Proceedings of the Sixth Conference of The Samuel Griffith Society

Townhouse Hotel, Carlton 17-19 November, 1995

Copyright 1996 by The Samuel Griffith Society. All rights reserved.

Table of Contents

Published 1996 byThe Samuel Griffith Society P O Box 178, East MelbourneVictoria 3002
Printed by: McPherson's Printing Pty Ltd 5 Dunlop Rd, Mulgrave, Vic 3170
National Library Cataloguing-in-Publication data:Upholding the Australian ConstitutionVolume Six Proceedings of The Samuel Griffith Society
ISBN 0 646 26913 5

Foreword

John Stone

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

After an interval of nearly two and a half years, The Samuel Griffith Society returned for its sixth Conference to Melbourne, the city in which its Inaugural Conference was held in July, 1992.

The papers delivered to this Conference, which constitute this Volume in the Society s series Upholding the Australian Constitution, were focused, as always, not on one single theme, but on a number of sub-themes comprising, in the judgment of the Society s Board of Management, some of the major constitutional issues confronting Australia today.

Thus, after not scheduling any papers at our previous (Sydney) Conference on what we have generally termed The Aboriginal question (Mabo and all that), we returned to that issue with two papers : first, a characteristically ironical assessment by Dr Colin Howard of the High Court s decision in Western Australia v. Commonwealth (1995); and secondly, an examination by Emeritus Professor Austin Gough of the Hindmarsh Island and La Trobe University affairs, involving allegedly sacred Aboriginal beliefs or archaeological material, and leading him to the conclusion that, in effect, the various Aboriginal Heritage Acts, both State and federal, have, in defiance of section 116 of our Constitution, established an official religion .

One of the fundamental flaws in our federal structure as it has evolved has been the imbalance in the financial powers of the Commonwealth and the States, at least as those powers have been interpreted over the years by the High Court. It is thus particularly appropriate that these Proceedings should contain two papers under the general rubric of Federalism and State Finances.

The first of them, by Mr Des Moore (himself for 28 years a Commonwealth Treasury official before his resignation in 1987), argues that, with some few notable exceptions, the great majority of Commonwealth specific purpose payments to the States under section 96 have no significant effect upon the final allocation of spending by State governments, and that such financial arrangements primarily constitute an exercise in extending or preserving the Commonwealth s political power.

The second paper in this area, by Dr Greg Craven, takes as its starting point the proposition that the High Court of Australia was provided for in our Constitution not merely to interpret that Constitution but also, in doing so, to preserve its federal nature-that is, to protect the States from the unwarranted incursion of federal power.

In his powerfully argued and thoroughly depressing assessment of the Court s performance in that regard, Dr Craven concludes that almost from the outset, but particularly since the Engineers Case, it has persistently and, of recent years, even wilfully, failed in that constitutional duty of care.

It is commonplace today to hear it said that, whether at federal or State level, our elected representatives are no longer faithfully representing the views of the great majority of those who have elected them. Increasingly, it is said, their performance is characterised by subservience to the minority policies, often of a highly authoritarian nature, of assorted pressure groups.

With that persistent (and growing) refrain in mind, the Society at its fourth (Brisbane) Conference introduced onto its agenda for the first time the topic of so-called direct democracy . It pursued that topic in Sydney, and again on this occasion, with two papers from the Clerk of the

Senate, Mr Harry Evans, and Professor Patrick O Brien, respectively, each of which, in their very different ways, makes riveting reading.

Despite having thus singled out these six papers for specific mention, it would be quite wrong to imply that their six fellows were in any whit their inferiors. On the contrary, it is a tribute to all those who have once more produced them that all twelve papers in this volume are as substantially meaty as they are highly readable by everyone wishing to inform themselves about the debate on constitutional issues in Australia. It is to that debate that this Volume, like its five predecessors, is dedicated.

Dinner Address

The Future of the Federation

Hon Jan Wade, MLA

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

If successive Commonwealth Governments had not spent the last 90 or so years increasing their power at the expense of the States, substantially imbalancing the Australian federation, we would not be here tonight. The energy and intellect directed to The Samuel Griffith Society would have sought other outlets.

That push for power has continued inexorably, whether by constitutional means or otherwise. The Samuel Griffith Society grew out of the resultant concern and a recognition of the need to redress the federal balance in favour of the States.

So we are here tonight.

I agree whole-heartedly with the aims of the Society and have been a member from the beginning. Tonight I wish to examine the proposition contained in the Statement of Purpose of the Society:

"The Australian people have voted many times against proposed amendments. We must presume that they regard the Constitution, on the whole, with approval."

In terms of achieving the aims of the Society this proposition is pivotal, but what it implies is not, in my view, as obvious as we might think. Nevertheless, while the proposition itself needs further examination, the results of that examination will not detract from the purposes of the society. Indeed, they may well enhance the effectiveness of those purposes.

It may, of course, be that no general inference at all can be drawn from the long record of failure of referenda to alter the Constitution. Perhaps the electorate simply did not like the particular propositions put to them, but that is not the point I wish to make.

The point I wish to make is that the proposition which I have quoted has to be seen in a particular context. That context is the present day, which means contemporary perceptions and attitudes.

In that perspective, it seems to me that in general terms, Australians are not too disturbed by the steady increase in power of the Commonwealth Government. It follows that the aims of the Society and, indeed, of the States, must be promoted in that context.

There can be no doubt that the emphasis in the 19th Century Convention debates was on a federation with a central government which would take over responsibility for defence, customs, external affairs (as then understood) and communications, leaving the bulk of governmental responsibilities to the States. The dominant partners in the federation were to be the States, not the Commonwealth.

The Founding Fathers would be astonished by the present distribution of powers and the overlapping responsibilities between the Commonwealth and the States. No doubt the great majority of those who voted for federation would be similarly astonished.

If today's Australians are satisfied with our present arrangements, how did this come about?

Many speakers at your conferences have enumerated the advantages of decentralised decision-making and, indeed, many of those advantages would have been well known to those participating in the Convention debates. Nevertheless, we must continually remind ourselves that

those who framed our Constitution did so in a particular environment which is quite different from that which exists today, and it was that environment which formed the basis for the Constitution.

The changes to the federation which have taken place since 1901 have taken place in a constantly changing Australia, and they will have been perceived by the Australian people in the context of the environment in which they occurred.

It was not until the 1920s that it was possible to travel by train from Northern Queensland to Western Australia and, even then, the different gauges meant at least five changes of train.

In my own childhood, the border between New South Wales and Victoria was marked each Christmas by a walk in the early hours of the morning down the length of the Albury station-there apparently being some rule of railway management that the compartment you were leaving must be as far as possible from the one you were joining. Now air travel makes it possible to have breakfast in Sydney, lunch in Melbourne and dinner in Adelaide.

Just as the nineteenth Century saw the major newspapers move to the colonial capital cities, so the second half of the twentieth Century has seen the move to national media concentrations. The 30 second grab on television transmitted nationwide from one central studio has replaced, for the majority of people, the once thoughtful newspaper articles and editorials. Who would have thought the former VFL would be a national league including Sydney and Brisbane?

With the huge development in computing and multi-media, it is quite likely that our present systems of receiving and sending information will be again fundamentally changed by the early part of the next century.

Throughout its history Australia has been a country of migrants-voluntary and otherwise. Our early settlers often had no choice as to the colony which was to become their home. For our later migrants, and particularly refugee migrants after the second World War, their destination was often a matter of chance. They were coming to Australia rather than to any particular State.

Perhaps most significant of all, our Founding Fathers endorsed a Constitution which entrusted maintaining the balance between the States and the Commonwealth to various office holders who are all part of the Commonwealth team, whether they be in the Parliament, the High Court or the Commonwealth bureaucracy.

They then compounded this error by establishing a home ground for the team in Canberra, and that home ground has gone from strength to strength in terms of numbers of team members and of resources.

In view of these changes, it would be surprising if the notion of federation acceptable to those who voted to adopt our Constitution was the expectation of today's Australians.

To say that expectations have changed does not mean that every aspect of the federation has changed. We are still all agreed about the desirability of free trade. No-one questions the continued responsibility of the Commonwealth for external defence and security, and as yet, no-one has seriously questioned the States' responsibility for internal security through our various police forces.

However, I would suggest that, despite the history of the Commonwealth and the arguments that have been put forward by the States over the last 50 years, very few Australians now query the imposition of income tax by the Commonwealth.

It is likely that the great majority would now oppose the imposition of a State income tax and, indeed, the imposition of any other major new tax (the GST has shown us that major changes to our tax system do not have popular support).

It is not unusual to find general agreement about the need for greater uniformity in school education, and last week when I was asked to accept Ned Kelly's pistol from the Dowsett family in the Old Melbourne Goal, it was patently obvious that, without exception, the audience would have preferred me to say that I accepted it on behalf of the people of Australia rather than saying (as I did) that I was receiving it on behalf of the people of Victoria.

We must remember that the founders of our Constitution set about establishing the concept of "Australia" in a legal as well as a geographic sense. They succeeded perhaps even more than they may have anticipated at the time. Perhaps having to land the Australians at Gallipoli only fourteen years after federation was a significant impetus.

The sentiments I have expressed must be recognised if we are to be successful in regaining a better balance in our federation.

For this reason, I believe that, rather than talk only in abstract terms about such reforms as the limitation of the external affairs power or a better system of appointments to the High Court, we must also identify the issues which are causing anxiety and uncertainty in the community, and focus our reform endeavours on them in specifics, not generics.

Firstly, and notwithstanding a strong desire for uniformity in many areas, there is anxiety about the inability of individuals to influence events.

The opportunity for choice between decisions being made in Canberra, in a State capital, or by local government must be made clear. It should be understood that the ability to influence a decision will vary depending upon where the decision is to be made. It is no use marching up Bourke Street if the decision is to be made in Canberra or Sydney.

The importance of the place of decision-making became clear to me some 25 years ago when I saw the impact on the Bolte Government of demonstrations against the subdivision of the Little Desert. Those demonstrations resulted in the establishment of the Land Conservation Council and a system of management of Crown lands that has served us well. There could have been no outcome as satisfactory to Victoria if the decision had been one for Canberra.

Our motto should be taken from the floor of the vestibule in this Parliament House:

"In the multitude of counsellors there is safety."

Secondly, the use of Commonwealth powers or money in a way that breaches the concept that the Commonwealth will treat the States in an even-handed way is creating uncertainty and unease. The fact that such incursions are often made for party political advantage can create hostility.

There are numerous examples, and I will mention only a few recent ones :

- Distribution of funding to arts organisations which appears to unduly favour Sydney-with the Victorian College of the Arts School of Film and Television getting Commonwealth funding of about $2 million in 1994Ä95, compared with $15.5 million which went to Sydney's Australian Film, Television and Radio School. Student enrolments in the two schools are about the same.
- Disproportionately large capital expenditure on Sydney airport against other airports around Australia.
- Recent threats by some members of the Commonwealth Government to refuse to classify the infrastructure bonds to be issued for the City Link project as bonds eligible for concessional tax treatment under the Commonwealth infrastructure development policy.

Going slightly further back :

- The payment by the Commonwealth to the then Victorian Government in connection with the sale of the State Bank of Victoria to the Commonwealth Bank had an interesting political twist.

The payment was in recognition of the increased company tax receipts that would flow to the Commonwealth. However, the Commonwealth was prepared to make a larger payment to the State if the State Bank of Victoria were sold to the Commonwealth Bank rather than to Westpac, thereby sparing the then State Government the political embarrassment of having to sell the State Bank of Victoria to the private sector.

In instances such as these, it is important that we focus on and articulate the underlying principle of the Constitution that States and their citizens were to and should receive even-handed treatment from the Commonwealth Government.

Thirdly, the intrusion of the Commonwealth into areas where the States have traditionally supplied major services has the potential to cause confusion and distress. The duplication of functions does not seem to be a major issue, and public response to such incursions appears to depend to a large extent on the outcome.

I have not detected any significant public concern about the effective takeover of universities by the Commonwealth 20 years ago.

However, the hospital system is the prime example of an area where political commitment, in this case to a national health system, formed the basis for Commonwealth entry into a State responsibility.

It has resulted in political point-scoring to the detriment of the system itself and the patients it is supposed to serve. The public are unable to apportion responsibility to either government.

The Commonwealth has taken over funding responsibility for nursing homes and has established monitoring teams to maintain standards and investigate complaints. Victoria has, as a result, repealed regulations which duplicated the Commonwealth system. This has caused considerable distress to people who believe that, as a result, there is no oversight of nursing homes.

It is in areas of concern such as the health system that an organisation such as The Samuel Griffith Society can play a significant role by explaining the issues in such a way that the alternatives can be clearly understood, and the advantages and disadvantages of particular structures are made clear.

Conferences which spell out the different ways in which health, education and transport could be dealt with in the federation would be an invaluable aid to public understanding-not the least in explaining that the incursion of the Commonwealth into these areas via section 96 grants has not always been to the overall benefit of the area.

As well as reacting to Commonwealth incursions into State areas of responsibility, we should be proactive in looking to ways within our present system to meet the challenges of the changing society without depending on constitutional or other structural change, and without moving further towards central concentration of power. There are areas in which either the States or the Commonwealth can make the running, and in many ways the Victorian Government is setting the pace.

Notwithstanding the appalling financial situation which it inherited, the Victorian Government has moved from a recurrent deficit in the State budget to a surplus this year in both the current account and in the budget overall.

Other States, although not facing such dire straits, are also producing balanced or surplus budgets despite the fact that since the late 1980s at least half Commonwealth budget savings came from squeezing the States.

States are high-lighting the contrast between responsible State Governments and a self-indulgent Commonwealth Government.

The privatisation programme being carried out in Victoria is, in part, a response to a situation where the previous government has burdened the State with enormous government guaranteed debt. In a number of States, including Victoria, statutory monopolies have over-invested in infrastructure, passing on the cost of borrowings to their customers.

A combination of out-sourcing, privatisation and corporatisation in all areas of government will, we believe, demonstrate that the retreat to smaller government can result in better services to citizens and at lower cost.

Again, there is a contrast with the Commonwealth Government which advances towards these reforms and then retreats.

The States have, for many years, been involved in various uniform and mutual recognition schemes. These schemes have widespread support. There is no need for the Commonwealth to institute a national response to a problem if the States have already dealt with it in this way.

We can drive from one State to another with a State licence. Our educational qualifications are recognised Australia-wide. The States have now agreed with the Commonwealth to extend this mutual recognition scheme to the recognition of trade and professional licensing schemes and to the sale of goods.

In devising Australia-wide schemes, the States must realise that compromise is essential. Simply put, it is usually better to compromise on issues than have a Commonwealth scheme imposed without input from State Parliaments, thus further distancing our citizens from decision making.

When, as Minister for Fair Trading, I inherited the Uniform Credit Bill, the States had been negotiating its contents for at least ten years.

As a result of a determined effort by New South Wales and Victoria, it will now come into operation next year, although it is being held up at present by a somewhat parochial approach of the Tasmanian Upper House, which wants to exempt a number of smaller Tasmanian credit providers. If the States want to remain in a particular area of government, which has a nationwide impact, such an approach is not appropriate.

Despite its long gestation, I believe that the uniform credit scheme provides a better outcome for both financial institutions and consumers than would have been the case if the legislation had been handed over to the Commonwealth-the reason being the input to State and Territory ministers and Parliaments from all the interest groups and a practical approach not dominated by any particular philosophy.

However, States cannot expect to remain in areas where uniformity is essential unless issues can be dealt with more expeditiously. Having read this morning's news I consider that, so far as credit is concerned, Tasmania must be regarded as no longer part of Australia.

The corporations law (which is now largely the responsibility of the Commonwealth, and is a piece of legislation requiring virtually full-time commitment from those who seek to understand it) replaced a uniform State scheme which was originally the initiative of my predecessor as Attorney-General and Member for Kew, Sir Arthur Rylah. It was updated and improved in the 1970s by another Victorian Attorney-General, The Honourable Vernon Wilcox.

The 1962 Victorian Companies Act was virtually uniform throughout Australia and was adopted by Malaya. Most of it is still in operation in Malaysia and Singapore. It is not clear to me that Malaysia and Singapore have been disadvantaged in the international community by remaining with this legislation, or that Australia has been advantaged by the continually amended Corporations Act.

I am, however, of the view that the regulation of small intra-state businesses would have been better left with the States. Why should a corner milk bar in Broome have its annual return transported by mail to Traralgon for processing, and why should its legal adviser have to make his or her way through some of the most complicated legislation in the world, when the business has no interstate or international component at all?

Variation between States in the regulation of small business may well have produced different trading environments, some of which may have been better than that currently existing for small business.

There is certainly room for improvement, and competition between States could well produce that improvement.

Police ministers are currently endeavouring to agree on uniform gun laws, and Australians will be looking to a successful outcome. If they do not succeed, there may well be a call for the Commonwealth Government to step in.

In many ways, it is up to the States themselves to find their place in the federation at the end of the twentieth Century and the beginning of the twenty-first Century.

There is a case for handing over genuine national issues to Canberra, but the fact that all States are involved in an issue does not make it a national issue.

Whatever decision States make on a particular issue, they still have to contend with such externalities as the High Court and the external affairs power. However, the successful creation of prosperous, efficient and fiscally responsible States, together with logical decision-making on Australia-wide issues, will make it more difficult for centralist solutions to prevail. There is intense interest in State Government activities and in State elections, and this interest, of itself, brings with it significant strengths.

Finally, there may be an opportunity for the States to compete successfully with the Commonwealth where the Commonwealth has intruded into a State area.

Although the folklore favours the Commonwealth as the founder of equal opportunity in Australia, equal opportunity is an area in which the States led the way. South Australia acted first to introduce anti-discrimination legislation applying to racial discrimination, in 1976. Victoria followed with sex discrimination in 1977.

Earlier this year, at the fifth Conference of The Samuel Griffith Society, Professor Winterton suggested that if States protected human rights then the Commonwealth's political case for using the external affairs power would be greatly diminished, and that public opinion would move against the use of the Commonwealth external affairs power in this area.

Victoria now has the most extensive and (in my view) the best equal opportunity legislation in Australia. It provides wider protection to disadvantaged groups and better remedies than the equivalent Commonwealth legislation. All States, except Tasmania, now have equal opportunity legislation in place.

I do not see the Commonwealth willingly withdrawing from this jurisdiction. However, I do see the probability in an area such as this for a State to provide a better service and, over time, to force the Commonwealth out through lack of customers. The Commonwealth is disadvantaged by the strict separation of administrative and judicial powers and a slower response to community concerns.

In conclusion, I would stress that what I have been talking about are strategies not outcomes. They are strategies designed to achieve, in part, what could be far better achieved by all or any of:

- Amendments to the Constitution or inter-Government agreements which eliminate vertical fiscal imbalance;
- The elimination of all duplication of Government functions;
- Limitation of the external affairs power; or
- A dream team on the High Court.

They are strategies based on the proposition that change is more likely to be achieved, at least initially, in the context of particular problems and issues rather than as a result of historical study or theoretical principle. Let us, therefore, identify those problems and issues, and let us support those States which have the courage to look for innovative solutions, whether or not they are solutions which we would have espoused ourselves.

A greater understanding of the basis of a federal system of government is crucial to further reforms. This must also include a greater public awareness of the history of our Constitution and of the constitutional positions of the States within Australia's federal system.

The States must accept a large part of the responsibility for advancing such understanding, and I would like to see Victoria lead the way. I would refer you to the words of Viscount Bolingbroke in 1733 :

"By constitution, we mean, whenever we speak with propriety and exactness, that assembly of laws, institutions and customs, derived from certain fixed principles of reason ... that compose the general system, according to which the community has agreed to be governed."

The written Constitution is only part of the compact between the Government or Governments and the people. The under- standing of that compact by the people, whether it has any basis in law or history or not, will affect the operation of the Constitution.

If we wish to change either the Constitution itself or its operation, those changes must have the support of the Australian people. That support cannot be assumed, it must be won.

Introductory Remarks

John Stone

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

Ladies and Gentlemen, welcome to this, the sixth Conference of The Samuel Griffith Society. Melbourne was, of course, the venue for the Society s inaugural Conference in July, 1992, and it is good, so to speak, to be back.

Last night we had from the Attorney-General for Victoria, the Honourable Jan Wade, an address on The Future of the Federation, which not only honoured the Society (of which she, and her husband, are both members), but also was a characteristically thoughtful contribution to the debate which is central to the Society s existence.

I take this opportunity to thank the Attorney-General not merely for her address, to which I shall refer again later, but also for her assistance in obtaining the approval of the Presiding Officers for our opening Dinner last night to be held in the splendid surroundings of the Queen s Hall in Parliament House. I understand that, over a century ago, the very first Federation Banquet was held in that same Queen's Hall at the outset of the long drawn out discussions which led, eventually, to the Federation

of the six Colonies under what was then our new Constitution. It would be hard to think of a more appropriate venue in which to have begun our Conference, and I repeat our thanks to Mrs Wade for facilitating that outcome.

It is instructive to look back upon the program for that 1992 inaugural Conference, to which I referred earlier, and to note how much more sharply defined the major constitutional themes on which it focused have since become.

The Mabo judgment had then very recently been handed down by the High Court; it was referred to in passing in the paper by Hugh Morgan, but had otherwise barely entered the consciousness of the great majority of Australians. Today, of course, its consequences loom ever larger, and ever more ominously, not only in the constitutional future of this country, but in its economic future also.

Indeed, as those of you who have read The Australian this morning will know, those consequences-or matters related to them-are now extending ever more widely into the whole intellectual and cultural future of this country. Later this morning we shall hear from Professor Austin Gough his full account of those aspects, to which The Australian's report this morning refers.

In some ways almost by contrast, my own judgment is that the Republic issue has if anything diminished in practical significance. In 1992 we had no less than three papers, out of the thirteen in all which were delivered, on that topic. On this occasion we have none, although the matter will no doubt be touched upon in one or two of the papers on more general topics, such as that by Professor Minogue this evening.

This is, in my view, because the more the Republic has been talked about-particularly by Mr Paul Keating on the one hand and Mr Malcolm Turnbull on the other-the more impractical it has begun to appear. Since the whole purpose of this Society is to ensure that, before constitutional changes are actually proposed, they should be adequately and widely talked about, I take much heart from that course of events.

Another contrast with that inaugural Conference is that our program this weekend contains two papers on direct democracy . The growing interest in that topic is, I believe, a direct result of the increasing disquiet among Australians about the growth, in our representative democracy, of the power of the Executive and, within that Executive, of the Prime Minister in particular-what some have described as "Prime Ministerial dictatorship". Anyone observing the parliamentary scene in Canberra today can only conclude that we are currently suffering from a very bad case indeed of that phenomenon.

So, as I say, the particular issues are becoming more sharply defined. Nevertheless, the general issue remains what it has been from the outset-the growth of centralism in Canberra at the expense of the healthy functioning of the Federation.

The continuing drive for self-aggrandisement by politicians and bureaucrats in Canberra has been facilitated by two means : first, by the persistent and, I would say, even wilful neglect of its constitutional duties by the High Court of Australia; and secondly, via the almost laughable (were its results not so serious) distortion by the Court of the import of those two words external affairs in section 51 (xxix) of the Constitution.

Our inaugural Conference four years ago contained one paper on each of those topics, and this weekend we shall return to them again with, in effect, two papers on each. In this, the 75th anniversary year of that watershed of federalism in Australia, the Engineers' Case of 1920, it is appropriate that one of those papers-the one with which this Conference will conclude tomorrow- focuses on that case.

In her thoughtful address last night the Honourable Jan Wade expressed the hope that the Society might focus more in the future on some of what might be called the "practical" issues confronting our Federation today, such as the (mis) allocation of responsibilities in such fields as health and education. While I entirely endorse her views on both those functional areas-and many others like them-I cannot but be reminded of Keynes' famous remark that "practical men" (he would never have said practical persons) were almost invariably the slaves of some defunct theoretician (he referred specifically to economic theorists).

While therefore I entirely agree that such practical issues as those to which Mrs Wade referred are a concern of this Society, it may be appropriate to remind ourselves (and perhaps even her) that the climate of opinion in which debates over practical issues can be won will be formed, in the first instance, by debates over such general issues as the distribution of powers, the need for power to be divided if liberty is to be preserved, and so on-issues of the kind, in short, to the discussion of which this Society is dedicated.

