the relationship of the Parliament to the executive and the control of its affairs by the community itself.

It would seem that the problem for the immediate future is to restore the authority of Parliament as being in constant control of the executive government, and of ensuring that bills presented to the Parliament are openly discussed by the Members of the Parliament. No doubt, to allow the Members to exercise their independent judgment and to have a bill fully discussed in the Parliament would make the path of the executive government much less comfortable and much more difficult. It would probably result in a considerable slowing down of the rate of legislation. But it may be that that would not be a bad thing.

However, no matter what the problems and what the difficulties, if parliamentary democracy is to be maintained, authority, independence and openness of the Parliament must be restored. Difficult as the problem might appear, it seems it must be faced and solved. This paper does not pretend to offer a solution; it is enough for present purposes that the problem exists and calls for a solution.

As the rule of law is an essential element of Australian government, only that conduct which the law forbids or restricts is unlawful. Thus freedom of speech, of assembly, of movement, of the ownership of property, are all liberties enjoyed by the whole community. They are liberties of the community itself, and are under its control through the Parliament which is responsible to it. They are not rights of individuals enforceable against the community, though of course those liberties are enjoyed by all its individual members. The community itself will decide whether or not these liberties should be in any manner varied or curtailed. Therefore those liberties can only be varied or curtailed by an act of the Parliament which has exclusive power to do so.

It is convenient at this point to compare the situation under the United States Constitution with its amendments setting up the Bill of Rights of individuals.

The American Constitution was founded on a distrust of the community and of the Congress, to whom unlimited sovereignty was not given. Want of confidence in the majority of the

community led to the entrenchment of individual rights as enumerated in the constitutional amendments. By entrenching those individual rights, the Constitution builders first of all diminished the sovereignty of the Congress, thereby reducing the democratic control of its affairs by the community itself. These rights were expressed in words, and therefore their construction and application were placed in the hands of the unelected and unrepresentative judiciary, which thus has the ability to determine the parameters of the rights contained in the amendments. The decisions of the judiciary on these matters cannot be overturned or modified by the Congress. Thus the amendments denied the American community the democratic control of its affairs thus committed to the judiciary.

It would be quite fair to say that those liberties which were spoken of earlier Ä freedom of speech, of association, of move- ment, etc. Ä are far more secure under a Westminster system of parliamentary democracy than they are in the United States of America, where they are in the hands of and subject to the vagaries of the judiciary.

This until recently could also have been said of the position of those liberties in Australia. Our liberties could be protected by ourselves. But recent decisions of the High Court have implied a constitutional individual right of free speech, and by doing so have reduced the sovereignty of the Parliament, withdrawn from the community its heretofore democratic control of its liberties and vested it in an unelected and unrepresentative judiciary. The Parliament cannot overturn such decisions, even though in truth they may be unwarranted in law. It is exclusively a judicial function to construe the words of the Constitution. Like the entrenchment in the American Bill of Rights, this is an undemocratic step.

Another thing the entrenchment of these rights in the United States Constitution did was to, as it were, embalm the views of the then current generation and place them beyond the reach of subsequent generations. Thus today the American community may not deal with the possession of firearms as the circumstances of the day may require. The attitude of a long past generation with respect to the possession of firearms cannot be altered. It needs little elaboration to show that this is a most undemocratic course, and it emphasises that the United States Constitution is not wholly democratic.

As a side note, it might be pointed out that individualism, so highly promoted in America, is not democratic because it sets the individual against and indeed above the community and, at the same time, withdraws from the community the power to do what is right by the community as a whole.

In Australia, prior to recent decisions of the High Court, no one could have doubted that the Australian community had freedom of expression, subject of course to the law of defamation, if that law really be regarded as a reduction of freedom of speech. This situation could only be altered by an act of the Parliament itself. No knowledgeable mind could doubt that the entrenchment of a constitutional right of free speech in the individual was not only unnecessary, but also inconsistent with the maintenance of parliamentary democracy. Such a mind could scarcely have imagined that there was any implication of an entrenched individual right in the Constitution. No word in the document suggests it and, as has been pointed out, such an implication is inconsistent with parliamentary democracy. But it has been so decided.