As previously remarked, one such issue is the abuse of the external affairs power, and we shall begin our Conference today with a Session containing two papers on that topic. As I shall be chairing that Session, perhaps I may kill two roles with one Stone by slightly extending these introductory remarks in that regard.

As all of you would know, our previous Conference in Sydney last April was honoured by what proved to be a remarkable paper from a previous Chief Justice of the High Court of Australia-our President s predecessor in that regard-Sir Garfield Barwick.

Sir Garfield s name also appears in the program of this Conference, and we shall shortly hear a brief paper from him on the external affairs power. Regrettably, the state of his health precludes his attendance in person to present it, and it will be read on his behalf by Mr Barrie Purvis. In the nature of the case, there cannot be our usual question period following that paper, and after it has been read we shall therefore move straight on to the following paper, The External Affairs Power : The State of the Debate, by Mr S E K Hulme, QC, whose previous presentations to this Society

have delighted all those who have been privileged to hear them. Indeed, and without meaning any disrespect to Sir Garfield, it may be fair to say that, if the brevity of his paper permits us, as it will, to hear Mr Hulme at somewhat greater length than usual, that will at least be a very considerable consolation.

Ladies and gentlemen, I shall therefore now close these introductory remarks, announce the opening of the first Session of the Conference, and call on Mr Purvis to present Sir Garfield Barwick's paper to you.

Chapter One

A View of the External Affairs Power

Rt Hon Sir Garfield Barwick, AK, GCMG

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

The Commonwealth is a federation of States, formerly self-governing colonies within the Imperial system, and was itself a colony within the British Empire, a circumstance which should be remembered when the Constitution is under construction. The State constitutions, though statutory and as modified by the federal Constitution, were confirmed by it. The federal Constitution is in writing and is explicit as to the powers it creates. It provides for a separation of powers and for a parliamentary democratic system of government.

On the separation of its territories from those of the Imperial regime, our Australian monarchy emerged, separate and distinct from the British Crown, as it is from the monarchies of New Zealand and Canada. The powers exercisable by the monarch are explicitly described, as are those given to the Governor-General personally. The monarch was given the power to appoint and instruct the Governor-General; to withhold assent to Commonwealth legislation if the Governor-General had reserved that question for the monarch; and the power to set aside a Commonwealth statute within two years of its passage through the Parliament ÄÄ but all these powers are exercisable only on the advice of the Australian ministry communicated to the monarch via the Prime Minister.

Thus the monarch has no power which can be exercised without or not in conformity with the advice of the Australian ministry. The powers given to the Governor-General personally are clearly defined. He has the power to appoint and therefore to dismiss the ministry which is appointed not for a term, but to hold office during his pleasure. This does not mean his personal pleasure, but means in substance so long as that ministry retains the confidence of the Parliament. He is given the power and authority to summon the Parliament, to prorogue it and to dissolve it. These powers of the Governor-General are explicit and are the result of the direct enactment of the Westminster Parliament, and not in any sense derivative from the fact that the Governor-General is representative of the Queen in Australia. The powers which are given to him are given to him personally and directly by the Constitution.

There has been talk lately about reserve powers of the Crown. It seems to have been thought that Sir John Kerr's dismissal of the ministry in 1975 may have been an exercise of these reserve powers, but in fact he exercised an express power given him by the Constitution to appoint and to dismiss the ministry. The notion of reserve powers being available to the Crown was developed in Imperial days when it was thought that in the long process of converting an absolute monarchy into a constitutional monarchy there remained some powers of the Crown which were exercisable without the concurrence of the ministry. Whether or not this was a correct view, the Commonwealth Constitution leaves no room for any such notion.

The Constitution lists the matters on which the Commonwealth Parliament can legislate. The matters are very succinctly described. The power to levy duties of customs and excise was given exclusively to the Commonwealth, but otherwise the powers nominated by section 51 of the Constitution are the same legislative powers as are retained by the States. Consequently virtually

all the powers given to the Commonwealth, other than the authority to levy customs and excise, are concurrent powers. Any possible conflict of legislation on these subjects is dealt with by section 109, which makes the law of the Commonwealth paramount in case of any conflict of legislative activity; that is to say, paramount to the extent of any inconsistency between the federal and State law on that subject.

It is for the Court to construe the descriptive phrases contained in section 51 to determine their meaning. That determination will be made as of 1900 and the descriptions will retain that meaning throughout, though the field that meaning will cover will depend upon current circumstances and will be found in the course of time to authorise ever widening actions. Illustrations will be found in the decisions of the Court.

We have so far not adopted the view of the majority of the Supreme Court of the United States about the incorporation of the grant of legislative power in the Constitution of that country. That majority has taken the view, strongly opposed by a vigorous minority, that the meaning of the grant will change with the circumstances.

The legislative power to make laws on external affairs is granted by those two words, "external affairs", in section 51 of the Constitution. The powers granted in this respect will be governed by the meaning of the words "external affairs" as they were understood in 1900. This cannot properly be read as a grant of power with respect to international relationships but rather, as the words indicate, with respect to external affairs, which must mean the external affairs of the federation, of the Commonwealth of Australia. An affair of the Commonwealth will be a matter of concern to the federation and if, because of its nature, that matter would need external action to accomplish it, to bring it to fruition, it is an external affair of the federation.

An illustration of such an affair would be the national need to make an arrangement with a foreign power or powers, the affair being of intrinsic national quality of what was sought to be done and the external aspect of it provided by the external treaty.

The Commonwealth had become a signatory to the Convention for the Protection of the World Cultural and Natural Heritage, under which the Commonwealth undertook obligations expressed in very general and wide ranging terms to protect the environment, and to submit an inventory of territorial features suitable for inclusion in a list which the World Heritage Committee was required to keep of properties considered to be of world heritage value. The Commonwealth nominated an area in Tasmania known as the Gordon below Franklin Dam area as suitable for inclusion in the World Heritage List. Thereafter that area was accepted as a suitable piece of international heritage by the Committee. The nomination by the Commonwealth was not pursuant to any obligation to make a nomination but entirely voluntary, gratuitous. Thereafter a section of the World Heritage Properties Conservation Act 1983, section 6, empowered the minister to forbid any development of the item nominated to the international committee as suitable for world heritage.

Of course in 1900 there was no concept of the United Nations nor any activities of that body. The United Nations decided to establish a list of physical manifestations which were to be regarded as the international heritage and to be voluntarily protected by the nations. The process of identifying the physical object to be included in the international heritage list included the voluntary surrender of power on the part of the national state. It is as well to remember that the United Nations has no legislative power but its activities depend upon the voluntary concurrence of nations in what is proposed.

The Convention for the Protection of the World Cultural and Natural Heritage to which Australia was a party did not impose any obligation on the Commonwealth to nominate a piece of territory

as suitable for inclusion in the World Heritage List. So that the Commonwealth's act in nominating the Tasmanian river as suitable for inclusion in the World Heritage List was a purely gratuitous act.

The High Court in its several recent decisions has taken a much wider view of the grant of legislative power. It seems to me it has not considered the validity of a statute giving the ministry authority to prevent development on a slice of Australian land because it has with the approval of an appointed committee of the United Nations been placed on a list of heritage properties. The Court does not address the question of whether what is authorised is an affair of the federation and test its validity accordingly.

The proposal before the Australian Government in 1982 was that it should nominate a slice of Australian territory as suitable for inclusion in a list of international heritage items to be kept by a committee nominated by the United Nations. The statute provided, as a consequence of the acceptance by that committee of the nominated item as suitable for inclusion in the list of international heritage items, that the local government lost control of the territory in the interests of its maintenance and preservation. By no stretch of the imagination could that proposal excite the interest and concern of the Australian community so as to become an affair of the Commonwealth and authorised so as to become an affair of the Commonwealth carrying the necessary authority for its implementation, thus making up the external affair. In terms the proposal is of international interest and evidently of academic interest lacking practical reality. It would be stretching matters beyond breaking point to call the proposal a Commonwealth affair, a matter of interest and concern to the country.

Yet a statute providing the consequences of the submission of a slice of Australian territory for inclusion in the list of international heritage items was held by the Court to be a valid exercise of the legislative power with respect to external affairs. It seems to me that if the very terms of the proposal were taken to represent the circumstances which would justify a statute to carry them into existence, such an act could not be held to be a valid exercise of the power with respect to external affairs, for the reason that the proposal did not constitute an affair of the Commonwealth at all, but was little more than an academic exercise of the United Nations. On that footing the Act would be invalid as a piece of Commonwealth legislation. The idea of placing an item of Australian territory at the disposal of a committee of the United Nations is little better than fanciful, yet the Court justified the statute and authorised the submission of a piece of Australian territory for inclusion in the list of international heritage items. It seems to me it did so not by testing the validity of the statute in the light of the circumstances in which it was being passed, but in the light of the circumstances which would have been created if it had been valid and placed in effect.

On the footing that the grant of legislative power is a power to accomplish an affair of the Commonwealth by external activity, it seems to me that if the question be asked, what affair of the federation called for the listing by an appointed committee of the United Nations of a physical item of Australian territory, the answer must be "none". It was of no concern to the federation, to the Commonwealth of Australia, to have listed by the United Nations committee this area, however much it was of consequence for the international community as of heritage value. I therefore conclude that the nomination of Australian territory as of international heritage value was not an affair of the federation and consequently, for that reason, the statute was void.

Chapter Two

The External Affairs Power : The State of the Debate

S E K Hulme, AM, QC

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

Introductory

The Background

It is hardly necessary to say to this audience that section 51 (xxix) of the Constitution gives the Commonwealth Parliament power to "make laws for the peace, order, and good government of the Commonwealth with respect to ÄÄ External affairs". This is "the external affairs power", which we are to consider this morning. Three Features of the Constitution

While you are considering what has happened with the external affairs power in recent years, it will do you no harm to have in mind three elementary facts concerning the Constitution.

The first is that in its creation the Constitution was setting out to create a federal system of government: "federal" in the sense that governmental power over people living in the same geographical area was to be shared between co-ordinate and independent governments operating in different spheres, the division of powers being effected and controlled by a written document. That aim was basal. The United Kingdom statute entitled the Commonwealth of Australia Constitution Act 1900, which sets out the Constitution in its section 9, begins by declaring in its preamble that the people of the Australian colonies "have agreed to unite in one indissoluble Federal Commonwealth under the Crown". The Proclamation which the good Queen Victoria issued at Balmoral on 17 September, 1900 in the sixty-third year of her reign declared that the people of the six States "shall be united in a Federal Commonwealth under the name of The Commonwealth of Australia".

The second fact to remember is that the way the Constitution goes about its task of sharing powers between Commonwealth and States is by giving the Commonwealth power over particular topics listed in the Constitution. Section 109 of the Constitution makes dominant the laws which the Commonwealth enacts under these powers. If you want to give the Commonwealth further power, you amend the Constitution by adding to the list.

The third fact to remember is that section 128 of the Constitution provides that the Constitution "shall not be altered except in the following manner", namely, putting it broadly, by a law passed by an absolute majority of both Houses of the Parliament, and approved at a referendum by a majority of the electors voting in a majority of the States, and constituting further a majority of the overall vote.

Amendment of the Constitution

Since facile remarks as to amendment abound, it is worth saying a little on the matter. The score for attempts to induce the people of Australia to approve proposals to alter the Constitution is well known and I fancy commonly misinterpreted, as by Professor Cheryl Saunders when she said that our Constitution had become "notoriously resistant to change".1 A contrast is often made with an allegedly more flexible attitude to amendment in the United States. The facts do not support the comment. In 94 years the Australian people have eight times approved a law

amending their Constitution. The United States score for the same period is nine times, and one of those amendments (repeal of Prohibition) cancelled out an earlier amendment (introducing Prohibition). Measured by what has been achieved, the notorious reluctance of the Australian people to change their Constitution is hardly evident.

It is most certainly true, that while these eight proposals have been approved, many other proposals to amend the Constitution have been rejected. In analysing these it is illuminating to break the proposals into two groups. Eleven were to amend the Constitution otherwise than for the purpose of giving the Commonwealth more power. Of these, the Australian people approved six. The other group contains no less than 31 proposals to amend the Constitution by giving the Commonwealth more power. Of these the Australian people have rejected 29. Only twice has such a proposal been approved : in 1946 (social security) and in 1967 (Aboriginals). Overall the figures show in the Australian people no deep reluctance to changing the Constitution as such, but a savage resistance to doing so in order to give more power to the Commonwealth.

Again the United States comparison is revealing. Only twice since the adoption of their Constitution in 1789 have the American people amended their Constitution in order to give the central government more power : in the 16th amendment, getting rid of an unintended but arguable constitutional anomaly which would have prevented the central government imposing an income tax, and in the 18th amendment, empowering Congress (and the governments of the States) to enact laws enforcing Prohibition. Nor am I aware of any other proposal having been made, to give the central government of the United States more power than was vested in it in the horse and buggy days of 1789. The United States has gone from being a combination of a few rural communities on the eastern side of the Alleghany Mountains to being the greatest power the world has ever seen, without once needing to amend its Constitution in order to give the central government more power. What ought to be notorious in relation to amendment of the Australian Constitution, then, is not some mythical deep-seated reluctance on the part of the Australian people to amend it, but the continuing zeal of Commonwealth governments in bringing forward proposals to amend it in such manner as to give themselves more power (combined with promises that Paradise on earth will be established shortly afterwards). The zeal of the Labor Party has scored one win out of 23 attempts; the zeal of non-Labor parties one win out of eight attempts. Seeing that this is the season of Test cricket, one may observe that measuring reluctance to amend the Constitution by the number of proposals rejected, is like comparing cricket umpires not on the basis of the number of appeals upheld, but on the number of appeals rejected. That latter number may tell us more about the propensity of the fielding side to appeal, than it tells us about the umpire.

Recent Growth in Application of the External Affairs Power

I return to the external affairs power. It is a commonplace that the last generation has seen a vast increase in the application of this power. The power has been held :

1982 : to empower the Commonwealth to make a law controlling the granting by the State of Queensland of pastoral leases over land in Queensland : Koowarta v Bjelke-Petersen;2

1983 : to empower the Commonwealth to make a law preventing the Government of the State of Tasmania from authorising the construction of a dam on the Gordon River, downstream of its junction with the Franklin River, in south-western Tasmania : The Commonwealth v Tasmania: the Tasmanian Dam Case;3

1988 : to empower the Commonwealth to make a law controlling the activities of the Government of the State of Tasmania in an area of forest in Tasmania (being 4.5 per cent of the State of Tasmania), while that area was being considered by the Commonwealth for designation

by it as a "world heritage area" within the Commonwealth law : Richardson v Forestry Commission;4

1988 : to empower the Commonwealth to control the law of land title on the Murray Islands, part of the State of Queensland : Mabo v Queensland, 5 commonly known these days as Mabo No. 1;

1989 : to empower the Commonwealth to make a law restraining the carrying out of activities by the Government of the State of Queensland within an area of rainforest within the State of Queensland : Queensland v The Commonwealth.6

The power has been relied on to support the creation by the Commonwealth of a whole structure of Commonwealth control over such matters as racial discrimination, sexual discrimination, sexual harassment, discrimination on grounds of religion, height, obesity, ugliness, and much else.

The power has been relied on to support the Industrial Relations Act 1993, using eight Conventions and four "Recommendations" of the International Labour Organization as the basis for adding some 300 sections to the Industrial Relations Act 1988.

Onlookers have asked two questions as to all this. The first question they have asked is how it comes about, that matters such as these, internal to Australia, are controlled by way of the external affairs power.

In fact the reasoning by which the High Court has reached these results is simple. In each case the law by which the Commonwealth intervened to control the matter concerned was a law which, by international treaty, the Commonwealth had assumed an obligation to pass. Each treaty was itself an external affair, the Court has said, and the law carrying out the treaty obligation to enact a law was therefore a law with respect to external affairs. Thus entry into a treaty which obliges the Commonwealth to enact the law, confers on the Commonwealth constitutional power to enact the law.

The lines of demarcation on the matter became clear in Koowarta.2 Mason, Murphy and Brennan JJ. took what long earlier Dixon J. had called "the extreme view".7

Mason J. said:

"It would seem to follow inevitably from the plenary nature of the power that it would enable the Parliament to legislate not only for the ratification of a treaty but also for its implementation by carrying out any obligation to enact a law that Australia assumed by the treaty."8

Murphy J. said:

- "It was conceded by Queensland . . . that the challenged sections of the Act conform to the Convention. The legislation thus falls easily within the external affairs power as an implementation of this treaty."9

Brennan J. said:

"The international quality of the subject is established by its effect or likely effect upon Australia's external relations and that effect or likely effect is sufficiently established by the acceptance of a treaty obligation with respect to that subject."10

Gibbs CJ., Aickin J. and Wilson J. took a more limited view of the power, requiring that the treaty be made in respect of a matter "international in character".

Gibbs CJ. (with Aickin J. concurring) said:

"I conclude, therefore, . . . that a law which gives effect within Australia to an international agreement will only be a valid law under s.51 (xxix) if the agreement is with respect to a matter which itself can be described as an external affair."11

Wilson J. said:

"It follows that Australia's obligation to eliminate racial discrimination within Australia will only assume the character of an external affair . . . if the manner of its implementation necessarily exhibits an international character."12

Stephen J. took a view which initially seemed similar. But for him "international" included "of international concern", so that if two countries worry about identical internal problems, and enter into a treaty by which each agrees to do something about the problem in its own country, the matter concerned becomes "international", and in the case of Australia the matter comes within the control of the Commonwealth Parliament.13 So at the end of the day Stephen J. decided the case in line with Mason, Murphy and Brennan JJ.

In the Tasmanian Dam Case, the extreme view (subject, in the case of Brennan and Deane JJ. in particular, to qualifications which have small practical importance) was adopted by a majority. It remains current doctrine.

Now under our Constitution the treaty-making power rests not merely with the Commonwealth, but with the Executive arm of the Commonwealth (Prime Minister, Cabinet, Ministers, bureaucrats). Without going near the Australian people, or near the Parliament, the Executive can, by bringing about entry into a treaty, add to the list of topics on which the Commonwealth Parliament may enact laws a topic which was not there before. And that is in fact what happens.

In form there has been no amendment of the Constitution. Any law so enacted will get to be upheld as a law with respect to external affairs, not as a law with respect to the topic concerned. Many feel that in substance there has been an amendment, and they feel that over the last generation there has in substance been a quite drastic series of amendments to the Constitution, none of which has ever been put to the Australian people.

The position is exacerbated by the fact that one cannot find out how many and what amendments there have been. Australia is party to something like 1500 treaties (it seems impossible to get a precise score), and the task of deciding their full ramifications would be enormous. Certainly the task has not been carried out. Yet if any one of the treaties is found to contain a relevant provision, it must be given its full constitutional operation.

I should add at this point that it has recently been held that the existence of a ratified treaty creates an expectation that bureaucrats exercising discretionary powers will exercise their powers consistently with the terms of the treaty, notwithstanding that no law has been passed by the Parliament to introduce the terms of the treaty into the law of Australia.14

Thus those concerned are told that entry into each treaty confers on the Commonwealth Parliament power to enact laws to implement the treaty. They see the untrammelled nature of the treaty-making power, and the enthusiasm of modern bureaucrats for spending more and more time discussing on an international level (perhaps even in international places) the manifold problems common to many countries. Put these various features together, and to these onlookers the external affairs power begins to resemble nothing so much as a blank cheque capable of taking to the Commonwealth power over, in practice, whatever the Executive and its bureaucrats choose. And that leads the onlookers to ask the further question, namely how all this is consistent with the federal nature of the Constitution.

The Debate of April 1995

The matter was discussed at the Society's Sydney conference in April 1995.

Dr Colin Howard

Dr Colin Howard had already recorded, mourned, and attacked what has happened.15 His April, 1995 paper did not seek to re-tell the tale, but merely to bring it up to date. His view may be summed up in his statement:

"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."16

Dr Howard's primary topic was remedying the matter. He distinguished two ways of going about it. One was based on what he called a positive approach, of seeking a more precise statement of the kind of laws which the external affairs power authorises. This remedy he thought could at best be only partially successful, "for no more than any other legislative power can it cover every possible situation".17 The approach he thought more likely to be effective was one based on what he called a negative approach, of stating what the external affairs power did not authorise. His preferred amendment was as follows:

"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;

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

(c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia."18

Professor George Winterton

Professor Winterton delivered a paper entitled A Framework for Reforming the External Affairs Power.19 The paper has some curious aspects.

Professor Winterton first sets out his logical framework, which is to include an initial examination of the effect of the external affairs power as regards federalism, representative government, and responsible government, followed by establishment of criteria for overcoming any deficiencies so revealed, and evaluation of the deficiencies against those criteria.

Professor Winterton turns to consider the effect of the recent developments on federalism. He acknowledges the legal potential to reduce the federal nature of the system to a mere facade. While doing so he sideswipes Sir Harry Gibbs' comment that "It is hardly an exaggeration to say that it would not make any difference if the word `anything' were substituted for `external affairs' in s.51 (xxix)", describing this as a considerable overstatement because, while it is true that any subject may potentially fall within the power, legislation implementing a treaty must be reasonably appropriate to that end.20

One may comment that Sir Harry's comment was directed to the range of topics on which laws might be made. It did not say that the power conferred on Parliament the right to enact simply whatever it thought fit on each topic.

There is a more fundamental point. The cases up until now have concerned treaties which have set out in some detail the provisions to be implemented. The Court has required that the legislation implementing the treaty follow those treaty provisions closely. But nothing requires that treaties take this form. We may in future run across treaties in which several countries undertake with each other to enact legislation dealing with the problem in their own country, without the treaty saying what the treatment shall be. Is Professor Winterton so sure that the implementing legislation will be held invalid ? Will it not still be legislation implementing the treaty?

For the present, Professor Winterton sees little likelihood of the Commonwealth seeking to make wholesale invasion of areas presently subject to State power, and he says that constitutional reform should be based on realities, not apprehensions.21 Many would say the Commonwealth has already made wholesale invasion. I fancy that Richard Court would. And many would say that the mere existence in one government of effective power to destroy the independence of the

other governments goes far to destroy the federal nature of the compact, without formal exercise of the power. Such considerations Professor Winterton does not examine.

Professor Winterton then introduces into the discussion the desirability of the Commonwealth having full power to bring about compliance with treaties on any and every subject. What that countervailing benefit is doing in this initial inquiry into the existence or otherwise of an asserted deficiency as regards federalism, it is not easy to tell. The countervailing benefit may well be relevant to the question whether we should be willing to surrender this part of the federal nature of the Constitution. It would seem totally irrelevant to the anterior question whether the existence of the power does or does not threaten that federal nature.

The sidenote Democratic deficit and the words "The other major complaint regarding the external affairs power" herald the conjoint discharge of the earlier promise to consider the external affairs power in relation to representative government and responsible government. Professor Winterton acknowledges that the Commonwealth Parliament may feel an obligation to implement treaty obligations assumed by the Executive, and turns to the desirability of the Commonwealth Parliament and the States having opportunity to contribute to the treaty-making process, and of the Commonwealth Parliament having a power of veto as to treaty-making. These questions of course arise irrespective of the width given to the external affairs power. Professor Winterton is in favour of there being opportunity for Parliament to contribute to the treaty-making process, but is against any parliamentary power of veto.

Professor Winterton then turns to Criteria for reform.22 His first criterion is that since it is very difficult to get the Australian people to amend the Constitution, no attempt should be made unless there is a very strong case for the amendment. Again we see the traditional assumption as to the attitude of the Australian people to constitutional amendment. Why it should be assumed that a people so reluctant to add to Commonwealth power will prove equally reluctant to reduce it, we are not told.

The second "criterion" asserts again that the main concern as to the external affairs power arises from apprehension as to future use, not from what has been done to date. There is no clear and present danger, and it is premature to undertake preventive constitutional reform. This is of course not a separate criterion, but a reason for finding failure to satisfy the first criterion.

The third "criterion" is that requiring the Commonwealth to rely on the cooperation of the States to any extent will pro tanto impair the Commonwealth in its conduct of foreign relations. That is not a criterion, but simply an argument the other way.

The fourth (this time a true) criterion is that any limitation on the treaty-implementation power must be expressed in a manner suitable for judicial determination. The point is valid, though discussion on the point is not assisted by quoting Mason CJ.'s dictum that "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."23 That is not the matter under discussion at this point.

The fifth "criterion" is simply a brief re-statement of things said earlier as to representative and responsible government.24 The passage includes the statement that a power of parliamentary veto "would appear to be inconsistent with the separation of powers". If that means that a Commonwealth law giving Parliament such a veto would be invalid, it is contrary to what Professor Winterton said three pages earlier.25

Finally Professor Winterton turns to consider Dr Howard's proposal. He comments that the proposal leaves the Commonwealth with no power beyond that to make laws as to diplomatic representation, a position he finds far too narrow, far narrower than State autonomy requires, and

including a withdrawal from the Commonwealth of power having no essential impact on States, as e.g. the power to enact such legislation as the War Crimes Amendment Act 1988, making criminal conduct engaged in countries overseas, by persons who later came to Australia.26 Accordingly Professor Winterton came out against Dr Howard's proposal.

Professor Michael Coper

A third paper was delivered by Professor Michael Coper.27 Professor Coper comments that in this area one does not have absolute rights and wrongs; he is content to find the High Court's present interpretation of the external affairs power at any rate a constitutionally appropriate one, and one he would not seek to alter. It is appropriate, firstly, because no one has formulated a judicially workable alternative narrower view. A test such as "inherently international in character" he regards as both subjective and elusive. The current interpretation is appropriate, secondly, because it is in line with approaches taken earlier. All that has happened is that there has been a marked growth in the list of matters which the international community sees as suitable for international agreement.

Professor Coper turns to political constraints. As to formal mechanisms, he sees a strong case for a greater role for the Commonwealth Parliament.28 He would prefer that greater role to be merely a matter of practice, but sees the case for there being a statutory requirement for tabling treaties in Parliament for a prescribed period as a pre-condition to ratification. This tabling is for information and to create an opportunity to contribute to discussion. He rejects parliamentary veto, pointing out that it means in practice a Senate veto, something no party would risk. Professor Coper also sees a case for a role for an Intergovernmental Treaties Council, involving the States.29 Indeed, it is for reasons of flexibility with regard to fitting together the participation of the Council with that of the Parliament that he would prefer the informative and consultative procedures to rest in practice rather than in more formal and almost automatically more rigid statutory requirement.

Professor Coper would prefer to avoid amendment, preferring to rely on political processes of the kinds just mentioned to reconcile the Commonwealth's legislative control in relation to external affairs, with federal values. If there is to be amendment, he finds Dr Howard's proposal too narrow, and would prefer that put forward in 1993 by Senator Peter Durack.30 This proposal adopts Professor Howard's preferred negative approach, but using different language. It would amend section 51 (xxix) to provide that the power does not authorise Parliament to make laws: "regulating persons, matters or things in the Commonwealth, except to the extent that:

(a) those persons, matters or things have a substantial relationship to other countries or to persons, matters or things outside the Commonwealth; or

(b) the laws relate to the movement of persons, matters or things into or out of the Commonwealth."

I must say that I would like to hear Dr Howard's views on Senator Durack's proposal, which does seem to me to avoid certain criticisms validly to be made against his own proposal.

The Early Warning

As so often, Sir Owen Dixon saw the problem years ahead. In R. v Burgess : ex parte Henry 31 the issue concerned the validity of air navigation regulations reflecting in large but not complete measure the provisions of a Convention drawn up in Paris at the 1919 Peace Conference, signed by representatives of the allied and associated powers, and ratified by King George V on behalf of the British Empire, with separate signatures on behalf of the Dominions and India. The Convention is mentioned in article 319 of the Treaty of Versailles.

The Convention recognised the complete and exclusive sovereignty of each country over the air space above its territory, so settling between the Convention Powers a long-standing and controversial issue. Some countries had asserted a "freedom of the air", akin to freedom of the seas. Others had asserted sovereignty, but subject to easements of peaceful passage. Other countries had other suggestions.32 Defeated Germany was of course not a Convention Power, but the Treaty of Versailles bound it also to the Convention. Numerous other provisions dealt with questions concerning the entry of aircraft of one power into the air space of another. It would have been hard indeed to dispute the international character of the problem or of the Convention dealing with it (though the case was decided against the regulations as regards the external affairs power, on the basis that the regulations did not implement the Convention properly).

Dixon J. always had firm views about Australian politicians. He saw the possibilities and sounded the warning. He began with something pretty obvious:

"It is not easy to interpret and apply the power to make laws with respect to external affairs."33

He saw the power as intended first to operate directly, independent of treaty :

"I think it is evident that its purpose was to authorize the Parliament to make laws governing the conduct of Australians in and perhaps out of the Commonwealth in reference to matters affecting the external relations of the Commonwealth. The Commonwealth might under this power legislate to ensure that its citizens did nothing inside the Commonwealth preparatory to or in aid of some action outside the Commonwealth which might be considered a violation of international comity, as, for instance, a failure on the part of private persons to behave as subjects of a neutral power during a war between foreign countries."

He then turned to the question of treaties, and there he sounded the warning and indicated the likely limitation:

"If a treaty were made which bound the Commonwealth in reference to some matter indisputably international in character, a law might be made to secure observance of its obligations if they were of a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a certain way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligations undertaken by the Executive, could not be considered as a matter of external affairs. The limits of the power can only be ascertained by a course of decision in which the application of general statements is illustrated by example. We are here concerned with a convention adopted under the full authority of the Crown and internationally binding in relation to this country. The matters with which it deals include the international recognition of sovereignty over the air and the relations of governments to the aircraft of other governments. It is, perhaps, wise to leave less formal arrangements with other countries and international agreements relating only to matters otherwise only of internal concern until questions arise under them. For, in my opinion, air navigation cannot be regarded as of this description."34

Of course Sir Owen Dixon was not always right, and of course every judge takes his own judicial oath and must follow his own mind, not Sir Owen Dixon's. But I cannot help observing that adopting a view which Sir Owen Dixon regarded as "extreme" is judicial valour indeed. "Very courageous", Sir Humphrey Appleby would have called it. Only since that "extreme" view has been adopted have good and respectable citizens, with plenty of things to do elsewhere, felt compelled to spend Saturday mornings discussing the external affairs power.

The commentators will tell you that none of the other judges in Burgess indicated any such limitation. Certainly none expressed the matter so clearly, but two comments must be made on those who would call the rest of that Court in aid for their modern view. The first is that no general statement should be held to cover an issue, unless that issue was present to the mind of the maker of the statement.35 The second is that certain of the other judgments do in fact contain statements able to distinguish between treaties which do and treaties which do not confer power to enact laws for their implementation.

Latham CJ. said that "It is very difficult to say that any matter is incapable of affecting international relations so as properly to become the subject matter of an international agreement."36 That simply is not saying that it will be enough if a matter not otherwise affecting international relations is dealt with by an agreement between two countries, each of which happens to be concerned about that matter. Equally, the further statement that modern conditions had "greatly increased the number of subjects to be dealt with, in some measure, by international action" says nothing as to problems which do not require to be dealt with by international action, as distinct from domestic action in more than one country. Starke J. cited Willoughby on The Constitutional Law of the United States (2nd edn., 1929) for the test "of sufficient international significance to make it a legitimate subject for international co-operation and agreement",37 and seemed to regard that as consistent with his own view. Certainly he saw a good deal to be decided in the future, saying "It is impossible, I think, to define more accurately, at the present time, the precise limits of the power."

Some Comments on the Debate

This paper is primarily a description of the state of play, not one for a more personal contribution. But it seems fair to indulge myself a little.

The Merely Potential Nature of the Threat to Federalism

I find it difficult to agree that response should be withheld until the Commonwealth has clearly marched toward using the external affairs power to swallow up most of the rest of the Constitution. In the first place, there is the authority of someone whose politics were very different from mine, for the proposition that the longest journey begins with a single step. When one sees how many steps have already been taken, one cannot but ask, how many steps did you want? It is worth recalling Churchill's comment on the response of the European countries to Hitler's incursions in the 1930s. "Each one hopes that if he feeds the crocodile enough, the crocodile will eat him last."

In fact, the perceived existence of unused power is dangerous. To adapt an aphorism, All power calls for its use, absolute power calls absolutely.

The knowledge that whatever one does in a certain area can be overreached by a different entity can discourage the intended handling of that area. As the Attorney-General said last night, Victoria has withdrawn from some areas it would otherwise occupy, and would prefer to occupy, simply because the Commonwealth has come in, and the duplication seems wasteful. If the Commonwealth can pass controlling legislation, bureaucrats and others will treat the Commonwealth view as controlling, even while the Commonwealth has not done so.

I have already commented on the connected argument, that unless something outrageous has already happened the Australian people would not vote for an amendment. It is worth noting that on that basis the appropriate time for amendment would never come. It is not likely that a Labor government would sponsor the necessary legislation for constitutional amendment on the issue, and no Liberal government would say that it wished to take matters any further.

But a little thought will show this point to be largely irrelevant. It is likely that at some point there will actually take place the Constitutional Convention which has already been accorded so much newsprint. The assumption underlying this promised Convention seems to be that there is a real likelihood of the Australian people adopting an "improved" Constitution emerging from the Convention. I imagine that the choice given to them will be acceptance or rejection of that Constitution as a single package. When the Convention does take place, those who pass up the chance to have this issue dealt with in the Convention, along with all the issues which others seem likely to bring forward, will have only themselves to blame for whatever happens in this area thereafter. In the period up to the Convention, those who are concerned with what is happening with the external affairs power should make sure that when the time does come, this issue will be well and truly on the agenda.

An Increased Role for the Commonwealth Parliament

Few I think would disagree that it is scandalous that even the Commonwealth Parliament should not be able to ascertain the terms of a treaty until after it has been ratified. A requirement to table impending treaties in Parliament is an obvious step forward. Certainly compulsory tabling will create some opportunity for comment. Given the usual time constraints, probably not very much. If there is no power of veto, the role of Parliament has not been expanded very much. But every step toward better government helps.

That increased role for the Commonwealth Parliament would not do much for the States, though it would create some opportunity for knowledge and intervention. Whether the Intergovernmental Treaties Council would prove any further use may be doubted. What concerns the States is the effect of entry into a treaty, on the balance of power between Commonwealth and States. The Intergovernmental Treaties Council and the opportunity for argument which its intervention would create seem unlikely to contribute to the solution of that problem.

Dr Howard's Amendment and Senator Durack's

Professor Howard's formulated amendment seems to me to be subject to two valid criticisms. Firstly, the formulation seems narrow indeed. It does not cater for treaties of a genuinely international character. On Dr Howard's formulation the air navigation regulations dealt with in R v Burgess, ex parte Henry7 would be dependent on State co-operation, and that seems to me unsatisfactory. Those regulations would be unworkable if they operated in some States and not in others. Further, it excludes the power Dixon J. mentioned first in the passage from Burgess cited above. Further, it excludes power to deal with matters of the war criminal/overseas paedophilia types, for no reason justified by protection of the States. Secondly, this is a Commonwealth power we are dealing with, and it seems to me unfitting and inappropriate for the Constitution to express it in terms suggesting that the Commonwealth is here little more than a supplier to States of laws they request. Senator Durack's formulation set out above seems to me better in these respects.

The Threat of Judicial Activism

We have seen the warning given, that use of a criterion on the lines of "international character", distinguishing which treaties do and which do not bring legislative power will involve an activist investigative judiciary of the kind of which this Society is supposed to disapprove. The difficulty may perhaps be overstated. True it no doubt is, that almost any matter might properly become international in character, and properly the subject of international agreement. That does not mean that it is beyond the wit of man to decide whether a particular matter has done so. During and for some years after the war the High Court was charged with deciding whether items of legislation were justified as laws with respect to defence. At no time, even at the height of

danger, did the Court leave that question to determination by government or Parliament. The Court handled the matters without acquiring a reputation for judicial investigative activism. It is not the topics the Court handles, but the way in which it handles them, that does or does not produce criticism on that score.

An associated matter arises, when we are told that no criterion has yet emerged to tell us which things are international in character. The method of the common law has been to deal with matters case by case, without ever seeking to achieve a total statement at the start. As the cases are decided, features emerge which are seen as indicia one way or the other. The location of a line may be unknown, but as decided cases begin to muster on one side and on the other side of the line, the location of the line slowly emerges. To assert the absence of "guidelines" to indicate international character, is in large part simply to say that the test has not been adopted. To reject the test on the basis that one does not at the start know the answers to all the questions which may arise in applying it, is to depart from the system of the common law.

Endnotes:

1. See the paper of Professor Saunders in the first Newsletter of the Constitutional Centenary Foundation.
2. (1982) 153 CLR 168.
3. (1983) 158 CLR 1.
4. (1988) 164 CLR 261.
5. (1988) 166 CLR 186.
6. (1989) 167 CLR 232.
7. R. v Burgess: ex parte Henry (1936) 55 CLR at p.669. The case is discussed in more detail below.
8. 153 CLR at p.224.
9. 153 CLR at pp.241-242.
10. 153 CLR at pp.259-260.
11. 153 CLR at p.200.
12. 153 CLR at p.251.
13. 153 CLR at pp.213-216.
14. Minister for Immigration v Teoh (1995) 69 ALJR 423.
15. See Howard (1991) Institute of Public Affairs Backgrounder, The External Affairs Power, and the paper presented to the Inaugural Conference of this Society, When External Means Internal, in Upholding the Australian Constitution, vol. 1, p.141.
16. Howard, Amending the External Affairs Power, in Upholding the Australian Constitution, vol. 5, at p.16.
17. Ibid. at p.10.
18. Ibid. at p.11.
19. Winterton, A Framework for Reforming the External Affairs Power, in Upholding the Australian Constitution, vol. 5, p.17.
20. Ibid. at pp.19-20.
21. Ibid. at p.21.
22. Ibid. at p.32.
23. Koowarta v Bjelke-Petersen (1982) 153 CLR 168 at p.229-230. 24. Upholding the Australian Constitution, vol. 5, p.34.
25. Ibid. at p.31.

26. See Polyukhovich v The Commonwealth (1991) 172 CLR 501. 27. The Proper Scope of the External Affairs Power, in Upholding the Australian Constitution, vol. 5, p.47.
28. Ibid. at pp.58-60.
29. Ibid. at pp.60-61.
30. See Durack, The External Affairs Power - What is to be Done ?, in Upholding the Australian Constitution, vol. 3, p.211, esp. at p.219.
31. (1936) 55 CLR 608.
32. See per Starke J., 55 CLR at p.656.
33. 55 CLR at p.668.
34. 55 CLR at p.669.
35. Few who forgot this when arguing before Kitto J. ever forgot it again. There was no quicker way to bring his Honour to a seething fury than to cite a judge's statement as authority on an issue not present to that judge's mind when he made that statement.
36. 55 CLR at p.640.
37. 55 CLR at p.658.

Chapter Three

Duplication and Overlap: An Exercise in Federal Power

Des Moore

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

Introduction

The issue of duplication and overlap between the Commonwealth and the States has become more and more controversial under the Keating Government as it has become increasingly clear that that Government seeks to involve itself more and more in the provision of the services administered by State Governments.

In fact, the terms "duplication and overlap" are something of a misnomer. What we are dealing with is Commonwealth intervention, the apparent objective of which is that the States would eventually move into the position primarily of administrative agencies, with the main lines of policy in all matters being nationally determined. The latest development in this regard was reflected in the report in The Australian of 26 September, 1995 that a condition of future Commonwealth funding of States' public hospitals would be the meeting of efficiency standards set in Canberra. Imagine!

However, while a Commonwealth take-over may be the eventual aim, a close examination of the Commonwealth's use of the section 96 grants mechanism to date suggests that, with one or two exceptions, the program of specific purpose payments (SPPs) has little, if any, practical effect on the levels of the various services provided by State Governments.

The proposition advanced in this paper is that, in the great majority of cases where Commonwealth intervention occurs, the State Governments remain the primary determinants of service levels, and the provision of funding by the Commonwealth is largely an exercise of political power designed to give the appearance of a concerned and involved national Government, but which has limited substance to it.

It is not going too far to say that the provision under section 96 of SPPs by the Commonwealth is, to a significant extent, a sham, whose main purpose is to allow Commonwealth Governments and Ministers to be able to pretend they are performing a more useful function than they are. The arrangements certainly cannot be justified as they are presently structured, and it is also difficult to see any basis for the claim by Commonwealth Treasurer Willis that "Tied grants offer a means of satisfying broader community demands for minimum national standards in program areas such as health and education and, where the Commonwealth has a role in determining strategic goals, of fostering the optional provision of public services by States from the available resources."

Let me be clear as to the basis on which I am suggesting that SPPs are largely a sham political exercise. I am not saying that, if the Commonwealth were to eliminate SPPs, that would have little or no effect on State expenditures in the areas that are targeted by the SPPs. With the present division of taxation powers it would obviously be politically impossible for the States to replace the lost revenue and they would have to make substantial expenditure reductions. However, the issue is what would be likely to happen if SPPs were converted to general purpose grants. If, as my analysis indicates, there would then be little or no change in States' expenditures

on the great majority of targeted activities, this suggests that SPPs are serving little if any substantive, as distinct from political, purpose.

If judgment is to be passed on the substance of the Commonwealth's program of SPPs, there is a need to consider the possible substantive objectives of having such a program and to assess the extent to which such objectives are being met. Before doing that, however, it may be useful to set out a few relevant facts about SPPs :

(i) In 1994-95 the Commonwealth Government paid State and Territory Governments no less than $17.6 billion under specific purpose programs that ranged from $3.7 billion to help meet the operating costs of public hospitals to $550,000 for the Bass Strait Passenger Service. The Commonwealth's Budget Paper No 3 for 1995-96 shows that there are 126 SPP programs, about 70 of which are for current expenditure and the remainder for expenditure on capital works of various shapes and sizes.

(ii) These 126 SPP programs now constitute over one half of Commonwealth grants to the States and Territories. By contrast, thirty years ago there were only just over 30 such programs and they made up only about 30 per cent of such grants. Seventy years ago there was only one such payment, that being the magnificent sum of $1.5 million paid under the Main Roads Development Act passed in 1923.

(iii) The big increase in SPPs occurred, of course, under the Whitlam Government, when the number of such payments jumped to over 100. Between 1972-73 and 1974-75 the Whitlam Government increased by nearly seven times the amount provided under SPP programs-from $632 million to $4,152 million. Since then the number of SPP programs has increased, but at a relatively gradual pace.

(iv) SPPs now finance about 22 per cent of total expenditure by the State and Territory Governments, a proportion which has not changed markedly since the Whitlam era but one which is significantly higher than before that era. Around 8-9 per cent of this expenditure, equivalent to some $6.5 billion in 1994-95, simply involves the on-passing to other institutions (mainly educational) of the Commonwealth grants.

(v) In terms of Commonwealth budget outlays, SPPs now account for about 14 per cent of the total. This is actually a little lower than it was in the Whitlam era, reflecting the fact that under the Hawke-Keating Governments Commonwealth "own purpose" outlays have increased significantly, mainly through the provision of additional social security and associated forms of assistance. In fact, since the late 1970s, Commonwealth own purpose outlays have increased by about 3.5 percentage points of GDP while SPPs are still about the same proportion of GDP as they were then (about 4 per cent).

(vi) These section 96 grants are heavily concentrated in four main areas where the Commonwealth's power to undertake spending directly is limited or non-existent:

_ Education, where SPPs are about 70 per cent of total Commonwealth outlays in that area ;

_ Health, where SPPs are about 30 per cent of Commonwealth health outlays;

_ Transport and Communication, where SPPs are 35 per cent of Commonwealth transport and communication outlays; and

_ Housing, where SPPs constitute almost all of Commonwealth outlays on this function.

On the surface, this analysis might raise a question as to what all the fuss is about, given that, in aggregate, specific purpose payments have not played an increased role in the budgets of Commonwealth or State Governments under the Hawke-Keating Governments. However, that does not mean that the Commonwealth has not become more "interventionist". Central power can be exercised in ways that do not necessarily involve the total take-over of financial

responsibility. There is potential for the Commonwealth to obtain enormous leverage through the provision of relatively small grants, or even no grants at all. The increased regulation of the use of State resources through the imposition or attempted imposition of environmental controls is one obvious example and, in regard to the harvesting of natural growth forests for wood chip exports, a very topical issue.

But there is also mounting evidence that the Commonwealth is applying detailed requirements to the expenditure of SPPs to an increasing extent and, particularly in the health area, is increasing the number of programs and sub-programs which are subject to such requirements. States are, in turn, exhibiting growing resentment of these detailed requirements, and of the increasing use of SPPs as a vehicle for the exercise of Federal political grand-standing.

On 4 November, 1995 for example, The Age reported that the heads of the Commonwealth and Victorian Departments of Health were at loggerheads over health trials for the chronically ill and that one of the heads had decided not to have any future dealings with the other. According to The Age, Dr John Paterson wrote in a letter to his Commonwealth counterpart, Dr Stephen Duckett, that: "It is difficult to escape the conclusion that your Minister resorts easily to what appear to be lies or half-truths, for the slightest political advantage".

The Age reported that Dr Paterson also accused Dr Duckett of "a subsequent campaign of obfuscation". Dr Duckett, however, denied this and claimed that Victoria was disrupting a process agreed to at an earlier Council of Australian Governments meeting. In the latest instalment, only last Wednesday, the Victorian Minister of Health was reported as accusing Federal Health Minister Lawrence of "immoral hijacking" of the COAG discussions on reorganising the 60 odd health programs into three streams of care.

While on the surface this sounds rather petty, even schoolgirlish, stuff, behind it lies a very real issue which relates to whether and when the Commonwealth should employ section 96 grants and, more broadly, to the respective roles which the Commonwealth and the States should be playing in the Federation. That is, of course, a massive subject on its own and it is not possible in this paper to do much more than touch the surface.

Commonwealth Intervention in Theory

The constitutional need for the Commonwealth to resort to grants under section 96 of the Constitution derives from the fact that the Commonwealth's direct legislative powers are largely limited to the areas specified in the 39 placitums of section 51. If the Commonwealth is to become involved in areas such as education, public hospitals, public housing, roads and railways it therefore has to do so mainly through the States via section 96 grants. (There is, however, a grey area where the Commonwealth appears to be able to legislate to spend money on these activities in its capacity as a national political entity where a national consensus can be said to exist. The funding of technical and further education through the Australian National Training Authority created under an agreement with the States appears to be based on such power.)

Of course, the Commonwealth does not even have to become involved in the matters listed under section 51. Given that the section 51 powers are concurrent with the States, the Commonwealth could leave it to State Governments to cover at least some of the matters designated under that section. In fact, the States do also operate in some of the areas designated under section 51, although to the extent that there is overlap, by virtue of section 109 the Commonwealth necessarily prevails where there is inconsistency. The focus of the present paper, however, is on those areas where the Commonwealth is intervening through section 96 grants.

One element in the economic case for Commonwealth intervention via section 96 grants derives from the argument that individual States will 'underspend" if left to their own devices, because

some of the benefits of a State's expenditure will "spill over" to residents of another State or to the nation as a whole. Potential examples include expenditure by a State on education, on the building of roads or railways that run into next door States, or on the eradication of some disease or pest that may have minor adverse implications in one State but significantly adverse potential effects in others. A State may also under-spend on pollution prevention where a substantial proportion of its pollution "spills over" into neighbouring States.

The case for Commonwealth intervention is also based on the potential for national uniformity to reduce the transactions costs of doing business in the various States or to create what are judged to be more socially equitable outcomes. The Constitution recognised the possible case for uniformity in regulation of business transactions by giving the Commonwealth power with respect to such matters as currency, weights and measures, banking, trading and financial corporations, taxation and so on. In the area of social policy, additions to section 51 made under the social services powers referendum of 1946 also recognised a possible case for national uniformity in a range of social security type measures (including sickness and hospital benefits and medical and dental services), and the Commonwealth already had powers with respect to old age and invalid pensions and to matters such as marriage and divorce.

One problem with the "spill over" and national uniformity justifications for Commonwealth intervention is that in many cases there is no obvious point as to where the line should be drawn between leaving it to States and having the Commonwealth impose national uniformity. Common weights and measures and currency are obvious but there is frequently an absence of agreement even among so-called experts as to what are the right policies for delivering services or regulating business. Indeed, as we are seeing from the current debate about awards provisions under the present industrial relations system, what constitute "community standards" is by no means agreed. And although there has, for example, been a long running debate about gun laws, attempts to agree even on a uniform gun "code" have so far failed. Should that be a matter for the Commonwealth to intervene via a section 96 grant?