In consequence, the sovereignty of the Parliament has been impaired, and the parameters of freedom of expression are now to be determined by an unrepresentative and unelected judiciary, whose decisions in this respect the Parliament cannot reverse. Already the Court has entered upon determining those parameters and has varied the law of defamation. The Australian community has been landed with an undemocratic aspect of the United States Constitution. Instead of the matter being controlled by an act of Parliament it will be controlled by decisions of the Court, all made on narrow majorities and not always expressed in unambiguous language.

The paper will now refer to the question whether the Constitution of the Commonwealth should be amended to remove the monarchy and substitute a President. As has been pointed out, parliamentary democracy provides Australia with all the benefits which a republic could give.

One cannot imagine the Australian community forgoing the enormous benefits of parliamentary democracy for some other form of government, as for example the American presidential and congressional system. With the continuance of parliamentary democracy, the Parliament, the ministry and the office of the Governor-General would remain. On that footing the proposal of this amendment must be to replace a powerless monarch with a powerless, that is, non-executive, President. The selection of the monarch is determined by rules of succession fixed by Parliament, but a President would need to be elected or appointed. In either case it is highly unlikely that the choice of President will always, if ever, have the unanimous support of the community. The probability is that a large proportion of the community will disfavour the choice, whether by appointment or by election. The fact that the choice is of an Australian will not necessarily produce unanimity.

Thus one might expect the substitution of the monarch by a President to cause division in the community, whereas the monarchy tends to provide a unifying influence. Faced with the necessity to restore the authority of Parliament, the question whether a powerless monarch should be replaced by a powerless President might seem to be of much less consequence.

Even allowing due weight to the criticisms made in this paper of the operation of the party system, the government of the community under a powerless constitutional monarchy is eminently practical and satisfactory. It is at best doubtful whether the offence it may give in some minds to Australian nationalism is enough to warrant the dislocation which an attempt to effect the change from a powerless monarch to a powerless President is likely to cause.

Concluding Remarks

The Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

I have been asked to sum up the proceedings of this Conference. My remarks, being necessarily brief, cannot do justice to the impressive papers and thoughtful discussion to which we have listened.

The Conference began with a scintillating after dinner speech by Mr Peter Coleman, who drew vividly to our attention the attempt that is being made to force upon society a stifling conformity of opinion and action under the guise of promoting diversity.

We pride ourselves on being a free society, but people have been made to suffer by various means, within and outside the law, for daring to express or to act upon opinions which are not in conformity with the ideology that is accepted as correct. Mr Coleman's address, in spite of its wit, would have been deeply depressing if he had not discerned evidence that the commonsense of the community is beginning to react against this attempt to make individuals conform in belief and action to the new orthodoxy.

Dr Howard, Professor Winterton and Professor Coper engaged in an instructive debate on the scope of the external affairs power. Since I have previously expressed my views on this subject I shall content myself with mentioning the questions that were raised in the course of the debate. Is there any practicable alternative interpretation of s.51(xxix) of the Constitution which confers this power? Can one rely on public sentiment and political convention to confine the exercise of the power so that it does not destroy federalism? If the scope of the section were restricted by amendment, would it impair the ability of the Commonwealth to participate fully in the conduct of external relations? Is the amendment suggested by Dr Howard one that would satisfactorily confine the extent of the power without unduly hampering the power of the Commonwealth to enter into treaties?

There was unfortunately no discussion of the question whether the suggested difficulty that the Commonwealth would face if it lacked the present power would be met by returning to the former practice of making treaties containing the so-called federal clause. There was a further question which I think admits only of an affirmative answer. That is whether the power of the Executive to make treaties should be subject to the control of the Parliament and in appropriate cases of the States.

Messrs John Hirst and Bruce Knox, who discussed the report of the Civics Expert Group, revealed to us the truly appalling deterioration of our education system. It is surely deplorable that our children are left ignorant of our history, which at least as far as the institutions of government are concerned includes the history of Great Britain, and it is a national scandal that students should be taught to look with shame, rather than pride, on the achievements of Australians.

Mr Hirst detected a change of the cultural mood which gives room for hope – a view similar to that of Mr Coleman. Mr Knox was less optimistic. Whoever is right, nothing is more important to our future than that the methods, values and content of our education system should be restored to rationality.