It is relevant that, even where there is wide agreement that there should be national uniformity-such as in the regulation of banking and companies and securities trading-it is by no means clear that the Commonwealth can claim that its policies and administration have produced efficient and effective results. Commonwealth failures in these and other areas of centralised control provide additional substance to the thesis that, where there is no obvious need for nationally uniform policy, there is much to be said for applying the subsidiarity principle, that is, limiting the central government's involvement to those functions which cannot adequately be performed by the States.

Those who argue for national uniformity also frequently fail to recognise the potential benefits from having competition between State Governments even where this may result in different rules applying to the conduct of business in the various States. Indeed, a strong case can be made that competitive federalism is likely not only to provide greater protection of individual liberty, but also the most efficient and effective economic result. Noted American economist and thinker Professor Aaron Wildavsky rightly posed the question a few years ago : "If we think so well of competition that we enthrone it in democracy, science and economics, why should we not tackle the problem of federal structure in the same way?"

The on-going dispute over workers compensation insurance is a good illustration of the competition/uniformity debate. Large businesses which conduct business in more than one State often complain about the different rules applying to workers compensation insurance and argue for national uniformity. Yet there is also considerable potential for a national compensation

scheme to be "captured" by interest groups and to impose unnecessarily high costs on businesses. Australia only just escaped copying in 1975 New Zealand's disastrous experience with its national scheme, and it is somewhat surprising that the Industry Commission should have recommended in 1994 that a National Work Cover Authority be established to 'minimise cost-shifting between jurisdictions, establish greater regulatory uniformity and provide competition with State-based schemes." A Commonwealth scheme would surely provide an excess of competition, particularly at a time when the advantages of inter-State competition in this area are very apparent, with the Victorian reforms producing considerable cost savings while NSW and Queensland are clearly going through the "capture" stage, resulting in higher costs for business operations in those States.

A similar point can be made in regard to social policies. It may be argued, for example, that it is socially equitable that every school child in Australia receive the same standard of education. But who is to determine that standard? In the case of government school education the Victorian school system is only just starting to recover from the Gramscian policies pursued under the CainÄKirner Governments. Imagine the disaster if such policies had been applied uniformly from Canberra right across Australia! Fortunately, NSW led the way in educational reform under the Greiner Government, even if that reform process did fade rather quickly.

The case for Commonwealth intervention to try to obtain "spillover" benefits is also a pretty thin one, and seems to have only fairly limited application if the various options are closely analysed. Commonwealth involvement in the construction of major interstate highways and railways may produce benefits additional to those that would flow if those matters were left entirely to the States, particularly with respect to the less populous States. But it is difficult to believe that individual States are likely to underspend on education because some of the benefits might flow to other States.

If we focus on the four main areas where there are programs of specific purpose payments-education, public hospitals, roads and railways, and public housing-there appears to be only a very limited theoretical justification for Commonwealth intervention on national uniformity or "spill over" grounds. That is not to say that the States may not need, on occasion, to be pushed or at least "persuaded" into reforms. For example, when grants to the States for universities were first introduced in 1951-52, there was probably a justifiable case that the States did not recognise the potential benefits from additional "investment" in tertiary education. But it would be difficult to mount such an argument now. Similarly, the Commonwealth deserves a good deal of credit for pushing the States to expose their public authorities to competitive pressures under the Hilmer reforms.

Some also favour having a national uniformity policy in regard to the level of services provided by State Governments in school education, public hospitals, public housing, and such like. However, there is a long history of quite wide differences between States in service levels in these areas without any serious apparent harm being caused. In fact, the very basis on which the Commonwealth itself distributes general purpose grants among the States recognises the right of each State to determine its own level of budget expenditures in such areas without being penalised for spending below the national average, let alone below the top spending State. Thus, the assessments by the Commonwealth Grants Commission on which general revenue grants are paid to each State effectively include amounts that allow each State to spend up to a certain standard but do not require the actual level of spending to be at that standard. Queensland, for example, has long been a low spending State, preferring to use part of its share of the general

revenue grants to operate a low tax regime. There is no penalty for that and nor does Queensland obtain any unfair advantage from it, contrary to claims by NSW and Victoria.

Commonwealth Intervention in Practice

Intervention via General Purpose Grants

Few people realise that the use of section 96 to provide general purpose grants which 'equalise" the fiscal positions of the States is a form of "intervention" by the Commonwealth, or that such intervention is entirely consistent with the principle of subsidiarity. By contrast, to the extent that Commonwealth SPP programs for current expenditures in areas such as health and education purport to be setting or encouraging certain spending standards in each State, they are largely an unjustified form of intervention, and are certainly inconsistent with the "philosophy' of the fiscal equalisation system.

Accordingly, it is appropriate that, as a matter of practice, the Grants Commission effectively over-rides the distribution of a large amount of current specific purpose grants where that is inconsistent with its assessment of the distribution of general revenue grants needed to achieve fiscal equalisation. In 1993-94, for example, the Grants Commission effectively treated some $6.5 billion of the $14.5 billion of SPPs it classified as being for current purposes as if they were general purpose payments. Thus, save in one possible respect, the programs under which these Commonwealth SPPs were provided may as well not have existed, and the grants may as well have been added to the general revenue grants pool.

It is worth noting some of the SPP programs which fall within this category. They include grants for:

- Government Schools;
- Technical and Further Education;
- Hospital Funding;
- Blood Transfusion Services;
- Pathology Laboratories;
- Breast Cancer;
- Home and Community Care;
- Disabilities Services;
- Bovine Brucellosis and Tuberculosis; and
- National Landscape Program.

As noted, there is one possible qualification to the generalisation that the SPPs which the Grants Commission effectively treats as general purpose payments may as well not exist. That qualification may be appropriate where the Commonwealth imposes conditions which restrict or inhibit the States in the management of the activity that is targeted by an SPP, or which put additional pressures on States' budgets.

Clearly, for example, the Commonwealth policy that makes grants for hospital services conditional on providing free treatment for eligible persons in public hospitals affects the demand for hospital services and hence impinges on States' capacity to manage their budgets. It also creates waiting lists for treatment for which State Governments are held politically responsible even though they basically result from Commonwealth policies. Even so, States spend on hospital services more than double the amount of SPPs they receive from the Commonwealth, and the quite wide differences between the States in per capita levels of spending on those services confirm that it is the States that determine at the margin the level of hospital services provided by them.

In fact, the Commonwealth could continue to require the States to provide free treatment in public hospitals for eligible persons without having hospital funding grants and without having a Commonwealth Human Services and Health Department, or at least not one employing as many as 6,800 public servants. It could simply make that requirement a condition of the general revenue grants. That would not destroy the general purpose nature of those grants and could readily be audited by the Department of Finance.

Other SPPs that are effectively treated by the Grants Commission as general purpose grants also have conditions attached to them. However, none of these conditions appears to prevent the States from effectively determining the overall level of service provided in the areas targeted by the SPPs. It is also evident that States have the capacity to effectively substitute at least some of the Commonwealth SPP money for their own funds, thereby freeing the latter for other purposes and raising a question as to the purpose of the SPP.

Grants for Government Schools

The sham that exists in the case of most Commonwealth SPPs has recently been highlighted in the case of SPPs for government schools, which total an estimated $1,165 million in the current year. According to the latest report by the Schools Council :

"The task of ensuring that Commonwealth funds actually add value to State schools rather than merely substitute for State funding constitutes a considerable difficulty for the Commonwealth. No mechanism exists to enable the Commonwealth to monitor the expenditure of resources on schools. The Commonwealth Government has never had any substantive evidence as to whether the resources it has put into schools over the past 20 years have been effective in raising education standards" (emphasis added).

Such comments are scarcely surprising given that the Commonwealth SPP finances only about 12 percent of total State Government spending on government schools. One has to wonder whether anyone in the whole apparatus of the Commonwealth Government and Parliament is at all concerned that over $1 billion of Commonwealth taxpayers funds is being provided for a particular purpose but that it may largely be substituting for State funding!

Funding of Technical and Further Education

A similar situation appears to exist with respect to Commonwealth funding of Technical and Further Education. Although this funding is now being channelled through a joint Commonwealth-State body, the Australian National Training Authority, and is no longer treated as an SPP, it remains in substance a grant to the States and is being treated as such by the Commonwealth Grants Commission. In 1993-94 the Commonwealth provided 29 per cent of the total current expenditure of $2.3 billion by the States on Technical and Further Education (as identified by the Grants Commission), and the Commonwealth has since significantly increased its allocation for this purpose. Reflecting the Commonwealth's policy of big-noting itself in the field of vocational training, the 1995-96 Budget thus provides $830.5 million, an increase of one third on the 1993-94 expenditure of $622.3 million.

However, following the recent revelation that the number of students enrolled at TAFE Colleges actually fell in 1994, a question has naturally been raised as to whether the States have been substituting part of Commonwealth funds for their own funding. According to The Australian of 11 November, 1995 the Commonwealth has been "persuaded that productivity improvements compensated for reductions in TAFE spending in South Australia and Victoria", and has accepted "an assurance of renewed efforts from States whose TAFE teaching contact hours fell last year". Even so, Commonwealth Minister Simon Crean is reported as saying that he was "sick to death of State governments moralising about the importance of training but when it comes to

putting the money up, not even maintaining their efforts". He said it was "only, effectively, the Labor States that take the rhetoric seriously".

Clearly, the Commonwealth is firmly engaged in political grandstanding in this area. But, if Mr Crean is correct in saying that some States are not even maintaining their efforts, he should be asked what he intends to do about such a contravention of the agreement with the States, which "requires that States will at least maintain their effort on vocational education and training on an on-going basis".

Grants for Non-Government Schools

The Commonwealth also provides grants to the States for on-passing to non-government schools. These grants are described as being:

"To equip the nation's young people, particularly through the acquisition of key competencies, to pursue post-school qualifications, to compete in and contribute to the labour market, and to contribute to Australian society while developing their full potential, by providing them with the necessary education foundation in cooperation with government and non-government education authorities and institutions."

In 1992-93 the Commonwealth grants for this vague purpose amounted to $1,371 million and no matching conditions were applied to the grants. In the same year, State Governments also provided grants to non-government schools, amounting in their case to about $922 million, making the total of such grants from governments $2,293 million. No data are available for total expenditure on education by non-government schools, but there is no doubt that these Commonwealth and State grants finance a substantial proportion, possibly over half, of such expenditure.

The fact that the Commonwealth provides about 60 per cent of total government payments to non-government schools, and that there are a number of sub-programs and conditions attached to the subsidies, indicates that the Commonwealth is the dominant player in regard to this particular activity. Some may argue that it is desirable that the Commonwealth be involved in subsidising private schooling, on which there is now (after many earlier years of heated political debate) bipartisan agreement. However, there is no need for national uniformity and, if the Commonwealth grants were converted to general purpose payments, there is no reason to suppose that States would cease to assist non-government schools. Moreover, with the likelihood that the operation of government schools will become more privatised or "contracted out", it is now even more appropriate for individual State Governments to decide on where to strike the balance between financial assistance to pupils attending government and those in non-government schools.

Higher Education Grants

Another case involving the straight on-passing of Commonwealth grants by State Governments relates to Commonwealth assistance for higher education, now running at around $3.5 billion a year. Here it is clear that the States play no role in determining expenditure levels as the Commonwealth provides virtually all the funding. Yet, as already noted, the substantive case for Commonwealth intervention in this area is a comparatively weak one. The greatest need in this area would seem to be to get any sort of government out of funding higher education institutions and focus instead on assisting individuals.

Grants to Local Government

Commonwealth assistance to local government is another example of the political sham involved in SPPs.

In 1993-94 the Commonwealth made two SPPs to State Governments for on-passing to local governments, one for "general funding" ($751.2m) and one described as being for "identified road funding" ($333.3m) but in reality also for general funding. Indeed, the purpose of both SPPs is simply described as being "to provide (untied) or general purpose assistance to Local Government Authorities."

These Commonwealth grants of $1,084.5million represented about 13 per cent of total revenues of local governments in 1993-94 and just over half of total grants received by them. While State Governments continue to provide grant assistance to their local governments, this has become a less important source of local government revenue as the Commonwealth grants have increased; that is, the Commonwealth grants have gradually substituted for State grants.

It is difficult to see any possible national "spillover" benefit from such grants by the Commonwealth. The grants are a relatively small proportion of total local government revenue and, even if their replacement by general revenue grants were to lead to some reduction in total grants received by local governments, the worst outcome would likely be a fairly marginal increase in local government rates and charges.

The only substantive argument for such grants is that they involve a requirement that State Governments undertake an equalisation exercise designed to help local authorities with low taxable capacities and higher overhead costs to maintain higher service levels than would otherwise be the case. This is, however, a matter that could readily be left to each State and is scarcely a national priority. Indeed, one effect of the equalisation arrangements may have been to entrench in the various States the existing structure of local government, which in most cases has significant inefficiencies.

This Commonwealth grant can be regarded as a classic example of the exercise of political power. Its main purposes are to allow Commonwealth politicians to be able to refer in their electorates to the fact that the Commonwealth Government provides "assistance"; and to help justify the existence of the Commonwealth Minister for Housing and Regional Development, and his Department. No less than five SES officers are responsible for the Local Government and Urban Development Division of that Department, and their duties are described in delightfully vague terms as being to administer "policies and programs to improve the social and economic wellbeing of local communities by assisting local government to achieve national objectives, and to improve the economic efficiency, social equity and environmental sustainability of cities and regions." It is difficult to envisage what "national objectives" local government might have.

Auditing of Specific Purpose Payments

The foregoing leads to a question as to the audit processes in regard to SPPs.

The Commonwealth Auditor-General has, in fact, produced an Audit Report on Specific Purpose Payments to and through the States and Territories which found that :

"For many programs accountability to the Commonwealth is poor. Some programs do not require statements or certifications of expenditure; of those programs that require statements or certifications of expenditure almost a third do not specify a time limit for their provision; and for those where a time limit is specified approximately 50% were late. Although the data collected suggests some improvement since a previous survey conducted by the ANAO in 1988-89, further room for improvement remains. Deficiencies have been identified in reporting to Parliament on SPPs and many problems exist in the collection of data on SPP programs.

"The survey identified a number of SPPs where the authoritative basis of the SPP consisted only of letters and/or Cabinet decisions, and one case where the authoritative basis was unknown. The ANAO considers that there is a need for formal agreements that include program goals,

performance indicators, targets and sanctions to facilitate the effective management of SPP programs. That is, the agreement should be comprehensive enough to allow it to be used as a management tool.....

"The overall results of the survey suggest that pockets of good performance exist across SPP programs. However, some agreements are not comprehensive enough to be useful as a management tool, there are failings in relation to accountability mechanisms and financial arrangements need closer scrutiny".

The report was forwarded to the Departments of Treasury, Finance and Prime Minister and Cabinet, each of which effectively disclaimed responsibility. The comments of the Prime Minister's own Department, which is supposed to have the supervisory role in Commonwealth-State relations, are particularly noteworthy (sic), viz :

"The Department of the Prime Minister and Cabinet does not administer any specific purpose payment programs. Accordingly, we are not well placed to discuss the practicalities of managing SPPs or to respond to those aspects of the report which are drawn from, or would impact on, particular cases. With that qualification, we would support the thrust both of the conclusions drawn from the survey, at page six, and of the recommendations of the report".

This Report is now presumably busily gathering dust in Canberra pigeonholes! The reality is however, that, while the Audit Office doubtless satisfies itself that the States spend the Commonwealth funds for the purposes specified, the Commonwealth taxpayer does not know whether his/her money is really adding value in the areas that are targeted. As there are no, or minimal, conditions on how much the States spend, funds provided by Commonwealth taxpayers may simply be being substituted for funds provided by State taxpayers.

Analysis of State Expenditures

As pointed out in the 1993-94 Industry Commission report on Federalism, the funds attached to most SPPs are potentially fungible, that is, they may simply displace State funds which are used for other purposes. In fact, even where the Commonwealth attaches matching requirements to an SPP they are not always on a dollar-for-dollar basis, and sometimes do no more than require that States maintain their own expenditure in nominal or real terms. In most cases States would normally exceed such a requirement in the course of time.

In any event, as the Industry Commission report noted, SPPs with matching conditions probably represented less than 4 per cent of total State outlays in 1992-93. It concluded that, "Even if all these SPPs involved dollar-for-dollar matching, the impact on State outlays appears not to be great".

Analyses which I have undertaken of State outlays by categories of expenditure suggest that, in the great majority of cases, Commonwealth SPPs finance a relatively small proportion of the expenditure area to which they are targeted. These analyses have taken three main forms:

(i) At the broadest level of aggregation of expenditures (ie "education", "health", etc), SPPs directed to each broad category of spending generally finance less than 50 per cent of total State expenditure in that category;

(ii) At the relatively disaggregated level of States' current budgetary spending undertaken by the Commonwealth Grants Commission (CGC), the proportions of such spending financed from SPPs targeted to the various CGC expenditure categories are relatively low in the great majority of categories; and

(iii) Disaggregated figures for State outlays obtained from the ABS show that, in those areas which are targeted by SPPs, only about one-third of total State/Local outlays in those areas were financed by SPPs. Moreover, apart from one or two expenditure categories, the proportion of

State outlays financed by SPPs is generally so small that it seems very unlikely that the SPP agreements could have any significant influence on total outlays in the targeted areas.

These analyses do not rule out that, at the level of one or two individual SPP programs, total expenditure on the activity is determined by the SPP agreement. However, it seems likely that such instances are few. It is important to recognise that there is no necessary contradiction between State public servants and politicians being concerned about various aspects of SPPs, on the one hand, and the SPPs not in general being the determinant of levels of spending, on the other hand. My thesis does not deny that the SPPs are imposing administrative and other costs, and, as already pointed out in the case of the hospital grants, in some instances they impinge on States' capacity to manage their budgets.

Conclusion

It is of some interest that comparisons of expenditures by three levels of government in Australia and Canada indicate that there is a not dissimilar extent of "intervention" by the Canadian federal Government in areas such as education, health, transport and housing. The Canadian federal intervention, however, is largely by way of direct expenditure rather than by grants to the Provinces, presumably because direct legislative powers exist in the Canadian case. (Only about 12 per cent of the outlays of Canadian Provinces is financed from federal grants compared with about 40 per cent for the Australian States).

This similarity between Australian and Canadian experience suggests that the much greater extent of vertical fiscal imbalance in Australia is not the primary reason for Commonwealth intervention via SPPs. One possible interpretation is that it establishes that there are either spill over benefits, or justifiable needs for national uniformity, and hence a need for central government involvement. Another is that there is simply a common force which leads the central government in a Federation to try to expand its power.

This latter interpretation, which I favour as the main influence, is justifiable by reference to the fact that federal intervention or involvement preserves or extends the political power of federal Ministers and their bureaucracies: indeed, without such intervention some federal Ministers and their bureaucracies would either not exist or would have much smaller portfolios. Moreover, even though federal intervention seeks to change State priorities and creates political tensions between federal and State Ministers and their Governments, relevant State Ministers and their bureaucracies tend not to oppose federal intervention because there is a similar "enhanced activity" spin-off for them.

This interpretation has not been much examined or debated in Australia, although it is entirely consistent with public choice theory. It is consistent with that theory for federal politicians, abetted by federal bureaucracies with a clear self-interest, to be wooing particular interest groups by promising to provide benefits to those client groups. "Justifications" for the offer of such benefits are readily provided by the numerous "experts" in the various fields who, unsurprisingly in view of their areas of expertise, point to the "need" for increased standards, and to "deficiencies" in States' services. Such justifications are often, moreover, superficially plausible-there is, of course, unlimited potential to increase standards if one assumes that the taxpayer has unlimited resources. Further, as public choice theorists have rightly pointed out, given that the cost per taxpayer of promised benefits is relatively small, it is difficult to mount effective opposition to what appear to be desirable objectives.

In the case of SPPs it is even more difficult to do so given that State Governments-or, more specifically, the relevant State Ministers and their particular bureaucracies-are naturally reluctant to reject offers of funding to provide apparent benefits, even though the administrative

arrangements involved may be onerous and quite costly and even though State Treasuries may capture some of the loot. In fact, even State Treasuries will be reluctant to advise against such offers if they know that, at least to some extent, the SPPs will simply replace State funds which can then be freed for other purposes, including deficit reduction.

The extent to which this explanation is plausible in the case of SPPs depends importantly on the effect which SPPs have on overall levels of State outlays in the areas of activity which are the target of such SPPs. If, as suggested, it is most unlikely that SPPs are determining at the margin the level of outlays in the great majority of those areas, and that the conversion of SPPs to general purpose payments would thus have little or no effect on total outlays in the targeted areas, this suggests that their use by the Commonwealth is primarily an exercise in extending or preserving political power. The conversion of SPPs to general purpose payments would significantly reduce not only the Commonwealth bureaucracy but also the number of Commonwealth Ministers needed. There would be similar, but smaller, effects on State bureaucracies and Ministers.

For the program of SPPs to be justified, the Commonwealth would need not only to establish that there are substantive objectives such as spill over benefits or national uniformity, but that it is in the best position to determine what should be done. As the Industry Commission's 1993-94 Annual Report put it:

"If.....some SPPs forcibly alter State expenditures, in principle such programs should continue only where the Commonwealth knows better than the States how much of a given service is demanded (interjurisdictional spill-overs) and can provide greater community benefit through SPPs than would arise under general revenue funding. And national policy objectives (universal health cover, standard national railway gauge), where funds need to be tied to a particular purpose, would need to be assessed using similar criteria. If, on the other hand, SPPs were found to be fungible, this would raise the question of why have them, especially if real costs are attached to SPPs arising from complex administrative requirements".

My submission is that SPPs are largely fungible and that we should not have them.

Chapter Four

The High Court and the States

Greg Craven

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

Introduction

It might be thought by some that the topic of The High Court and the States sits somewhat oddly in a Conference session devoted to Federalism and State Finances: a little like coming to a seminar on great cathedrals of Europe, and in between Chartres and Rheims, receiving a dissertation on the black-bellied albatross. I have to confess that this lack of thematic symmetry is entirely my fault. When first asked to speak at this Conference, the subject allotted to me was the classically financial one of section 90 of the Constitution, the notorious excise provision. In the great tradition of lawyers, however, I chose to be difficult, and proposed that I should speak on the wider subject of the relationship between the High Court and the States, using section 90 as a particularly grisly case study. This was agreed to by the organizers, and so the Conference's discussion of section 90 finds itself embedded in a wider consideration of the High Court's treatment of the States.

In fact, I consider this to be entirely appropriate, and for at least three reasons. First, as a vital restraint on State legislative and financial power, the Court's interpretation of section 90 naturally falls to be considered within the broader context of its performance in relation to the States. Second, as will be seen, the High Court's interpretation of section 90 has in fact been typical of its approach to the interpretation of constitutional provisions affecting State interests, and a discussion of the interpretative history of section 90 thus sheds valuable light on the continuing experience of the States before the High Court. Finally, now is the time--as never before--when the record of the High Court in relation to the States, and thereby in relation to federalism itself, should be subjected to the most rigorous scrutiny. In the constitutional disorder that is inevitably being produced by the Court's recent enthusiastic abandonment of its old methodologies of interpretation, it is vital that those who value federalism maintain a strict vigilance over the Court's discharge of its functions.

Thus, the basic approach of this paper will be to engage in a general discussion of the High Court's relationship with the States, and to follow this with a specific examination of the Court's interpretation of section 90. I note that it is often suggested that the Court has come to a cross-roads in its interpretation of section 90, and I will try to perform that least-favoured trick of constitutional lawyers--crystal ball gazing--with a view to predicting future directions which the judicial explication of section 90 might take.

In considering the general relationship between the Court and the States, I will first isolate the position that the Founders intended should be held by the States under the Constitution. I will then consider the role envisaged for the Court in relation to the States, and the role that has in fact been played by the Court in the years since Federation, particularly in relation to the crucial area of State finances. I will also attempt to isolate some general themes emerging from the Court's interpretation of the Constitution as it touches upon the States. As regards section 90, I shall examine the history of its interpretation by the Court; the point which that interpretation has

reached at the present time; and future directions which might be pursued by the Court in relation to that provision.