Mr Hirst suggested that the Constitution should be rewritten to make its terms reflect present practice. I can see no objection to the removal of provisions that are entirely obsolete, and of course there are some provisions, such as s.90, which I would like to see amended, but there are real dangers in trying to encapsulate in the fixed words of a Constitution conventions which are flexible and developing. One can imagine, for example, what effect judges of a particular philosophical attitude would give to a provision that read, "There shall be a Prime Minister".

My own contribution was to point out the unfortunate results of the present interpretation of the words "excise duty" in s.90 of the Constitution. Encouraged by the recent judgments of three Justices, at present in the minority, I expressed the hope that a new interpretation would be given to those words. It was gratifying that Professors Coper and Winterton agreed with me.

The second after dinner address was given by Sir David Smith, who exposed some of the errors and misconceptions concerning the dismissal of Mr Whitlam in 1975, and who showed that no legitimate criticism could be made of the actions of Sir John Kerr or Sir Garfield Barwick in dealing with that crisis. He has made an important contribution to our knowledge of the events surrounding this constitutional crisis, which was eventually resolved democratically and decisively by the electorate.

The speeches at this morning's session discussed the nature of modern democracy and changes that have occurred – in North America perhaps for the better, and in Australia for the worse. Mr Ted Mack, who advocated direct democracy, which he had practised as Mayor of North Sydney, suggested reasons why the Australian public has become generally disillusioned with its politicians. Professor Ayres showed how a similar or even greater alienation of the people from those in power exists in the United States and Canada.

Mr Mack convincingly argued in favour of citizen initiated
referenda. There are no doubt arguments to the contrary, but the question certainly warrants full consideration. Professor Ayres gave an interesting account of affairs in North America, where the current mood seems to be to require politicians to give real weight to public opinion, a mood which in Canada has gone so far as to lead to the proposal to give voters the right to recall Members of Parliament.

Does this mean that there is, at last, an effective reaction in North America against the tyranny of politically correct dogma? If so, is it too much to hope that this reaction will spread to Australia?

Finally, Sir Garfield Barwick gave an authoritative account of the nature of parliamentary democracy. He pointed out that the authority of Parliament, which is at the heart of our democratic system of government, is threatened on two flanks. On the one hand, the power of the Executive virtually turns the Parliament into a rubber stamp to approve decisions taken in secret by a party Caucus. On the other hand, the sovereignty of the Parliament has recently been impaired by decisions of the High Court, which have declared constitutional principles that the Parliament cannot overturn, although there are no express provisions in the Constitution to support them.

Sir Garfield also pointed out that a republic could not confer any benefits not already provided by our constitutional monarchy, whereas the substitution of a President for the Monarch is likely to produce division in the community. I respectfully agree.

I have not been able to refer to the very useful contributions made from the floor in the course of the debates. I am grateful to all who have spoken at this Conference and to you all for your attendance.

Appendix I

Contributors

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1. Addresses

Peter COLEMAN was educated at North Sydney Boys High School and the Universities of Sydney and London. After a period in journalism, including as editor of The Bulletin, he was elected in 1968 to the New South Wales Legislative Assembly, where he served until 1979 as Minister for Revenue, Chief Secretary and Leader of the Opposition. In 1975 he chaired the Select Committee on the Appointment of Judges to the High Court of Australia. After a period (1979–81) as Administrator of Norfolk Island, he became the Liberal Member for Wentworth in the Commonwealth Parliament (1981–87). He was editor of Quadrant for 20 years and has published several books, including The Liberal Conspiracy, a study of the role of the intellectuals in the Cold War, and Memoirs of a Slow Learner.

Sir David SMITH, KVCO, AO, was educated at Scotch College, Melbourne and at Melbourne University and the Australian National University. After entering the Commonwealth Public Service in 1954, he became in 1973 Official Secretary to the then Governor-General of Australia (Sir Paul Hasluck). After having served five successive Governors-General in that capacity, he retired in 1990, being personally knighted by The Queen. He lives in Canberra, where he is now very active in both scouting and in musical activities.

2. Conference Contributors

Philip AYRES was educated at Adelaide Boys High School and at the University of Adelaide (BA, 1965; Ph.D, 1972) and is currently Associate Professor of English Literature at Monash University. In addition to numerous books and scholarly articles on English literary history, he is the author of Malcolm Fraser: A Biography (1987). He has published first-hand accounts of Khomeini's Iran and of the mujahedeen side of the war in Afghanistan, as well as contributing numerous articles to various journals. In 1989 he was elected a Fellow of the Royal Historical Society (London), and in 1993 was Visiting Professor at Vassar College in New York State.

The Rt. Hon. Sir Garfield BARWICK, AK, GCMG was educated at Fort Street High School, Sydney and the University of Sydney (BA, LLB). He was admitted to the New South Wales Bar in 1927 and became King's Counsel in 1941. After a long and distinguished career at the Bar, he entered the federal Parliament in 1958 as Liberal Member for Parramatta, serving as Attorney-General (1958-62) and Minister for External Affairs (1961-64) before being appointed Chief Justice of the High Court in 1964 and serving in that position until his retirement in 1981.

Professor Michael COPER was educated at Cranbrook and at St. Paul's College, Sydney University (BA,LLB(Hons) 1970). During 1971–1988 he held various positions within the University of New South Wales, becoming associate Professor of Law. During 1988–90 he was a member of the Inter-State Commission, and during 1991–1994 Director of Government Advising with Sly and Weigall. He is the author of numerous books and articles on the Australian Constitution, including Encounters with the Australian Constitution (1988). He is now Professor of Constitutional Law at the Australian National University, Canberra.

The Rt. Hon. Sir Harry GIBBS, GCMG, AC, KBE, was educated at Ipswich Grammar School and Emmanuel College at the University of Queensland, and was admitted to the Queensland Bar in 1939. After serving in the A.M.F. (1939–42), and the A.I.F. (1942–45), he became a Queen's Counsel in 1957, and was appointed, successively, a Judge of the Queensland Supreme Court (1961–67), a Judge of the Federal Court of Bankruptcy (1967–70), a Justice of the High Court of Australia (1970–1981) and Chief Justice of the High Court (1981–1987). Since 1987 he

has been Chairman of the Review into Commonwealth Criminal Law and, since 1990, Chairman of the Australian Tax Research Foundation. In 1992, he became the founding President of The Samuel Griffith Society.

John HIRST was educated at Unley High School and the University of Adelaide. After tutoring in Economic History at that University, he moved to La Trobe University in 1968, where he is now a Reader in History. He is the author of several books, including Convict Society and its Enemies and The Strange Birth of Colonial Democracy, and numerous articles. He is the Victorian convenor of the Australian Republican Movement, and served in 1993–94 as a member of the Prime Minister's Republic Advisory Committee (the so-called Turnbull Committee).

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

Bruce KNOX was educated at C.E.G.S., Brisbane, and at the Universities of Queensland and Oxford (Magdalen College), where he was awarded the Beit Prize in 1961. After holding a number of academic teaching and research positions in Australia and overseas, he is currently a Senior Lecturer in History at Monash University. In 1968 he was elected a Fellow of the Royal Historical Society (London). He is currently a member of the Victorian Council of Australians for Constitutional Monarchy.

Ted MACK, MHR was educated at Sydney Boys High School and the University of New South Wales (B.Arch.). After working for various architectural firms in Sydney and London, he joined the NSW Public Works Department (1961–70), subsequently moving to the NSW Housing Commission (1972–74) as Assistant Chief Architect. He was an Alderman of the North Sydney Council (1974–88), including eight years as Mayor (1980–1988). In 1981 he was elected to the NSW Legislative Assembly as the Independent Member for North Shore, resigning that seat in 1988. From 1990 to date he has been the Independent Member for North Sydney in the federal Parliament, and has recently announced his intention to retire at the next election.

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

Professor George WINTERTON was educated at Hale School and the University of Western Australia (LL.B. (Hons) and LL.M.), and gained his Doctorate in law from Columbia University. He is currently Professor of Law within the University of NSW. He has published widely on constitutional issues in Australia, England and the USA, including Parliament, the Executive and the Governor-General and Monarchy to Republic: Australian Republican Government. He was a member of the Executive Government Advisory Committee of the Constitutional Commission (1986–87), and of the Republic Advisory Committee (the Turnbull Committee) in 1993.