The Founders and the States

The starting point for any discussion of the relationship between the High Court and the States must be an identification of the position which the Founders intended that the States should hold within the Australian Federation. Only after this has been done can any intelligent assessment be made as to the performance of the High Court in relation to the States.

There is a school of constitutional history in Australia which is fond of down-playing the significance of the preservation of the States as a key objective of the Founders of the Australian Federation. These adherents to what might be referred to as the Manning Clark-Don Watson theory of constitutional history determinedly identify the single significant object of Federation as having been the creation of one great Antipodean nation, within which the old encumbering colonial boundaries would be swept away. They are adept at isolating the more soaring nationalist rhetoric of the Founders, ripping that rhetoric ruthlessly out of context, and parading it as proof of Australia's envisaged unitary destiny.

While, contrary to Henry Ford's much quoted observation, not all history is bunk, this history certainly is bunk. Any reading of the contemporary Federation material will quickly reveal that, yes, the Founders did indeed intend to bring into being a great new nation, but that they intended to do so on strictly limited terms. In particular, the creation of the new Commonwealth was to be subject to the absolute condition that the colonies (thereafter States) should survive, within the limits of the Constitution, territorially, politically and constitutionally intact.

Still more inconveniently from the point of view of Federation revisionists, there is no doubt that the Founders had the clearest and firmest views as to the nature of the on-going balance of power that should prevail under the Constitution of the newly created Federation. They were--with insignificant exceptions--united behind the proposition that the States should be the dominant entities within the Commonwealth. Thus, to say merely that the Founders intended Australia to be a federal nation is to speak only half the truth. What they in fact intended was not merely that Australia be a federal nation, but that it be a very specific type of federal nation: namely, one in which the powers of the regions heavily outweighed those of the centre. The truth is that, in today's intellectually impoverished parlance of "centralists" and "States-righters", the most centrally inclined Founder of the 1890s would most probably be regarded today as a rabid proponent of States' rights.

The fundamental point to be made, therefore, concerning the Founders' much-vaunted desire to create a nation must be that they saw the achievement of this purpose as being strictly dependent upon their capacity to produce an enduring constitutional settlement which would preserve the independence, within their sphere, of the States. To put the matter at its simplest, it is abundantly clear that had the Founders been given their choice between the achievement of national unity at the cost of dispensing with the independence of the States, and no unity at all, a large majority would have chosen the latter.

After decades of High Court jurisprudence in which the powers of the Commonwealth have been amplified relentlessly, it is easy to forget just how strong was this preference of the Founders for the loosely federal construct which they believed they had embodied in the Constitution. It is perhaps, therefore, useful to ponder two aspects of the federating process during the 1890s. The first very minor, but telling point, is that when at the Great Conventions one of the delegates referred to the Dominion of Canada, the example was usually derided as referring to a federation

so centralised that it was scarcely worthy of the name. Today, of course, and with much constitutional irony, Canada is a vastly less centralised polity than Australia.

The second, far more important point, is that an unjaundiced reading of the language in which the Founders chose to express the powers of the Commonwealth, excluding assumptions generated by the course of subsequent judicial interpretation, quickly dispels any impression that the Founders were attempting to create some omni-competent, unrestricted national authority. The corporations power is as good an example as any. Today, even the short-hand way in which we commonly refer to it--the "corporations" power--tends to suggest that it is a sweeping power over corporate entities. In fact, its text reveals that it is a power which is heavily hedged about by internal restrictions, extending only to "foreign" corporations, and "trading" and "financial" corporations, and in the case of the latter two, only if they are "formed within the limits of the Commonwealth". These words, in common with the words of many of the other key Commonwealth powers contained in section 51 of the Constitution, are hardly those of unstinting trust and unreserved endowment. Rather, even after their on-going subversion by the High Court, they remain textually redolent of the fundamental intention of the Founders, that the Australian Federation was to be a loose one, in which the balance of power would lie decidedly with the States.

The States: The Role of the High Court

There recently has been some academic controversy over the role which the Founders intended the High Court to play vis-a-vis the States, and indeed, in relation to the constitutional role of the High Court generally. In particular, two very different views have been put forward.

The first view might be described as the "classical" or "traditionalist" position. According to this view, as it applies specifically in relation to the States, the High Court was intended to operate as the protector of the States. The argument runs that, just as the Founders intended to safeguard the States from the Commonwealth by ensuring that the Commonwealth was a government of limited powers, so they intended that the Commonwealth should be confined effectively within those powers by the operations of a federal supreme court wielding the power of judicial review. It was for this reason that the High Court was to be regarded as the keystone of the federal arch.

The alternative view of the projected role of the High Court is most often put forward by apologists for the role it has played in securing the massively enhanced power of the Commonwealth at the expense of the States. This view forms part of a school of thought which is probably best described as "political federalism, and which is heavily influenced by constitutional developments in the United States". As relevant for present purposes, the argument essentially runs that the High Court was never intended to protect the States, nor to patrol the borders of the federal division of powers. Rather, this was a political function to be discharged by the States' House of the federal Parliament, the Senate. While the political federalists cheerfully admit that the Senate has never done and is never likely to do any such thing, they with equal equanimity deny a role to the High Court. Thus, the basic argument of the political federalist is that if the States for whatever reason cannot secure their due as part of the political process, then they have no business flying to the Court. It is a position which would have appealed about equally to Sir John Latham and at least one first century procurator of Judea.

The only problem with the political federalism theory as a description of the intended role of the High Court under the Australian Constitution is that it is controverted by every known historical fact. The Convention Debates and the writings of the Founders make it clear time and time again that the delegates intended the High Court to operate in precisely the way posited above as the "traditional" understanding of the Court's function, namely, as a constitutional court which would

enforce the Constitution and strike down any attempt by the Commonwealth to legislate beyond its capacities. The fact that the Senate was a further, vital protection for the interests of the States indicates not that the Court was precluded from playing such a role, but just how critical to the Founders was the comprehensive protection of States' rights.

In fact, it is important to understand the exact place occupied by the High Court in the Founders' constitutional scheme for the protection of the States. Given the course of Australia's constitutional history since Federation, there are many who are inclined to deride the Founders as constitutional planners, and to argue that the decline of the States was an inevitable and predictable consequence of the grossly deficient constitutional arrangements which they set in place. The reality, however, is that the Founders erected within the Constitution a carefully thought out scheme for the protection of the States, which included but was not limited to the functioning of the High Court.

This scheme had three features. The first mechanism for the protection of the States was to be the conferral upon the Commonwealth of strictly limited powers. The brutally simple idea here was that even if the central government wanted to invade the spheres of the States, it would lack the legislative artillery necessary to support such a purpose. The second States-protective mechanism was indeed the Senate. If the popularly elected House of Representatives dominated by the larger States sought to have the Commonwealth strain against the limits of its legislative power, the States' House would intervene in the federalist interest. Finally, in the event that both these protective devices failed to prevent the Commonwealth from seeking to implement its designs upon the States, the High Court was to descend like a constitutional deus ex machina, and send it whimpering back within the proper bounds of its authority.

For present purposes, there are two things worth noting of this scheme. The first is that it by no means represents the laughably inept attempt to safeguard the States sometimes portrayed by contemporary constitutionalists. As the authors of a carefully articulated three-pronged constitutional strategy, the Founding Fathers deserved better of the constitutional fates. Secondly, and crucially, the pivotal role of the High Court in the Founders' scheme for the protection of the States is immediately apparent. The Court sits at the very apex of the federal structure embodied in the Constitution, drawn up as the last line of defence for the States against the potential ravages of the Commonwealth. Consequently, there can be little doubt that the Founders would have regarded as the basic determinant of the Court's efficacy its capacity to maintain effectively the federal division of power.

The Performance of the High Court

From the avowedly federalist perspective of the Founders, it would be difficult to find words which would aptly describe the performance of the High Court as a protector of the States. This is because asking the question, "How well has the High Court safeguarded the interests of the States?" is a little like posing the query, "What was the contribution of Attilla the Hun to Western civilisation?": the mismatch between the question's premise and the reality which underlies its answer is positively grotesque.

In general terms, the High Court has been an utter failure as the protector of the States, and even this conclusion does less than justice to the depth of the Court's dereliction of its intended constitutional duty. The reality is that the Court has not merely failed to protect the States, but for most of its constitutional history has been the enthusiastic collaborator of successive Commonwealth governments in the extension of central power. Indeed, the enthusiasm of the Court for this centralising enterprise has not uncommonly exceeded the appetite of the federal government itself.

The fundamental point to grasp concerning the impact upon the States of the High Court's exegesis of the Constitution, is that since the 1920s, the Court has deployed in division of powers cases an interpretative methodology which was consciously developed by such judges as Sir Isaac Isaacs for the specific purpose of facilitating an on-going transfer of power from the States to the Commonwealth. This is the approach most commonly referred to as "literalism"--but more accurately described as ultra-literalism--and which was first endorsed in the Engineers' Case.

Briefly, the main feature of Australian constitutional literalism is that it focuses obsessively upon the terms of the specific legislative powers conferred upon the Commonwealth Parliament in section 51 of the Constitution.

Despite the fact that these powers are conferred within the crucial context of a strongly decentralised federal Constitution, literalism holds that they are to be interpreted with all the generality that their words allow, and without regard being had to the necessity to maintain any federal division of power as between the States and the Commonwealth. The practical result is that the powers contained in section 51 become constitutionally privileged "super powers", operating to indefinitely contract the notional residue of power theoretically preserved for the States under section 107. Consequently, it is literalism which renders such provisions as the external affairs power [i.e. section 51 (xxix)] so profoundly dangerous to Australia's federal character, by insisting that they be interpreted in the widest fashion possible, without regard being had to any federal considerations.

As if this were not bad enough, the High Court has in recent times extended its repertoire beyond literalism, in a manner which further threatens the legislative capacities of the States. The High Court's recent implausible forays into the area of "implied" rights are risible enough in relation to the Commonwealth Parliament, which is at least the creature of the Constitution from which the Court purports to derive those rights. However, in the Stephens Case, the Court decided that the implied right of political free speech flowing from the Commonwealth Constitution also operated to restrict State legislative power. Implied rights theory as practised by the Mason Court thus has the same almost open-ended potential to circumscribe the powers of the States as it possesses in relation to the Commonwealth.

The result is that in the High Court's interpretation of the Constitution, the States are now caught both ways. In the context of the division of power, a rigid literalism operates to expand the legislative competence of the Commonwealth at their expense. As regards implied rights, a free-wheeling implicationism--which the Court would not dream of applying in relation to the concept of federalism--further restricts their powers.

There is little, if any, sign of the Court departing from the path of centralism upon which it commenced with Engineers. Indeed, one way of viewing the Court's present obsession with rights is that it regards the issue of federalism as having been concluded finally in the Commonwealth's favour, and is sighing for new fields of constitutional jurisprudence to conquer. If this view is correct, then the High Court has ceased to regard the States as constitutional obstacles, and now considers them constitutional irrelevancies.

The High Court and State Finances

It is important to appreciate that the Court's facilitation of the dominance of the Commonwealth over the States has not occurred solely through its construction of the provisions of the Constitution dealing with the legislative power of the Commonwealth. The Court exercised a similarly baleful influence over the States through its interpretation of those constitutional provisions which affect the financial relationship between the central government and the States.

Broadly, the position here is that from its earliest history, the High Court has interpreted the financial provisions of the Constitution--which indisputably were among the least satisfactory products of the Founders' labours--in a manner inimical to the interests of the States. Perhaps surprisingly, this process began well before the Engineers' Case, with the decision of the first High Court in the Surplus Revenue Case.

That case concerned section 94 of the Constitution, the centre-piece of the extremely shaky financial settlement agreed upon by the Founders. This section provided that, from a point five years after the imposition of the federal tariff, the "surplus revenue" of the Commonwealth should be distributed among the States on a monthly basis in the manner prescribed by the federal Parliament. Admittedly, section 94 was so indifferently drafted in an attempt to conceal a multiplicity of different views as to how it should operate that any reasonable lawyer would have been able to drive a truck through it. That the strongly federalist Sir Samuel Griffith and his like-minded colleagues on the first High Court should have been behind the wheel is, however, undeniably singular.

Briefly, the Court held that it was perfectly permissible for the Commonwealth to avoid entirely the operation of section 94 by allocating, before the end of the financial year, any available surplus revenue to what were in effect special holding accounts. The funds concerned having been duly "appropriated" by being lodged in these accounts, there ceased to be any surplus revenue upon which section 94 could operate. Thus, with reasoning that surely would have appealed to the corporate sharks of the 1990s, the High Court--comprising three of the leading figures at the Great Conventions--obliterated the key feature of the financial settlement haggled over for so long by themselves and their colleagues.

Much worse was to follow. If the Surplus Revenue Case sounded a shrill warning note for the States, the First Uniform Tax Case in 1942 set their financial death knell tolling in earnest. The facts of this case are too well-known to bear rehearsing here. In what still remains after fifty years the greatest judicial blow to the economic independence of the States, the Court upheld a Commonwealth legislative scheme which had the practical effect of excluding the States entirely from the field of income tax.

This scheme had two essential features. The first was the use of the Commonwealth taxing power (section 51 (ii)) to impose an income tax at a rate equal to that previously represented by both State and federal income tax combined, thus placing the government of any State which wished to impose such a tax in a politically untenable position. The second, and probably more constitutionally significant feature of the scheme, was the use of the grants power contained in section 96 of the Constitution to grant to each State an amount of money approximately equal to that which it would have raised through the imposition of its own income tax, but on the condition that the State itself imposed no such tax. The scheme in the First Uniform Tax Case was thus avowedly aimed against the revenue raising capacities of the States, with its use of the taxation power to create a need in the States, followed by the crocodilian deployment of the grants power to supply that need, on the condition that State taxation policy conformed to the desires of the Commonwealth.

It might have been thought, therefore, that if ever the High Court were to see the wood of federalism behind the trees of the constitutional text, it would have been in connection with the legislation comprising the uniform tax scheme. Such was not the case, however, with a majority of the Court upholding all aspects of the scheme. Indeed, Chief Justice Latham, in dismissing the arguments of the States based upon the potential misuse of section 96 to subvert the federal division of power, cheerfully remarked that "the remedy for the alleged abuse of power.....is to

be found in the political arena and not in the Courts." So much for the key-stone of the federal arch.

The First Uniform Tax Case thus established that the Commonwealth grants power could be exercised subject to whatever conditions the Commonwealth saw fit, and towards objects entirely outside the competence of the Commonwealth Parliament. This is a position from which the Court has never departed over the years.

In summary, the Court's performance in the interpretation of the financial provisions of the Constitution essentially mirrors that which we have already examined in the context of the legislative division of power. The Court has consistently adopted an interpretation that has favoured the Commonwealth over the States, and in so doing has set its face resolutely against interpreting the Constitution in the light of the federal spirit which suffuses that document.

The High Court and the States--Themes

It is worth pausing very briefly at this point, before proceeding to a detailed discussion of section 90, in an attempt to isolate the major themes which emerge from the High Court's interpretation of those provisions of the Constitution which are of importance to the States.

The first is that through most of the history of the Court, most of its members have displayed an indifference bordering on disdain for the intentions of those who framed the Constitution, and indeed, for the understanding of those who voted to approve that document at the Federal Referenda of the 1890s. Few High Court judges, particularly in recent years, have seen their task as being to glean the intention of the Founders behind the Constitution. Rather, the judges of the Court have come increasingly to see the Constitution as a canvas upon which their own constitutional vision is to be portrayed, whether in the form of a greater centralisation of power, or as more recently, in the garish abstractions of the Mason Court's implied rights theories.

Correspondingly, there has been a profound reluctance on the part of the Court to focus too closely upon the history of the Constitution in seeking to interpret that document. The obvious reason for this is that the Constitution's history is a profound embarrassment to the Court, revealing as it does the Founders' commitment to precisely that form of strongly decentralised federalism that the Court has devoted its institutional life to undermining. Interestingly, during the mid-1980s the Court to some extent re-discovered history, as part of its attempt to re-interpret the chaotic section 92. Predictably, however, this has not led to a general reappraisal by the Court of its more profoundly unhistorical decisions on the federal division of power. Instead, some of the judges who have done greatest violence to the historical spirit of the Constitution--most notably Sir William Deane--are particularly fond of advancing wildly improbable versions of constitutional history in order to support equally implausible constitutional interpretations.

Finally, and fundamentally, it must be clear to any observer of the Court that over the course of its history it has shown virtually no commitment to federalism, the corner-stone of the Australian Constitution. Indeed, the Court has tended to regard the concept itself with some disdain, and to haughtily dismiss any argument seeking to proceed from first-principles based on federalism as "vague", "political", or "illogical". True, the States have had their occasional constitutional "wins", but these have been few and far between, and are simply overwhelmed by the weight of the Court's decisions amplifying and extending the power of the Commonwealth. Desultory attempts have been made by some members of the Court to erect certain limited constitutional protections for the States, but these feeble barriers have proved no real defence against the Commonwealth juggernaut, facilitated as it is by the literalism of Engineers. The fundamental difficulty, of course, is that since the 1920s the Court has seen its central constitutional role not as being to foster federalism, but to dismantle it. In this, it has achieved considerable success.

The History of Section 90

At this point, we may turn to a consideration of the excise provision of the Constitution, section 90. As indicated earlier in this paper, the approach adopted here will be to examine that provision as a case-study of the High Court's treatment of the States in the process of constitutional interpretation. The appropriate point at which to commence this study is with an examination of the history of the Court's jurisprudence on section 90.

It can be argued that section 90 is striking as an important Australian constitutional provision in at least two senses. The first is that its key term is vague to the point of incomprehensibility. Years of futile research by historians and lawyers have revealed no clear meaning of the term "excise" as employed in section 90 by the Founders during the last decade of the nineteenth century. The most that can be said is that there seem to have been two meanings of the word. Under one meaning, current particularly within the Australian colonies at the time of Federation, "excise" had the quite narrow connotation of a tax on the production or manufacture of internally produced goods. An even narrower variant of this local understanding of excise would have contracted the concept still further to imposts upon the production of tobacco and alcohol.

An altogether different vision of excise, however, may be culled from historic and contemporary English authorities, which seemed to regard the term "excise" as a catch-all for virtually any indirect tax--a sort of compendious expression for "fiscal plague", if you like. Which of these versions of excise was upper-most in the minds of the Founders it is impossible to say with certainty on the basis of contemporary evidence, for the Founders were as vague in their use of the term as anyone else. However, in light of the discussion which appears below, it seems most likely that they were utilising the expression in its narrower sense.

The second striking thing about section 90 is that however obscure may be the exact meaning of its central term, the general purpose behind the provision is at least relatively clear, both from the provision's documentary context within the Constitution, and from contemporary material surrounding its drafting. As a matter of documentary context, section 90 is clearly bound up with the federal tariff: on its own terms, its operation commences only upon the imposition of a uniform tariff, while it is located in the Constitution in close conjunction with those other key constitutional provisions concerning the tariff, sections 92 and 93.

This textual relationship between section 90 and the tariff is more or less elucidated by a detailed reading of such contemporary sources as the Convention Debates themselves, and Quick and Garran. What emerges from these sources as easily the most convincing view of the purpose behind section 90 is that it was intended to operate, not so much as a primary constitutional provision in its own right, but as a protection for the federal tariff to be imposed and implemented under other sections of the Constitution. The idea appears to have been that a State potentially could negative the protective effect of the tariff by the simple expedient of placing a corresponding duty on the relevant class of locally produced goods. To prevent this from occurring, section 90 was intended to prohibit a State from imposing such imposts analogous to customs duties on local goods, these imposts being all too loosely described as "duties of excise".

The crucial point here is that, on this understanding of the purpose behind section 90, the only tax which could conceivably be regarded as constituting an excise would be one which discriminated between overseas and locally produced goods. This would follow inevitably from the fact that it would be only these taxes which could have the effect of undermining the federal tariff. For the purposes of discussing the High Court's interpretation of section 90, it is worth noting at this stage two things concerning this postulated rationale behind the excise provision.

The first is that it is by no means difficult to discern: a careful reading of the Constitution and accompanying contemporary sources, and an understanding of the historical circumstances surrounding Federation, virtually impel one to the conclusion that this was the purpose underlying section 90. The second is that, construed in this way, section 90 clearly represents a very limited restraint upon the legislative and economic capacities of the States.

Unsurprisingly, the High Court's early decisions on section 90 broadly reflected this view of its function. In Peterswald v. Bartley, the first High Court--consisting of three leading Founders, Griffith, Barton and O'Connor--held that an excise for the purposes of section 90 was a tax on locally produced goods in respect of their production or manufacture, imposed in relation to the quantity or value of the goods concerned. This narrow conception of section 90 was entirely consistent with the suggested historical purpose of the provision as a measure to protect the federal tariff. Moreover, nothing in the interpretation of the excise provision in Peterswald v. Bartley posed any threat to the capacity of the States to manage their economic and financial affairs.

This was to come, by successive instalments, in later decisions of the Court. In a paper delivered to the previous Conference of this Society, Sir Harry Gibbs traced in some detail the decline and eventual eclipse of the test enunciated in Peterswald v. Bartley, and it would be inappropriate to do more than sketch the most modest of pictures here.

Briefly, the Court had by the late thirties begun a process of progressively widening the operation of section 90. That process intensified in 1949, when in the case of Parton v. Milk Board, the Court held that the concept of an excise extended beyond taxes on the manufacture and production of goods, and included any tax on goods before those goods reached the hands of consumers. Worse from the point of view of the States, in justifying this decision, Sir Owen Dixon identified behind section 90 a purpose completely at variance with that narrow object relating to the protection of the federal tariff which previously has been outlined in this paper. To Sir Owen, section 90 was not an incident to the customs union effected by section 92, but a vital element in the grand economic scheme of the Constitution, intended to confer upon the Commonwealth economic control over the supply of goods and services throughout the nation. This wide, and quite unhistoric view of the object of section 90, was to prove irresistible to subsequent High Court judges, and it is to Parton that much of the mischief wrought upon State finances by the High Court's interpretation of section 90 may be traced.

Subsequent cases, such as Bolton v. Madsden, while affirming the general approach adopted in Parton, sought to limit its application by means of the so-called "criterion of liability" test. This test posited that in order for a tax to constitute an excise, it was necessary that the tax be "directly imposed on goods". Moreover, this issue of the relationship between the tax and the relevant goods was to be determined not through an examination of the economic effects of the charge in question, but by reference to the legal operation of the statute imposing it. Consequently, the criterion of liability test enabled both the States and the High Court to avoid the more extreme consequences of the wide view of section 90 taken in Parton, through the use of such entirely artificial devices as franchise fees and licences in preference to more immediate taxes on goods.

However, this uneasy compromise began to unravel in 1983 with the decision of the High Court in Hematite. In that case, the Court abandoned the criterion of liability test. It decreed that henceforth, the test of whether or not a tax was an excise would be one of substance, not form, and would essentially turn upon the question of that tax's economic effect. Here, the crucial issue would be whether the tax ultimately entered into the price of the relevant goods: if so, it would comprise an excise. The immediate effect of Hematite, as confirmed by subsequent cases such as

Philip Morris, was to remove all logical justification for the exemption of State franchise and business licence fees from the scope of section 90. While the High Court has so far hesitated to take the final step on the path laid down in Hematite, and draw these taxes within the grim embrace of the excise provision, their constitutional basis can never be more than dubious so long as the Court's present broad interpretation of section 90 prevails.

The picture presented by the High Court's interpretation of section 90 thus conforms in every way with the general history of the Court's interpretation of the Constitution as it touches upon the States. Most notably, one may again observe the progressive widening of the scope of a provision by the Court in a manner calculated to intrude upon the independence of the States. As was the case in the context of the legislative division of power, the Court has shown scant or no interest in seeking to ensure that its construction of a provision conforms with the wider federal purpose of the Constitution. Likewise, the Court has shown as little empathy with the original intention of the Founders in connection with section 90 as it has in relation to the legislative powers of the Commonwealth contained in section 51. Just as the limited powers conferred upon the Commonwealth by that section were elevated by the Court into an almost open-ended charter of legislative action, so at the hands of the Court has section 90 mutated from a relatively inoffensive provision designed to protect the federal tariff, into the constitutional equivalent of the feral goat, deeply destructive of State economic policy, and serving no obvious economic purpose of its own.

Section 90 Today

The High Court's present position on the interpretation of section 90 is represented by Capital Duplicators Pty. Ltd. v. Australian Capital Territory. That case concerned a challenge to imposts levied in connection with the sale of pornographic video tapes pursuant to legislation of the Australian Capital Territory.

In holding these imposts to constitute an excise, the majority--Mason CJ., Brennan, Deane and McHugh JJ.--adopted a classically expansive interpretation of section 90. Their starting point was to discern a suitably grand historical purpose behind that provision. In line with the views of Sir Owen Dixon in Parton, section 90 was regarded as having been intended not merely to protect the federal tariff, but also to serve as a key weapon in the economic armoury of the Commonwealth, by conferring upon it "effective control over economic policy affecting the supply of goods and services throughout the Commonwealth".

Consistently with this sweeping vision of the purpose underlying section 90, the majority took a wide view of the scope of that section. An excise was any tax on goods before they reached the hands of the consumer, and included not only taxes on the production or manufacture of goods but also charges levied in respect of distribution, and (it would appear) sales taxes. Moreover, the question of whether a charge is a tax on goods was a question of substance, or in other words, of the economic effect of the tax. Here, the majority adhered to the view taken in such cases as Philip Morris, that if a charge had the "same effect" as an excise by ultimately entering into the price of the goods concerned, then it was as a matter of economic substance (and therefore law) an excise for the purposes of section 90.

Somewhat ironically for the Court which decided the Mabo case, the majority Justices piously opined that the doctrine of precedent precluded a general re-opening by the Court of the whole question of the interpretation of section 90. The only crumb of comfort for the States was that the majority declined to countenance the final extinction of the franchise fees anomaly, which had been clinging precariously to constitutional life ever since the discarding of the criterion of liability test in Hematite.

As an exercise in logic (legal or otherwise), the judgment of the majority in Capital Duplicators is profoundly unconvincing. In particular, its purported identification of a grand historical design behind section 90 simply does not hold water. No attempt is made by the majority to provide actual historical evidence of this design, one would suggest for the very basic reason that none is available. Moreover, even were one inclined, in defiance of all available data, to accept that section 90 was indeed intended to serve as the constitutional flagship of the Commonwealth's internal economic policy, one would need to base that acceptance upon the supposition that the drafters of the Constitution were economically illiterate to an extent uncommon even among lawyers.

This follows from the fact that only an economic simpleton could suppose that the mere granting to the Commonwealth of power over duties of excise could possibly give it, in the words of the majority, "effective control over economic policy affecting the supply of goods and services throughout the Commonwealth." So long as the States maintain their ability to impose a host of other charges which ultimately will affect the price of goods, such as pay-roll tax and land tax (to name just two), as well as their general legislative capacity which can be utilized to influence the production, supply and distribution of goods in a myriad of different ways, the "effective control" expounded by the majority is sheer fantasy.

In terms of practical federal economics, the majority judgment displays no awareness of (or at least no interest in) the fact that the interpretation of section 90 which it propounds involves the continuation of major difficulties in the field of federal finance. The most that the majority are prepared to venture in this direction is the grudging concession that the franchise exemption, while clearly anomalous, should not be disturbed. Similarly unimpressive from both a legal and an economic point of view is the majority's definition of an excise as a tax which enters into the price of goods. If this ridiculously wide definition is correct, it follows that a vast range of implausible taxes with little or no real connection with goods, but which undoubtedly are passed on to consumers in the form of increased costs for goods, are excises. Such taxes presumably would include pay-roll tax, some stamp duties and even potentially workers' compensation levies, none of which could conceivably be regarded as constituting an excise according to any accepted historical, economic or legal understanding of the term. The minority judgments in Capital Duplicators are those of Dawson J., and of Toohey and Gaudron JJ. There are differences of emphasis and expression between the two judgments, but as they are essentially to the same effect, they will be treated here together.

Both judgments proceed directly from an identification of the historical purpose behind section 90. Consequently, each is vitally concerned to interpret section 90 in light of that purpose, and to accord to the section an operation that is consistent with the object of the Founders in including it in the Constitution. The purpose identified by each of the minority judges is that referred to previously as constituting the most historically plausible explanation for the appearance of section 90 in Chapter IV of the Constitution; namely, that section 90 was intended to prevent a State from undermining the federal tariff by imposing a discriminatory tax upon locally produced goods, thus cancelling out the protective effect of the tariff.

For the minority judges in Capital Duplicators, it followed inevitably from this that an excise for the purpose of section 90 was not constituted by a tax which merely entered into the ultimate price of goods. Instead, the only tax which would answer the description of an excise within the meaning of that section would be one which discriminated between locally and externally produced goods. All three judges comprising the minority seem to have accepted that the

question of whether a tax did discriminate against local goods would be a matter of substance rather than legal form.

The constitutional implications of the minority judges' reasoning are both profound and obvious. The States would be able to impose any tax in relation to goods, so long as that tax did not discriminate between internally and externally produced articles of manufacture and production. While there would be some practical limits on the application of this principle, its most immediately obvious effect would be to permit the levying of a general State sales tax, the constitutionality of which has been at least highly dubious since such cases as Hematite and Philip Morris. Likewise, while under the minority view State taxes on the internal manufacture or production of goods obviously would continue to be excises within the meaning of section 90, taxes on such secondary steps as the distribution would not be excises unless they operated to discriminate between locally and externally produced goods, which would by no means necessarily be the case. There can be little doubt that the reasoning of the minority judges in Capital Duplicators is vastly superior to that contained in the joint judgment of the majority. As a matter of history, it is plain that the purpose discerned by the minority as underlying section 90 more accurately reflects the historical intention behind that provision. On this point, the careful analysis in the judgment of Sir Daryl Dawson, in particular, stands in stark contrast to the sweeping assertions of the majority relating to economic unity. Critically, as a consequence of its plausible historical basis, the minority's reasoning would accord to section 90 an operation fundamentally consistent with the legislative intent behind that section. In so doing, that reasoning would keep faith not only with the Founders themselves, but also with the most basic principles of statutory and constitutional interpretation.

The minority's reasoning also is persuasive in terms of federal financial arrangements and economic logic. The discrimination test which it poses would preserve the maximum State taxing capacity consistent with the operation of section 90 as a mechanism to protect the federal tariff. It would allow the States to broaden their tax bases without resorting to such regressive taxes as pay-roll tax, or to artificially constructed fiscal monstrosities like the much-abused business franchises. At the same time, the minority's narrower understanding of excise would avoid the logical absurdities of the definition adopted by the majority, whereby every tax which enters into the price of goods, however remotely and incidentally, is analytically to be regarded as an excise. All in all, there can be little doubt that the minority had the best of the arguments--if not the numbers--in Capital Duplicators.

Section 90 - The Future

When I was asked to prepare this paper, it was made clear by the organizers of the Conference that it was the question of possible future directions in the interpretation of section 90 that excited them most, and in particular, whether some as yet inchoate majority of the Court could be persuaded to adopt the narrow version of excise endorsed by the minority in Capital Duplicators. Indeed, such was the excitement at the rare spectacle of three High Court judges speaking sense at the one time, that it was thought that a little crystal ball-gazing might well reveal the States and the High Court, hand in hand, gambolling towards the sun-lit pastures of responsible fiscal federalism.

This vision is made all the more tantalising by the recent departure from the Court of two members of the majority in Capital Duplicators. Sir Anthony Mason has retired, while Sir William Deane--a judge of ferociously anti-federal sentiments--has left the Court to serve as Governor-General. Consequently, the technical state of the Court on section 90 at present is as follows. Three judges--Dawson, Toohey and Gaudron JJ. (the minority in Capital Duplicators)--

favour a revision of section 90 to the effect that it would only prohibit the imposition by the States of taxes discriminating against goods of local production or manufacture. Two judges--Brennan CJ. and McHugh J. (the survivors of the majority in the same case)--adhere to the old, wide view of excise as enunciated in such cases as Philip Morris.

Finally, two judges--Gummow J. and the as yet unappointed successor to Sir William Deane--are closed books on the subject of section 90. The crucial question is thus whether the Court will take the opportunity presented by its change in composition to re-appraise the trend of its decisions on excise, and to opt instead for some version of the narrow test proposed by the minority in Capital Duplicators.

The starting point here must be to note that, for all the reasons previously adverted to in this paper, such a reappraisal would be highly desirable. The present doctrine of the High Court on section 90 is untenable as a matter of history, legal logic and federal economic reality. A revision along the lines suggested by the minority in Capital Duplicators, by way of contrast, would see section 90 operate not only in the manner which appears to have been intended by the Founders, but in a manner which would be consistent and legally predictable, and which would promote rather than hinder the capacity of the States to engage in intelligent revenue raising and financial planning. Such a re-casting of the interpretation of section 90 would be very much the companion piece to the Court's historic re-invigoration of section 92 achieved in Cole v. Whitfield.

However, the very desirability of an alteration in direction by the High Court on the question of section 90 may tempt one to exaggerate the chances of such a change occurring. As stated earlier, the historic trend of the decisions of the Court over the last seventy years has been one of a consistent amplification of the powers of the central government over those of the States. While there have been variations in the intensity of the High Court's enthusiasm for the constitutional diminution of the States, the Court's basic direction has remained remarkably constant.

Thus, one must view with considerable scepticism any suggestion that the High Court will make a radical departure from established constitutional doctrine in favour of the States. Indeed, were the High Court to follow such a course in relation to section 90, this would undoubtedly constitute the only occasion when the Court would have undertaken a major revision of the Constitution's interpretation working to the advantage of the States. For this reason, if for no other, the hopes raised by the minority in Capital Duplicators should not be allowed to run too high.

Putting aside such wide issues as the historic trend of High Court decisions, it is obvious enough that the immediate practical question in relation to section 90 is how the two new appointments to the Court will position themselves on the question of its re-interpretation. Will they adhere to the present constitutional orthodoxy, or will one--for this is all it would take--join Justices Dawson, Toohey and Gaudron in adopting a narrow view of excise? The prediction of individual judicial form being a notoriously inexact science, the best approach is probably to consider first the type of judge who might be attracted by the Dawson-Gaudron-Toohey thesis in section 90.

Broadly, there would seem to be three types of judge who might be tempted to take a restrictive view of section 90. The first would be a careful legal historian, who was impressed by the weight of contemporary and contextual evidence suggesting that section 90 should be given a circumscribed operation. An example of such a judge presently on the Court is clearly Sir Daryl Dawson. A second species of judge who would be propelled in the same direction would be one who believed that the interpretation of the Constitution requires, within the limits of its text,

adherence to the intentions of the Founders, and that this in turn necessitates the maintenance of a strongly federal polity in Australia. Again, Sir Daryl Dawson would be the relevant example. Finally, and perhaps more exotically, a judge who was neither a historian nor a federalist, but who had served at a sufficiently high level within the government of a State to observe the fiscal havoc wreaked by section 90, might well be a convert of necessity to the cause of taming the excise provision. Such may be the case with Justice Gaudron, who served as Solicitor-General for New South Wales for some years.

Correspondingly, there are at least three types of judge who would incline naturally towards the Mason view of excise. The first would be a judge who was a committed centralist, and who saw his or her task as being to interpret the Constitution in such a way as to advance the cause of central government at the expense of the powers of the States, regardless of the possible views of the Founders on the matter at hand. Sir Anthony himself was an example of such a judge. The second type of judge likely to take a wide view of excise would be an old-style literalist with a general disinclination towards the use of history in the interpretation of the Constitution. There are (some) elements of this in Justice McHugh's judicial personality. Finally, a radical implicationist who regarded the Constitution merely as a canvass for their own judicial creativity would very probably take a broad view of the prohibition contained in section 90, if only because the creativity of such adventurist judges ordinarily has a centralising, rather than a decentralising bent. Sir William Deane is the perfect example of this species of judge.

The undeniably difficult question, therefore, is into which category the two new appointments to the Court are likely to fit. In the case of Justice Gummow, the relevant facts (or suppositions) seem to be as follows. He is a New South Welshman, hailing from the largest and dominant State of the Federation, and one whose inhabitants often seem to display less federalist feeling than citizens of other States. He was formerly a Federal Court Judge, thus coming from a background where his institutional attachment was to the Commonwealth, rather than to a State. He is reputed to have been chosen for appointment to the High Court by the Commonwealth Government because he is a "lawyer's lawyer", and temperamentally opposed to the implicationist fancies which presently so divert his brethren. Finally, one reasonably may suppose that so authoritarian a central government as the present one would not have made the appointment without some belief that the new Justice did not hold unacceptably federalist views on division of powers issues.

Thus, at the obvious risk of committing an indelible blunder, it would seem unlikely (on the scant information available) that Justice Gummow is a good prospect for conversion to the narrow view of the excise power. Viewing him admittedly as a mere judicial embryo, he emerges most plausibly as a conservative, centralist, probably literalist lawyer. While none of these things will send him down the rights path so beloved of Sir William Deane, nor are they characteristics likely to predispose him towards a history-and-federalism fuelled reconsideration of section 90.

If a majority is to be formed for the narrow view of excise in Capital Duplicators, therefore, it presumably will have to include the forthcoming appointment to the Court. Here, the only thing that intelligently can be said is that if Justice Gummow appealed to the Federal Government in connection with the last vacancy, it is highly likely that a similar candidate will be chosen to take Sir William Deane's place on the Court. On this basis, there seems no particular reason for confidence that the new appointment will side with Justices Dawson, Toohey and Gaudron on the question of excise.

One thing which clearly should be appreciated is that if the new appointments to the High Court do bring with them a reappraisal of section 90, many questions will remain to be answered

concerning the future operation of that section, even if the minority position in Capital Duplicators is adopted virtually intact. For example, what will be the position where a tax is imposed on distribution or some analogous step in relation to goods, in circumstances where the particular class of goods is produced only in the State concerned? Will the discriminatory operation of the tax mean that it constitutes an excise (as seems to be suggested by Justice Dawson in Capital Duplicators), or will it be saved by its undifferentiated application to all goods of that class? Either way, considerable refinement of the position enunciated by the minority in Capital Duplicators will be required. Moreover, will the resurgence of Peterswald v. Bartley stop with the reinstatement of the discrimination test, or will the Court carry it so far as to question the Parton view that the concept of excise extends beyond imposts on manufacture and production and into such fields as sales and distribution? One's guess would be not, but the one thing that is amply demonstrated by the Court's on-going reappraisal of section 92 is that even after a new constitutional doctrine has been formulated successfully, its elaboration and application to novel circumstances require considerable judicial effort.

Of course, the real difficulty for both litigants and commentators at the present time is that the chaotic state of the High Court's constitutional jurisprudence makes it almost impossible to predict with confidence the outcome of any complicated case, and this obviously includes cases concerning the interpretation of section 90. The Court is currently a confused jumble of competing constitutional theories and their application to particular questions, and in any given month the balance of judicial opinion may swing, depending on the subject matter of the case, from a stuffy and pedantic literalism to an uninhibited determination to re-write the relevant section of the Constitution. In this atmosphere, the meaning that will be given to section 90 in six months time can never be more than an open question.

Conclusion

The conclusions which emerge from this paper are clear. The Founders believed that they had created a federation in which the balance of power would lie decidedly with the States. The fundamental role of the High Court was to preserve that balance. Instead, the Court has consciously presided over an on-going transfer of power from the States to the Commonwealth. This has occurred not only in the obvious context of the federal division of power, but also in the area of fiscal federalism, where the High Court has played a crucial part in reducing the States to financial captivity. Nowhere has this been more obvious than in relation to section 90, where the Court has transformed what was intended as an important but ultimately secondary mechanism for the protection of the federal tariff into a potent weapon against the financial independence of the States.

While there are reasons to hope that the Court may be moving towards a reassessment of its position on section 90, it must be remembered that its historical record is one of relentless centralisation. A recantation of the dimensions that would be involved in the reinterpretation of section 90 would be unprecedented.

Chapter Five

The Second Native Title Case

Colin Howard

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

I have to start with a disclaimer. When I was asked by John Stone to speak on this topic I had no idea that when the time camefor me to do so I should have been appointed Crown Counsel to theAttorney-General for Victoria. In light of that event I think it wouldbe at least circumspect for me to make clear that should I from timeto time inadvertently express an opinion, which would of course beentirely out of character, it would be my own and is not to be taken in any sense as the opinion of my Minister or the Victorian Government.

The term Second Native Title Case may be confusing to some. They will recall the first one as being Mabo v. Queensland [No.1](1988) and the second as being Mabo v. Queensland [No.2] (1992), which makes the next time around number three. The reason why I regard the High Court decision that was handed down on 16 March,1995 as the second of its kind is that the Mabo cases were two stages of the same proceeding.

The official description of the Second Native Title Case is Western Australia v. Commonwealth (1995). It was actually three cases heard together, the other two being Wororra and Yawuru Peoples v. Western Australia and Biljabu and Others (representing the Martu peoples) v. Western Australia. Procedurally, the litigation took the form usual in High Court constitutional matters of the parties formulating questions of law which are then submitted to a single Justice, in this case the Chief Justice, who settles them and reserves them for the opinion of the Court.

In substance what was at stake was whether native title survived in Western Australia, the validity of the Land (Titles and Traditional Usage) Act 1993 (WA) ("the WA Act"), the validity of the Native Title Act 1993 (Cth) ("the NTA") and the operation of the Racial Discrimination Act 1975 (Cth) ("the RDA").

A particular issue was the impact of native title and the Native Title Act on Western Australia.

Having regard to the implications of native title for the whole country, this was a matter on which the Western Australian Government might reasonably have expected support from other State governments and mining, agricultural and grazing interests. In theevent only South Australia sought, and was granted, leave to intervene.

You will recall that Mabo [No.2] was widely criticised for the unsatisfactory character of the majority reasoning, the diversity of opinion among the majority and, in some passages, the emotive language.

It is evident from the Second Native Title Case that the Court took at least some of this to heart. The most outward and visible sign is that instead of three majority judgments of three, two and one respectively, there is only one. The three, two and one managed to put their differences aside and speak with a single voice.

The results at which they arrived were then made unanimous by Dawson J., the sole dissenter in Mabo [No.2], on the basis that although he still held the views he expressed in dissent in the earlier case, no good purpose would be served by his persisting in them. I take the opportunity to

say that his short and dignified concurring judgment illustrates to perfection why he is regarded by many as a judicial exemplar.

The Court's rapid retreat from the diversity of opinion which so often makes it hard to know what a case stands for encourages me to suggest that henceforth their Honours give consideration, or further consideration, as the case may be, to adopting the usual practice of the American Supreme Court whereby one author writes for all the majority. Certainly under the American practice the other members of the Court who concur in the outcome influence the final text of their single judgment, but they do seem in general to avoid our judicial tendency to arrive at a common result by separate judgments that differ only in relatively marginal ways.

Majority unanimity in the Second Native Title Case is not the only sign of the Court's having been taken aback by critical comment. The reasoning throughout the main judgment, while it does not by any means have the quality of inevitability, is nevertheless much tighter than was the case in Mabo [No.2].

One notes also, with sincere gratitude, that the Court this time has dispensed with the merely emotive or rhetorical. So far, so good.

Now for what the Court actually decided. I will not try your patience by taking you through each and every painstaking point made, but clearly it would be inadequate for me merely to recite the answers given to the technical questions put to the Court without conveying how those answers were arrived at.

Indeed, I can confidently assure you that it would be not only inadequate but also incomprehensible. In fact in one case the answer trembles on the brink of incomprehensibility even when explained.

Western Australia opened its case with a proposition which would have made all else, including its own statute, irrelevant had it been established. This was that the survival of native title after an assumption of sovereignty by the British Crown was no more than a presumption which could be rebutted by proving that the Crown intended to extinguish it. That this was the case in Western Australia was demonstrable from the instruments establishing the State. This argument failed because, even if it were correct to describe the survival of native title in Western Australia as a rebuttable presumption, the history of the establishment of the State did not support such an intention on the part of the Crown. On the contrary, if anything it supported the opposite conclusion. Moreover Mabo [No.2] required not merely an intention to extinguish but also a positive lawful act pursuant to that intention.

It does not appear to have been argued that the mere assumption by the Crown of sovereignty over the land was enough in itself to extinguish native title. No doubt this was because such a contention would have run counter to Mabo [No.2]. The forensic tactic seems to have been not to directly challenge anything in that case but to persuade the Court, should the initial submission about the survival of native title fail, that the Western Australian Act complied with the principles laid down in it. This approach was consistent with the aim of the draftsmen of the Act but meant losing an opportunity to persuade the Court to at least modify some of Mabo [No.2].

Personally I regret that decision because I think that the majority judgments in Mabo [No.2] were in many particulars not well argued, and would have benefited from modification without any need to impair the concept of native title. Still, the cash value of regrets is nil so I move on to the next stage of the Court's approach in the Second Native Title Case.

Having decided that native title had not been abolished in Western Australia as a necessary consequence of the establishment of the State, the Court took up the question whether the WA

Act was inconsistent with the Racial Discrimination Act, specifically section 10(1), and, if so, to what extent and with what effect. This led to a complex analysis which I shall try to put simply.

The deceptively unhelpful answer to the question the Court asked itself is that, by virtue of section 109 of the Constitution, if the WA Act was inconsistent with the RDA of the Commonwealth it would be inoperative to the extent of the inconsistency. Section 109 questions are usually, and perhaps always, a matter of definition of the word "inconsistent". This is never easy but the Second Native Title Case produced a novel subtlety of its own. This was how to divine what section 10(1) of the RDA actually means. The text of that subsection is as follows: "If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin, do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin".

There was some discussion of section 10(1) in Mabo [No.1]. I disagree with the interpretation arrived at by the majority in that case.

I agree with the minority, in particular the analysis made by Wilson J., which still seems to me unanswerable. As with the regrets to which I referred earlier, however, the cash value of arguing with the present High Court on this point is nil.

Fortunately, nothing which was said by the majority in Mabo [No.1] seems to have much bearing on the Second Native Title Case.

The Court's starting point was the distinction drawn in the WA Act between title and native title. The Act treats title as an interest in land arising from Crown grant, and native title as an interest in land arising from Aboriginal law and custom via the common law. It is to be noticed that under any definition native title is necessarily a narrower concept than Crown grant. In section 3 the WA Act gives this legal situation greater precision by defining "native title" as a right or entitlement to the occupation or use of land, or otherwise relating to land, exercisable by Aborigines in accordance with their tradition.

In my opinion that is an entirely reasonable rendering in statutory form of both the legal and the philosophical essence of Mabo [No.2].

I say that because immediately after the judgments in the Second Native Title Case were handed down there was an outbreak of hindsight in the Western Australian media severely critical of the Premier, Mr Richard Court.

The prevailing attitude seemed to be that by passing and defending his own Act, attacking the Commonwealth's NTA, and in the meantime carrying on business as usual in the matter of land titles, he was recklessly wasting public money because he knew that his cause was hopeless. This was highly hypocritical. The outcome of the Second Native Title Case was by no means legally inevitable. In my view the WA Act was an intelligent, sincere and reasonable response at State level to Mabo [No.2]. The High Court could without difficulty have upheld it, as I hope I shall be able to demonstrate.

On the basis of the foregoing definition the WA Act abolished common law native title, to the extent that it might exist in that State, and created the statutory entitlements which it recites. It had to deal also, however, with the uncertainty surrounding titles (as opposed to native titles) granted on and after the RDA came into operation on 31 October, 1975. It did so by confirming the validity of all such titles and providing that if in any instance this had extinguished a native title without compensation, a claim for compensation could be made.

In dealing with the relation between these features of the WA Act and section 10(1) of the RDA the Court first set aside the alternative possibility of inconsistency with the NTA, making the curious observation that that was not in issue. What this passage appears to mean is that logically the RDA came first in the inconsistency stakes because, if the WA Act failed that test, there was no need to proceed to the NTA on the inconsistency point. The only NTA question would be whether the Commonwealth had power to enact all or any part of it in the first place.

Let me now analyse section 10(1) of the RDA, abbreviating the references to people of any race, colour or national or ethnic origin simply to the people of any race. The subsection starts by hypothesising the existence of a law of the Commonwealth, a State or a Territory. This law has the effect of preventing the people of one race from enjoying a right to the same extent as the people of another race.

Being a common lawyer I have always had difficulty in understanding as a practical matter the concept of a right which is not a legal right. It is for this reason that I have never grasped the relevance of the insight, which we owe to the majority in Mabo [No.1], that the rights with which section 10(1) is concerned are not confined to legal rights but encompass also human rights. The consequence of that is said to be that, when deciding whether the law hypothesised by the subsection has the effect of limiting the enjoyment of a right by one race as against its enjoyment by another, we must look to substance and not mere form.

This is a familiar judicial concept but none the less vague for that.

As soon as I read it I look for the imminent arrival of suspect reasoning. In this respect the Second Native Title Case did not disappoint me. Having hypothesised its law, section 10(1) goes on to say that, notwithstanding anything in it, the people of the disadvantaged race should enjoy the right in question to the same extent as the other race. What could this mean in terms of native title? Surely a straightforward analysis would say that, by reason of Mabo [No.2], native title has placed one race, the Aboriginal race, in a position of advantage over everyone else in the matter of enjoyment of interests in land. This is a situation to which section 10(1) can, at the very least, have no application. As things stood immediately after Mabo [No.2] the Aboriginal race had acquired a common law right which, by definition, no one else could enjoy. This was not in itself contrary to section 10(1), because that provision is directed to legislatures, but it was certainly contrary to the intention of section 10(1), and indeed of the RDA as a whole.

The logical consequence of this was that any Australian State or Territory legislature had power to abolish native title without running foul of section 10(1). Subject to any relevant constitutional limitation on its powers, it was also open to the Commonwealth to legislate to confirm or enlarge native title rights without regard to section 10(1).

The later statute would have displaced the RDA to the extent of any incompatibility between them.

The WA Act did not merely abolish native title. On the contrary, it reproduced it in a statutory form, the object of which was to bring a potentially chaotic land title situation under proper governmental control in a manner not inconsistent with the principles of Mabo [No.2]. On the face of things, therefore, there should have been no question of inconsistency with the RDA.

The High Court in the Second Native Title Case avoided this straightforward conclusion by a simple device which might in a less dignified context be described as moving the goalposts. The right in question for the purposes of section 10(1), it now appeared, was not the legal right to enjoy entitlements to property but the human right to do the same thing. That meant, by some step in the reasoning which continues to elude me, that each and every right to enjoy an

entitlement to property should be as unfettered as every other such right. Hence a right to enjoy native title should be co-extensive with all other rights to enjoy title in land.

From this position it was not hard to find provisions of the WA Act which could be plausibly said to place a more restrictive limitation on the enjoyment of native title than existed for other forms of title.

Two immediate comments are in order. The first is that since the Court was not comparing like with like (native title bearing no serious resemblance to any other form of title), the exercise, although prolonged, was not difficult. Secondly, this part of the judgment displays a notable attention to statutory detail at the expense of what some might have thought the substance of the matter.

Observe what has gone on here. There is a perfectly rational argument, not to mention common sense if that ever plays a part in race relations, that the WA statute comes nowhere near inconsistency with the RDA. Conscious, no doubt, of the need to deal with that argument, but being unable to meet it in its own terms, the Court retreats into a non-legal, indeed mystical, concept of human rights. It then uses that concept to create a kind of supra-legal criterion of what amounts to equal enjoyment of property rights.

That in turn entrenches for the foreseeable future a land title regime which is highly and undeniably discriminatory on a racial basis. The justification for this dismal progression is that the non-Aboriginal component of the population, which is nearly all of us, must atone for alleged wrongs committed by none of us. That sentiment too departs from justice, let alone law, and finds its home in judicial mysticism.

An interesting feature of this aspect of the Second Native Title Case is that it bears an eerie resemblance to the High Court decision on 5 April, 1995 by a 4:l majority in what has become known as the Teoh Case: Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh (1995). The majority held that before a Commonwealth decision-maker acts adversely to a person in contravention of an international obligation binding on Australia, the decision-maker must give that person an opportunity to be heard on why the international obligation should be adhered to. That was held to apply even where neither party was aware of the international obligation.

Teoh startled everyone because it clearly gave an instrument of international law a degree of direct operation in Australia without its having been enacted by Parliament as domestic law. The degree of operation is admittedly limited, but that is hardly the point. Ironically the federal Government, which has been more gung ho than any previous government about using external affairs as a source of domestic legislative power, took great fright and is now putting a bill through Parliament which it hopes will nullify the decision. I suspect that it would have been less alarmed had the case not involved its own bureaucracy.

As it happens, the High Court, if given the opportunity, may well come to the Commonwealth's rescue. McHugh J. delivered a strong and cogent dissent, Mason CJ has now retired and Brennan CJ, Dawson and Gummow JJ. are thought unlikely to support the decision, so that a full Court of seven may well reverse it.

McHugh J. pointed out, among other things, that the doctrine of legitimate expectation on which the majority judgments were based (in this case an expectation that Commonwealth decision-makers would observe Australia's international obligations), could not arise from international law because the injunctions of international law are directed to the international community, not to members of national communities. There is also something other-worldly about the notion of legitimate expectations where the person concerned is unaware of the critical fact.

The reason why I make reference to Teoh in the present context is that by its treatment of inconsistency in the Second Native Title Case, as indeed in Mabo [No.1] in 1988 also, the High Court did very much what it has just done again in Teoh, only less obviously. By going back to the Convention on which the RDA is based in order to extract from it a supra-legal concept of human rights which in some mysterious way reversed the plain meaning and effect of a provision of a domestic statute, the Court gave the Convention, an instrument of international law, an area of direct operation in domestic law.

In the native title context, of course, this was widely accepted as a right and proper thing to do. Far from unsettling the Commonwealth bureaucracy, it resulted in a lot more jobs for them and proved yet again that the famous Yes Minister television series was a masterpiece of verisimilitude.

Returning then to the Second Native Title Case, the conclusion at which the Court arrived on inconsistency was that the WA Act was wholly inoperative by reason of section 10(1) of the RDA. An interesting little quirk of the way in which the High Court has interpreted and applied section 109 of the Constitution is that, although the section says that the inconsistent State statute shall be "invalid" to the extent of the inconsistency, it has always been treated as if it said "inoperative". The significance is that if the relevant Commonwealth statute is repealed, the State statute revives. This produces the irony that if a future federal government were to repeal, or in relevant ways modify, the RDA and the NTA, the WA Act would at once become not only operative but the most enlightened native title legislation in the country. That would be an appropriate political memorial to a Premier who happens to have an adopted Aboriginal daughter and undoubtedly knows a great deal more about the realities of Aboriginal problems than his largely academic and dogmatic critics. The major remaining features of the judgment in the Second Native Title Case are perhaps of greater interest to constitutional lawyers than others, so I will content myself with summarising them.

They covered the questions whether the NTA was within the power of the Commonwealth, under section 51(xxvi) of the Constitution, to legislate with respect to the people of any race for whom it is deemed necessary to make special laws; and if so, whether the NTA nevertheless made so great an intrusion into the power of the States to govern themselves, with particular reference to Western Australia, as to be invalid by reason of implied constitutional limitations.

The States went nowhere along either of these lines. At least under section 51(xxvi) the Court confirmed that the power could validly operate to the disadvantage of the relevant race as well as to its advantage, as for example where for some reason that race was regarded as a menace. No challenge was made to the rule that Parliament is the proper body to decide whether a special law under section 51(xxvi) is necessary. Constitutionally this is clearly right because it is Parliament which decides whether to legislate about anything.

Leaving aside inconsistency questions, the NTA was not an attempt to control the exercise by the States of their legislative powers. It was simply a comprehensive exercise by the Commonwealth of one of its own legislative powers, together with the regulatory consequences. Neither did the NTA amount to an unconstitutional interference with the management by the States of their land management and related policies. In a distinctly lofty fashion the Court dismissed Western Australia's impressive demonstration of the degree of interference involved as illustrating merely that performing some of its functions would become more difficult. That was not the same thing as becoming impossible. The one win that the States had brings me particular personal satisfaction, as I shall shortly explain. It also embodied an important constitutional issue, although not one that attracted attention in the surrounding stormy context. When the NTA was

passing through Parliament in December, 1993 I suggested to S.E.K. Hulme, QC, with whom I was briefed, that the proposed section 12 would be clearly invalid. He was kind enough to agree and we duly made this view known.

A question was asked and the Acting Solicitor-General of the Commonwealth, Dennis Rose, QC, in a short advice written under great pressure, assured Parliament that the provision was clearly valid.

It was therefore a source of boundless gratification when I discovered in due course that the High Court had decided that section 12 of the NTA was the only flaw in an otherwise peerless Act. I am on very good terms with Dennis Rose, whom I have known for two or three decades, but there is no room for sentiment in these matters.

What section 12 said was this: "Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth." An innocuous sentence you may think, and you may well be right, but one pregnant with constitutional significance nevertheless.

There is nothing wrong with the Parliament passing an Act, pursuant to one of its enumerated legislative powers, which refers to a specific text which is not part of a Commonwealth statute and declares that henceforth that text shall be a law of the Commonwealth. The text referred to becomes the legislative content of the Act. The fault with section 12 was that the common law is not a text. It is a series of declarations by the courts of what the law is.

The declarations frequently change by reason of successful appeals to a higher court, by modification of a previous declaration or by outright overruling of what the law was previously said to be.

If the common law had the force of an Act of the Australian Parliament, which is what the term "law of the Commonwealth" means, every time a court altered the common law it would be legislating, which it cannot constitutionally do. That was enough to dispose of section 12, but for good measure the High Court added that in any event the section did not fall within either the race power or the external affairs power.

The immediate response in business circles to the Second Native Title Case was to congratulate the High Court on having clarified the situation. Actually the Court has not clarified very much. We know that the WA Act is inoperative for inconsistency with the RDA, but the price of that information is thorough obfuscation of what section 10(1) of the RDA means. We know also that unless legislation intervenes after a change of government, native title is here to stay in an extreme and complex form, most of the nuts and bolts of which remain obscure. We know that even Dawson J. has now given up, deeply though he believes that the Mabo decisions were both legally and morally wrong. That is about all we know.

So what of the future? I mentioned earlier the hypocritical criticism directed at Premier Court as soon as the judgments in the Second Native Title Case were handed down. He was accused of wasting public money. No-one seems to think that the hugely greater expenditure of public money by the Commonwealth on Mr Keating's peculiar version of law reform might be a waste. That is not going to stop in a hurry.

Vast amounts have been poured into Aboriginal affairs organisations over the years. Much of it has disappeared without trace and without any noticeable improvement in the conditions of the Aborigines it was meant to benefit. Anyone who doubts these observations would do well to read the article "Black Money" by Trevor Sykes and Joanna Doyle in the March, 1995 issue of the unfortunately now defunct Australian Business Monthly. Now the nation has to gear up for the

astronomical sums which are going to disappear into the sprawling Mabo bureaucracy, probably for decades to come.

What the exercise is supposed to be all about is reconciliation. I have no idea how you measure reconciliation. What seems to me to have happened so far has been an enormous land grab, which is scarcely surprising. So far as the courts are concerned, none of the claims made has been successful thus far, but that fails to take into account the considerable pressure to cut a deal outside the courts. In some quarters there is also pressure to amend the NTA to reduce even further the capacity of leasehold title to extinguish native title.

Entirely foreseeably, and foreseen, the land grab has been accompanied by much talk of Aboriginal independence in one form or another. I suspect that this owes more to an emerging Australian version of a cargo cult mentality than anything else: only ask and you shall be given, complete with yet another layer of bureaucracy run by compliant nominees of your friendly neighbourhood strong man.

To an increasing extent, Aboriginal interest groups squabble with each other over the loot while the genuinely needy at the bottom of the heap stay there. Apparently even the Meriam Islanders are muttering about secession. The picture is not inspiring and reconciliation does not seem to be flourishing. Yet as these predictable, and predicted, consequences of the retrospective guilt industry inexorably unfold, the most obvious way of improving the situation in the general public interest has been discarded by the federal Opposition.

This would be to repeal, or at least radically amend, the NTA. Repeal would not in itself abolish native title. Whether that consequence would follow from amending the NTA would depend on the nature of the amendments, but in light of the High Court's latest observations on section 51(xxvi) of the Constitution there is ample legislative power to modify the present situation. What is missing is the political will. With a federal election looming, one can understand the Opposition not wanting to make a charitable donation to the Government's scare campaign at this stage. Nevertheless I hope they return to the matter if and when they are in a position to do so.

Encouraging though it would be to see the NTA repealed, or at least repealed so far as any future claims are concerned, it has to be recognised that that would be only the first of two steps which need to be taken to return to a self-respecting basis for race relations in this country. The second is to repeal the RDA as well. I have always regarded that statute, and still do, as a self-inflicted national insult enacted only to court cheap popularity on the international stage, a governmental attitude to which Australia is becoming all too addicted.

You will have gathered that in the present context I am not exactly optimistic about the future. Nevertheless let me end by discerning one faint ray of hope. At the moment the politics of native title is a dismal story of inverted racism, phoney guilt, distorted history, devalued land titles, extreme Commonwealth centralism and non-accountability for public money. Surely a program like this has minimal staying power, however much sentimental rhetoric is poured out by Mr Keating, Mr Tickner, assorted academics and clerics and a handful of self-identifying representatives of 1.5 per cent of the population, most of whom do not seem to accept them.

What we need is not sentimental rhetoric but a sharp dose of common sense, which in the present context means a return to a sense of proportion unfettered by international grandstanding.

Chapter Six

The New Official Religion : The Hindmarsh Island and La Trobe Affairs

Austin Gough

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

Australian public life has always had a sceptical and sardonic flavour, which has preserved us from many political mistakes, and it is a measure of the change in the intellectual climate during the Keating era that we seem to have lost some of this collective sense of the ridiculous.

Ten or fifteen years ago the cartoonists would have had a field day with the spectacle of a federal minister making policy decisions on the basis of magical secrets in sealed envelopes; they might have seen the possibilities of applying this technique to other areas of government, such as the Budget Speech. More recently there has been the clash of cultures in which a court has ordered the archaeology department of La Trobe University to close down an entire program of research, and to hand over a scientifically valuable collection of non-human remains from the Ice Age period to the Tasmanian Aboriginal Land Council.

Both the Hindmarsh Island enquiry and the La Trobe affair are excellent examples of the way courts and royal commissions are being asked to resolve questions that really belong to history, science and economics. It may be only a matter of time before the High Court is asked to declare the law of diminishing returns invalid, or to grant an injunction against the law of gravity.

The current problems of archaeology and anthropology are instructive and significant for everyone living in cultures, like our own, founded on Western intellectual traditions.

In spite of all that can be said about the damage that indigenous societies have sustained by being forced into contact with Western civilisation, there is no doubt that archaeology, largely a Western phenomenon, has been immensely valuable to indigenous people in various parts of the world by revealing the long perspectives of their prehistory, and by rescuing the physical remains of ancient cultures from complete oblivion.

Australian archaeologists have behaved with exemplary sensitivity, and until about fifteen years ago they had very good relations with the Aboriginal people in the regions they were investigating. But they are now having to repeat the disturbing experience of American archaeologists: there has been an explosion of indigenous militancy, in which even the smallest--and sometimes previously undefined ----ethnic groups are defiantly asserting their authenticity and are rejecting everything, including science and history, that can be interpreted as part of an exploitative white colonial culture.

In the USA and in Australia, archaeologists excavating sites where the material is 10,000 or even 25,000 years old have been assailed by zealots claiming to be the traditional custodians of the remains--accompanied by teams of lawyers and anthropologists--who have laid down conditions, for example that nothing be touched by women archaeologists, and have demanded that both human remains and non-human detritus be "returned" to them for reburial in secret locations or for ceremonial destruction. Generally speaking, the claimants have had no discernible relationship to the excavated material: in one celebrated American case the remains from a very old site in West Virginia had to be "handed back" to activists claiming to represent the Native American Nation, coming from various parts of the USA, some from as far away as Seattle.1

In Australia almost every university and museum collection is having to deal with demands to hand over archaeological material, the classic instance being the Kow Swamp collection formerly in the Museum of Victoria. Kow Swamp was a unique archaeological site, subsequently written up in scholarly journals all over the world; the material was between 9,000 and l5,000 years old and included remains of two distinct physical types of early humans, throwing further light on the successive migrations into the Australian continent. In 1990, without consulting the archaeologists who had been studying the material, or the Museum itself, the State Government handed over the Kow Swamp collection to the Echuca Aboriginal Collective, who claimed to be the "traditional custodians": they announced their intention of reburying it in a secret location, a curious interpretation of the duties of a custodian.

Each case in North America and Australia has followed an almost ritual pattern. First, the assertion that indigenous representatives own the remote past, and are quite within their rights to forbid access to it by archaeologists and palaeontologists. Second, a series of breathtakingly tendentious demands for all excavated material to be given up, "returned", "handed back". Third, ritual abuse of the discipline of archaeology itself as a form of colonial exploitation, an appropriation ----virtually a theft ----of indigenous culture, and scientifically worthless.

The recent court order to La Trobe was celebrated by the winning side with triumphalist media appearances and letters to the editor, including one from Michael Mansell ridiculing "the mad scientists at La Trobe".2 And the ritual end to each case is an embarrassed retreat by the archaeologists. Most people in the discipline depend on permission from indigenous organisations to continue their field work; their nervousness is reflected in the 1990 code of practice of the World Archaeological Congress, adopted in a stronger and more explicit form by the Australian Archaeological Association in 1991, virtually conceding ownership of the prehistoric past by modern Native Americans and Australian Aborigines.3

However, a few distinguished archaeologists who are either retired or no longer need permits have put forward a very powerful case for the defence of their discipline--an important case because it amounts to a defence of the entire Western scientific tradition.

Australian archaeology is world archaeology, because the early humans who reached the Australian continent were part of a great migration outwards into the furthest corners of the world, at a time when races were not at all as clearly differentiated as they are in the modern period. The people of the Pleistocene epoch were, simply, early humans, and form part of the spectrum from the first hominids in Kenya to the first farmers in the Middle East, the West European cave painters, and the bog people of Scandinavia.

There is world-wide interest in any discoveries from South-East Asia and Australia, because they produce evidence of how humans adapted to very different circumstances, and especially how they coped with the Ice Age in the Southern Hemisphere. The remains enable scientists to study very early nutrition, health, stature, life expectancy and population density; how the earliest stone and wood technology developed, how seed plants were used, how communities were organised, and how religions began. As Professor John Mulvaney has remarked, very ancient remains at a distance of 400 or even 1,200 generations "assume a world significance, meaningful to persons of any race", and should be available to scientists from Europe, China, Canada or Latin America who are qualified to study them.4

So there is an obvious question: if material is to be "handed back" ----handed back to whom? The humans whose remains have been excavated in the past 70 years were the predecessors of modern Aborigines, but not necessarily the direct ancestors of any particular Aboriginal group. Hardly a single one of the famous archaeological sites in Australia was known to modern

Aborigines, much less venerated, before white archaeologists discovered them. The sites had been forgotten and deserted for as much as ten or twenty thousand years. Since that time there have been vast climatic and geographical changes. The retreat of the ice in the Southern Hemisphere, for example, caused sweeping population movements as the rising sea levels forced many coastal tribes into the interior, displacing and supplanting others; and there were renewed migrations from the north, with evidence of widespread warfare. The odds are astronomical against any present-day Aborigines in southern Australia having a close genetic affinity with the people who inhabited their regions 20,000 years earlier.

There has always been a sensible attitude towards the remains of the remote past in Europe, where every town and village is built over layer upon layer of graves and buried artefacts; it is recognised that important discoveries cannot belong exclusively to the people who happen to live in that area. In the case of the man whose body emerged from the ice in the Austrian Alps where it had been preserved for 5,000 years, nobody suggested that he could be studied only by Austrians. The residents of the Lascaux region in France could hardly insist on destroying the Aurignacian cave paintings to suit their present religious beliefs. Archaeology is in a more mature phase in Europe: the digs are not usually picketed by representatives of the Aurignacian community, or by lawyers acting for the Beaker Folk.

The question of reburial or destruction raises a fundamental point about scientific method. If material is preserved under good conditions, it becomes possible to take advantage of each new scientific technique as it appears. Carbon dating first became available in the 1950s; then, in turn, pollen analysis, dendrochronology, fluorine analysis, thermoluminescence, and improvements in palaeopathology; and, most recently, very advanced techniques for extracting DNA from bone and other human samples. Each advance allows the scientist to draw more secure inferences from the material, especially regarding health, disease, and family relationships among early humans.

It is absurd that one generation of activists ----who don't by any means represent unanimous Aboriginal opinion ----should claim the right to hide or destroy material that would be of immense value to future generations of Australians of all racial backgrounds. Some archaeologists have supported the rather desperate solution of establishing "keeping places" under Aboriginal control, where ancient Australian material can be preserved until there has been time to train Aboriginal scientists who would have the exclusive right to work on it. Despite the excellent intentions behind this, I can't help seeing it as a surrender to the Volkisch romanticism that was so influential in the early twentieth century and has reappeared in the crypto-discipline of Black Studies in the USA--the idea that certain fields of science should be reserved for members of a designated race, and that only the Folk can study the Folk.

In any case, the "keeping place" project has run into vehement opposition from the stricter zealots. This arises from a confluence of two streams of thought: the wave of indigenous militancy has coincided with the loss of cultural confidence on the part of a great many Western intellectuals which, in particular, has led many anthropologists to embrace an extreme kind of post-modern relativism.

Anthropologists, with some distinguished exceptions, have always been inclined to take an uncritical view of indigenous societies as models of ancient wisdom and profound spirituality, by contrast to what they see as the shallow materialism, scientism, and general inadequacy and wrongness of Western civilisation. Their distrust of the West, a d,formation de metier, has made anthropologists very receptive to the post-modern doctrine that it is time to abandon our search for objective truth and our reliance on scientific methods of enquiry.

In university social science departments it appears self-evident that statements are neither true nor false: each statement, each scientifically ascertained "fact", is no more than a hegemonic gesture shaped by gender and race. What matters is simply which hegemonic gesture is going to win. Science is a discourse of Western or Westernising males, a narrative which, as post-modernists say, must not be privileged over other narratives. The American anthropologist Tyler said in 1987 that his discipline was now in a post-scientific age: "scientific thought is now an archaic mode of consciousness surviving for a while yet in a degraded form".5

So, a geologist may have an explanation of how the Olga Ranges in Central Australia were formed; that is his narrative, but an indigenous story-teller will have another narrative for the same event. The first is hegemonic, colonialist, exploitative ----in a word, white; the second is authentic, non-white, perhaps ancient, and therefore ought to prevail. The role of the anthropologist is to be an advocate and a "facilitator" to allow the non-Western narrative to be heard, and to become the dominant discourse. The Hindmarsh Island enquiry heard two lapidary statements of post-modern doctrine earlier this month: from one anthropologist witness, "the truth is not a useful notion anthropologically"; and from another, "in cross-cultural exchanges truth cannot be defined".

To return, then, to the idea of training Aboriginal scientists, the activists are strongly influenced by current anthropological trends and are annoyed by any proposal that might appear to endorse Western scientific method. In the words of Ros Langford, "we are not sure that training Aborigines within a white value science is desirable".7

White archaeology has already produced a series of highly unwelcome narratives about successive migrations from the north, the shifting and replacement of populations over time, and evolutionary change taking place amongst the earliest inhabitants; and the more that scientific techniques improve, the more intensively the ancient remains are studied, the more unwelcome these findings are likely to become. They collide head-on with the creationist legend that Aborigines have always inhabited this continent and have preserved an unchanging culture. The president of the Victorian Koorie Information Centre said in 1990:

"Your archaeological theories about our origins are just hypotheses supported by very meagre evidence ... we believe we were created here, a belief supported by our religion (and) our history which goes back to the creation time ..."8

For much the same reason, there may be very little enthusiasm for preserving ancient remains for DNA testing to establish genetic affinities, even if the research is to be done by Aboriginal scientists. Archaeologists have said bitterly, although very quietly, that Aboriginal leaders have been quick to accept the fact of 40,000 years of human occupation, established by white archaeologists, because of its iconic political effect, but feel free to reject the science of archaeology itself, along with history and the entire "white concept of knowledge".9

The archaeologists find themselves almost in the position of Darwin after the publication of The Origin of Species, having to defend the results of scientific enquiry against the onslaught of zealous evangelicals. They can expect no help from the courts, which are at sea in this peculiar sphere of jurisprudence and rely heavily on the advice of anthropologists and radical lawyers; court decisions in the USA and Australia have gone overwhelmingly against the interests of archaeology.

This is the point, then, at which the intervention of governments could shape events one way or the other. Is it possible to envisage some future federal cabinet including a Minister for the Western Intellectual Tradition? (It could be a promotion for the present Minister for Aboriginal

Affairs.) We might imagine the Minister's office issuing an inaugural press statement, perhaps along the following lines:

"We are all, in our different ways, descended from people of the Ice Ages; but modern Australians are also the heirs of an old and very rich tradition of rational scientific enquiry, running from Aristotle, Euclid and Pythagoras to Newton, Descartes and Einstein; and from the builders of the Roman aqueducts to Brunel, Edison and Marie Curie.

"We agree that the benefits of modern medicine, sanitation, communications, transport and education should be shared fully with indigenous Australians; but the Western tradition is able to provide these benefits precisely because it has emancipated itself, after a long struggle, from superstitious explanations of cause and effect, from ignorance of history, and from religious taboos on whole areas of thought. With all its failures and uncertainties, it is based on scientific method, repeatable and verifiable experiment, an acceptance of the notion of falsifiability and the need to be persuaded by fresh evidence and, above all, on freedom of enquiry."

I don't suppose that we will ever read such a communiqu, from this utopian ministry. Both here and in North America, governments feel that they have to be seen to give way on the symbolic issue of indigenous culture, because of the need to conciliate the romantic left who are so influential in the universities, the schools, and the media. At the same time, they can't very well state the real theoretical basis for their symbolic retreat. The federal Government is not likely to set the parliamentary draughtsmen to work on a bill saying frankly:

"Be it enacted that science is a hegemonic male discourse which must not be privileged over the discourses, narratives and texts arising from indigenous cultures; and be it further enacted that archaeology is a colonialist act of cultural appropriation ..."

What, then, are governments to say? The legislative solution to this problem has been so ingenious and adroit that one can't help admiring it. Governments have simply agreed, or pretended, to accept that the entire question is not political at all but falls into the unassailable category of religious belief.

Looking at the legislative acts of particular relevance to the Hindmarsh Island and La Trobe affairs, the Aboriginal and Torres Strait Islanders Heritage Protection Act (1984) and the Heritage Protection Amendment Act (1987), which incorporate both Commonwealth and Victorian legislation; the South Australian Aboriginal Heritage Act (1988); and the Tasmanian Aboriginal Relics Act (1975), there is a clear progression in language from the 1975 Tasmanian Act which speaks of preserving relics from being damaged, destroyed or sold, to the Acts of the 1980s where the language becomes concerned with "religious significance", "spiritual affiliations", and preserving remains and relics from "desecration". The Shorter Oxford Dictionary defines "desecrate" as "to take away its sacred character from something: to treat as not sacred".

Having established that we are dealing not simply with historical arguments but with religion, the Commonwealth/Victorian and South Australian Acts go on to concede a whole series of tendentious and question-begging propositions. All statements by indigenous activists about the past, and about the control of the past, are treated as being in essence religious beliefs and therefore exempt from criticism or discussion.

The Acts blur the distinction between remains dating from the last 200 years, and extremely ancient remains uncovered by archaeologists. All remains are flatly "Aboriginal remains"; Aborigines who live in the vicinity and who claim "social, economic or spiritual affiliations with the site or object" are assumed, however implausibly, to have direct ancestral links and become the traditional custodians, with a right to have any excavated material "returned" to them.10

There is no obligation to prove a right to speak for the wishes of people who lived 10,000 or 20,000 years earlier. The 1987 Heritage Protection Amendment Act brushes aside all objections and reservations relating to Victoria, for example, with a firm declaration that "the Aboriginal people ... are the rightful owners of their heritage and should be given responsibility for its future control".11

Enthusiasts with a passionate sense of racial identity can confer sacredness on the non-human detritus of occupation by early humans, which may not have had any sacred character in the first place. The Tasmanian Act protects "any object ... that bears signs of the activities of the original inhabitants", and all the State and Commonwealth Acts lay down penalties of fines and imprisonment for disregarding the sacredness of ancient material. Mr Tickner announced recently that he was studying even tougher laws to strengthen "the protection of sites from desecration".

In effect, the Aboriginal Heritage Acts have established an official religion, composed of an amalgam of many regional traditions, all of them evolving and changing as traditions do; and at the same time they have revived the moribund offence of blasphemy for infringements of the officially endorsed beliefs.13

It has already been remarked, notably by Hugh Morgan, that no other religious beliefs enjoy this degree of protection. Governments may have to take notice of Christian or Islamic opinion on some matters, but the force of this opinion usually depends on voting strength; it is a long time since anyone has suggested that governments should legislate to give Catholic or Muslim theologians, for example, a legal right to veto some particular field of scientific research.

After the Racial Vilification Act it may become more difficult to argue against the extreme cultural relativism of the activists. But a more serious difficulty may arise from the idea of a special preamble to the Constitution recognising the ancient occupation of the Australian continent. This can be done in such a way as to promote reconciliation ----or in such a way as to postpone reconciliation indefinitely. There is an obvious danger that by embodying a racial division in the Constitution, and at the same time recognising its separate flag and separate legal status, we will make the division permanent; and in the light of the Hindmarsh Island and La Trobe affairs, there is the further possibility that a preamble to the Constitution might strengthen the impression that the two cultures are not only separate, but incompatible. That is something we should work to prevent.

Endnotes :

1. Clement W. Meighan, The burial of American archaeology, Academic Questions, Summer 1993, vol.vi (3), 9-19.

2. The Australian, 4 October, 1995. Deprecating remarks about archaeology have come also from radical and feminist archaeologists: e.g. Sandra Bowdler, Repainting Australian rock art, Antiquity, lxii, 523.

3. Iain Davidson, Notes for a code of ethics .., Australian Archaeology, No.xxxii, June, 1991.

4. DJ.Mulvaney, Reflections on the Murray Black collection, Australian Natural History, xxiii (1), Winter 1989.

5. Quoted by S.P.Reyna, Literary anthropology and the case against science, Man, N.S. xxix, 1994, 555. See also the important article by Adam Kuper, Culture, identity and the project of a cosmopolitan anthropology, in ibid., 537-554.

6. Kuper, op.cit., 542. Dr Deane Fergie was appointed as a "facilitator" with regard to the Hindmarsh Island women's secrets.

7. R.Langford, Our heritage, your playground, Australian Archaeology, No.xvi.
8. Robbie Thorpe, quoted in Antiquity, lxv (1991), 19.
9. Marcia Langton, quoted by D.J.Mulvaney, Museums, anthropologists and indigenous peoples, Bulletin of the Conference of Museum Anthropologists, xxiii, April, 1994, 6.
10. S.A. Aboriginal Heritage Act (1988), definition of "traditional owner"; cf. Aboriginal and Torres Strait Islanders Heritage Protection Act (1984), sections 20-21.
11. Discussed by Mulvaney in Antiquity, lxv (1991), 14.
12. The Mercury, 21 October, 1995.
13. Tasmanian Aboriginal Relics Act (1975): Definitions: 3 (b).

Chapter Seven

Does Australia Need a Bill of Rights?

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

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

Nowadays bills of rights are to be found in most democratic countries in the world--like Aids, one might add, if one were tempted to be frivolous and to adapt Malcolm Williamson's remark about the music of Andrew Lloyd Webber. Does Australia lack something which is essential to modern democracy, or have we simply resisted the temptation to follow fashion for fashion's sake? Of course, nowadays nobody would be prepared to express agreement with Bentham's view that to talk of human rights is "rhetorical nonsense".1 There is general agreement that there are human rights and freedoms which are fundamental and which it is the duty of the state to protect. It is much more difficult to find agreement as to what those rights and freedoms are. As I shall endeavour to show, it would be unduly optimistic to think that a bill of rights would necessarily provide the protection for which its advocates hope, and it would be foolish to ignore that the enactment of a bill of rights entails disadvantages which may well outweigh its benefits.

I should at the outset make clear what I mean by a bill of rights. In the strict sense, a bill of rights is a constitutional provision which protects individual rights from infringement by the legislature or the executive. It prevails over, and cannot be amended by, ordinary legislation. In that way it detracts from the sovereignty of the Parliament. Since a bill of rights is enforceable by the courts, it becomes the province of the courts, and not of the Parliament, to determine the nature and extent of the protected rights.

There may of course be variants of this model. For example, it may be provided, as it is in the Canadian Charter of Rights and Freedoms, that the Parliament may expressly declare in an Act of Parliament that the Act shall operate notwithstanding some of the provisions of the Charter, and that an Act in respect of which such a declaration is made shall have the same operation as it would have had but for those provisions in the Charter. Also a bill of rights may be enacted as an ordinary statute which is not constitutionally entrenched. That has been done in New Zealand. As I shall later mention, the enactment of a bill of rights as an ordinary statute of the Commonwealth Parliament would be as effective against the States as a constitutional amendment, and would further tip the federal balance in Australia steeply against the States.

I should immediately make the concession that I am in favour of constitutional guarantees which protect fundamental institutions and basic political rights--provisions, for instance, which entrench the independence of the judiciary, the right to vote and the bicameral nature of the legislature. It is true that the criticisms which I am about to make of guarantees of other rights apply with equal force to guarantees of constitutional and political rights. However, it is essential for the protection of those rights that it should not be possible for a political party which happens to control the legislature, perhaps temporarily and by a small majority, to make a significant change to any element of the Constitution without first having obtained the approval of the people, expressed either by referendum or at an election at which the party expressly sought a mandate to make that change. The surest way of protecting the essential elements of the Constitution is by preventing the legislature from interfering with them by ordinary legislation.

There are, of course, some arguments in favour of the adoption of a bill of rights. Mr Frank Devine advanced some of those arguments at the initial meeting of this Society. Although Australia has been notable for its freedom and tolerance throughout a century which has seen the most appalling violations of human rights elsewhere (often in countries which themselves have adopted bills of rights) there is concern that Australian governments do sometimes infringe rights which may be regarded as fundamental. There is no doubt that the power of the bureaucracy has grown considerably, with the potential to neglect the rights of the individual. It is true that a bill of rights would enable the courts to invalidate some statutory provisions and executive actions which would fail the test of compliance with the highest standard of human rights. I am not at all sure, however, that a bill of rights would enable the courts to check the worst abuses of political and bureaucratic power. It is unlikely to prevent a political party which had secured the requisite majority in the Houses of Parliament from stacking the courts and the public service, or from engaging in ruinous commercial ventures, or from subverting the conventions of the Parliament itself.

It is sometimes argued in favour of a bill of rights that individuals and minority groups who can never muster a majority in Parliament will not have the political power to protect their liberties. I am not convinced that experience in Australia shows that minorities suffer in this way--indeed, minorities sometimes form pressure groups which seem to have excessive influence--but it is true that the possibility of the neglect of minority interests is one argument in favour of a bill of rights.

The advocates of a bill of rights often point to the examples set by the United States and Canada, although how a consideration of the constitutional developments in the latter country should be useful, except as a warning, I am not sure. In the United States the Bill of Rights is very highly valued and is constantly enforced by the courts. Nevertheless I very much doubt whether the citizens of that great nation enjoy a greater level of freedom than we do in Australia.

Indeed, I am reminded of a story which Sir Arthur Fadden used to tell of an incident which occurred when he was representing Australia at the celebrations held at the inauguration of a West African nation, formerly a colony of Great Britain, which had just received its independence. The United States Secretary of State, who was also there, said rather patronisingly to a black man whom he saw standing nearby, "You must be very proud to have been granted your freedom". To which the black man replied, "I aint got no freedom. I'm from Alabama".

The Bill of Rights did not seem to inhibit the activities of Huey Long, who ruled Louisiana in a way that put the worst of some of our former State Premiers in the shade, or Senator McCarthy, who destroyed the careers of many writers and actors by his inquisition into their opinions. Constitutional guarantees may provide some protection to human liberties, but in the end freedom depends on the willingness of a community to defend it.

The existence of a bill of rights requires the judges to decide questions of policy which in a democracy should be decided by the Parliament. The judges may persuade themselves that in deciding questions of that kind they are giving effect to the will of the majority of the people, or that they are acting in accordance with current social values. However, they have no reliable means of determining what is the will of the people, and the values to which they give effect must necessarily be their own.

If a judicial decision which has been made as to the effect of a constitutional guarantee proves to be inconvenient, costly or contrary to the public interest, it can be corrected only by an alteration to the Constitution (which in Australia is difficult to achieve) unless the court reverses its decision. Whether or not it is desirable, it is certainly not democratic that decisions on matters of

social and economic policy should be made by unelected judges who are not accountable for their decisions except to their own consciences.

One of the gravest objections to the constitutional entrenchment of human rights is that constitutional provisions of this kind can lead to results which restrict the power of the Parliament in ways that are unnecessary and undesirable as well as quite unpredictable. If a bill of rights is to be effective, some of the rights which it seeks to protect must necessarily be defined in fairly general terms. Experience shows that an apparently clear provision of a bill of rights can be given a meaning which was quite outside the contemplation of those who framed the provision. The cases on the Bill of Rights in the Constitution of the United States provide a myriad of examples.

One clause of that Bill of Rights forbids any State to "deprive any person of life, liberty or property without due process of law". This clause, when enacted, had the desirable object of forbidding such things as the execution or imprisonment of a person without due trial, or the seizing of property by military or other authorities without legal sanction. However, over a period of many years the Supreme Court of the United States held that the clause invalidated statutes which were designed to achieve such apparently beneficial results as limiting the working hours of employment, fixing minimum wages for women, restricting commerce in goods made by child labour, and preventing the use of substandard materials in manufacture.2 In 1937, in one of the shifts of opinion which have not been unusual on that Court, that view of the clause was rejected,3 and since then it has been held to have the effect, which was equally far from the original intention of those who framed it, of governing the extent to which the States can pass laws forbidding abortion.4

Another swing of opinion, almost manic in its intensity, has occurred on the Supreme Court in the interpretation of the provision which prevents any State from denying to any person the equal protection of the laws. At one time it was held that this provision did not invalidate laws which prevented black people from giving evidence in any case in which a white person was involved, or render unlawful the refusal of a State court to admit women to the Bar, and that it did not render unlawful State legislation which excluded blacks from railway carriages reserved for whites.5 Of course, all this has changed. Since then the provision has been held to require the racial desegregation of schools6 and, for that purpose, to authorise the compulsory busing of pupils (some of whom did not want to be bused) to schools (many of which did not wish to receive them).6

While one can understand the social aims of these decisions, it is surely an arguable question whether those who were bused against their will, and the communities who unwillingly were forced to receive them, received the equal protection of the law. That, however, is not the point, which is that the provision was given an operation which was unpredictable, and so opposed by one section of the public that it led to disorder in the streets.

Another provision of the United States Bill of Rights provides that "Congress shall make no law.....abridging the freedom of speech or of the press". No doubt this provision has been beneficial in allowing the media in the United States to operate with a degree of freedom which is envied by the media in many other countries. On the other hand, it has afforded protection to actions of the most trivial kind. It has required the Supreme Court to decide whether it is lawful to prevent a student from wearing long hair braided in the Indian fashion, or to make it an offence to display an article depicting the United States flag with marks or drawings on it.8

Perhaps the most absurd and unlikely operation of the constitutional guarantee of free speech was the decision of the Supreme Court that a zoning ordinance under which live entertainment

was not permitted in a particular area abridged the freedom of speech of a storekeeper who wished to install a device which, when a coin was inserted, allowed the customer to see a nude woman dancing.9

On the other hand, the provision has not always prevented serious invasions of free speech. The Court has upheld the conviction of persons who protested against American military intervention in Russia after the Bolshevik revolution, and of others who expressed left wing socialist views.10 I have already mentioned Senator McCarthy. The Bill of Rights gave no protection to the victims of the House Committee on Un-American Activities, and Senator McCarthy's Committee during that period of recent American history which Lillian Hellman has called "scoundrel time".

The approach of the courts in Australia to those few guarantees that are contained in our Constitution shows that it would be too much to hope that the interpretation which our courts would give to a constitutional bill of rights would be more predictable. The words of section 92 of our Constitution, which provide that trade, commerce and intercourse among the States shall be absolutely free, could hardly be written in plainer language, but they have given rise to persistent disagreement, and have eventually led the High Court to give them a meaning which was arrived at only by disregarding a multitude of previous decisions.11

Section 80, which requires indictable offences to be tried by jury, has been held to mean that State laws which allow the accused to elect to be tried by a judge alone, or which permit a jury to bring in a majority verdict, cannot be applied to a trial on indictment for an offence against Commonwealth law.12 I do not intend to suggest that these decisions were wrong, but it may be strongly argued that they have prevented the development of the law in ways which have proved successful in practice elsewhere, and which the Parliaments were entitled to regard as desirable or even necessary.

There is a real danger that the provisions of a bill of rights that may seem appropriate today may prove to be positively harmful tomorrow. The United States Constitution provides some striking examples. That Constitution guarantees trial by jury in suits at common law where the amount in controversy exceeds $20, and goes on to provide that jury decisions shall be appealed only in accordance with the rules of the common law. Quite apart from the fact that the figure mentioned is ridiculously inappropriate today, the provision has had the effect of preventing the abolition of trial by jury in cases at common law, and the further effect that the law governing appeals from juries is frozen in the form that it had in the eighteenth Century. The United States Constitution also guarantees the right to keep and bear arms, and it seems right to say that this provision has contributed to the culture of violence that is so harmful to American society.

There can be no doubt that if we were to adopt a bill of rights in Australia there would be strong pressure to include provisions which give effect to opinions which are fashionable today but which in future may be rejected as mistaken. Some of the draft bills of rights that have already been prepared include provisions which guarantee the right to freedom from discrimination, on grounds which include language, marital and parental status and religious, political or ethical belief. Those who so fervently wish to outlaw discrimination seem to give little weight to the fact that a law which forbids one person to discriminate against another necessarily interferes with the first person's freedom of choice. Not everyone in the past has believed that it is wrong to discriminate on grounds such as those mentioned, and in spite of the committed views which some persons hold today it is impossible to say whether the same beliefs will be held in fifty years time.

Some of those draft bills of rights include, in addition to provisions from which the Parliament cannot derogate, and provisions which may be over-ridden by express declaration, provisions

which are intended to be only directory. Those provisions, which are modelled on the International Convention on Economic, Social and Cultural Rights, declare that every Australian has the right to social security, to an adequate standard of living, to employment, to leisure, to education and to a clean environment and ecologically sustainable development. It would be simpler to provide that everyone has a right to live in Utopia.

Although provisions of this kind are not intended to be used to invalidate any legislative, executive or judicial acts which are inconsistent with them, any experienced lawyer will know that it would be by no means beyond the ability of the courts, when deciding cases, to take those statements of principle into account in various ways with unforeseeable consequences. The recent decision in the Minister of State for Immigration and Ethnic Affairs v. Teoh13 illustrates one way in which this might be done.

An attempt to mitigate the possibly inconvenient consequences of enacting a bill of rights was made in Canada by providing that the rights and freedoms guaranteed by the Charter "are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". A provision of this kind has some advantages, but it entails the disadvantage that it introduces an additional test--and a complicated one14--for the validity of the legislation.

The arguments which I have been discussing do not apply with the same force to a bill of rights which is enacted as an ordinary law by a State legislature which can amend or repeal it by ordinary legislation. However, such a law tends to be regarded as having some sort of superior status, and legislators appear reluctant to repeal or amend a bill of rights, even if they have power to do so, because of the political consequences. We have already seen a reluctance to interfere with the provisions of the Racial Discrimination Act 1975, which to some extent operates as a bill of rights.

It seems to me that it is much more satisfactory to define rights clearly and precisely by detailed legislation rather than to guarantee so-called fundamental rights which are expressed in general terms. For example, a draft prepared by the Constitutional Commission in 1988, and a draft recently prepared by the Law Council of Australia for discussion (which I should add has not yet been adopted by the Law Council), both contain the statement, "Every person has the right to be secure against unreasonable search or seizure". This provision, like a similar provision in the United States Constitution, expresses a principle with which everyone would agree, but it leaves it entirely to the courts to decide in what circumstances a search or seizure should be held to be unreasonable. There have been innumerable decisions on the subject in the United States. Provisions of that kind may be compared with the detailed provisions of the Crimes Act and the Crimes (Search Warrants and Powers of Arrest) Act 1994, passed by the Commonwealth Parliament, which define in considerable detail the powers and duties of officers conducting a search. The comparative certainty of a law of that kind is to be preferred to a general statement of principle, however fine it may sound.

One disadvantage of a bill of rights, whether or not it is constitutionally entrenched, is that the courts in enforcing it tend to concentrate on the technical question whether there has been an infringement of a guaranteed right, rather than on the question of what justice requires in the circumstances. For example, in New Zealand a driver was convicted when a breath test showed an excess of alcohol in the blood, but the conviction was quashed because he had not been warned of his right to consult a lawyer.15 In the United States a person accused of murder told the police that he could take them to where the murdered child was buried, and he did so and the body was found, but the conviction was quashed because the accused had not been informed of

his right to consult counsel.16 In Ireland one Trimbole was detained for the purposes of extraditing him to Australia on numerous charges, some of which were of the utmost seriousness, but the court ordered his release on the ground that his detention was tainted because his original arrest was invalidly made.17 He could lawfully have been rearrested immediately, but he escaped before that could be done. Cases like this suggest that adherence to the letter of the law has been preferred to substantial justice.

It is notable that in the United States the reform of criminal procedure has lagged behind that of other developed common law countries. It may be that the existence of a Bill of Rights has lulled lawyers and politicians into the belief that the protection afforded by a Bill of Rights is adequate and that reform in other respects is unnecessary. Speaking generally--for the position varies from State to State--an accused person there is not entitled to see the evidence on which the grand jury committed him or her for trial. The judge sums up only on the law, so that the jury is given no assistance to sort out a set of facts which may be very complicated. Appeal courts cannot quash a conviction on the ground that the evidence was unsafe and unsatisfactory.

Reliance on the Bill of Rights does not make up for these deficiencies. On the contrary, it has the effect of dividing and prolonging criminal proceedings, and is one of the causes why convicted persons may spend up to twenty years on death row--something which itself is regarded as a serious breach of human rights.18 Moreover, the concentration on the infringement of rights creates a climate in which litigation flourishes and responsibilities are neglected. We see that tendency in Australia also.

A bill of rights, particularly one that has constitutional status, would tend to have the result that judges would be appointed not so much for their legal ability as for their political or ideological attitudes. When a court is empowered to give a final decision on important matters of social policy there is a great temptation to appoint judges whose views on those questions of policy are views of which the executive government approves. The circumstances surrounding some judicial appointments in the United States show that it has often been impossible to resist this temptation. Thus one of the essentials of a free society--an independent judiciary--tends to be weakened when the judges are given what virtually amounts to political power.

As I have already suggested, some of the objections that may be raised to a constitutional bill of rights do not have the same weight when the bill of rights is contained in a statute which the legislature is free to amend. However, a bill of rights enacted by the Commonwealth Parliament would be in a significantly different situation from a bill of rights enacted by a State Parliament. The power of the Commonwealth Parliament to enact a statute of that kind would largely depend on its power to make laws with respect to external affairs. The Commonwealth Parliament could not amend a statute containing a bill of rights which was passed to give effect to a treaty, if to do so meant that the statute no longer conformed to the treaty or went beyond it or was inconsistent with it. In other words, although the Commonwealth Parliament could repeal such a statute, its power to amend it would be limited.

There is an even more important reason why a bill of rights contained in a Commonwealth statute would have a vastly different significance from a bill of rights contained in a State statute. Under the Constitution, any State legislation which was inconsistent with a Commonwealth bill of rights would be inoperative. A Common- wealth bill of rights would be likely to have the effect of imposing extensive restrictions on the exercise of State rights and powers. However much inconvenience or damage might be shown to result, a State could not remedy the situation. We have already seen how State legislation, which would have extinguished the native title successfully claimed by the plaintiffs in Mabo v. Queensland (No.2)19 was held by a majority of

4 to 3, to be inconsistent with the Racial Discrimination Act.20 If the Commonwealth Parliament enacted a bill of rights in the wide terms of some of the existing drafts, the effect on the States would be serious indeed.

The very name--a bill of rights--has a persuasive sound. No advertising firm could suggest a more attractive title for a statute. Some persons advocate the enactment of a bill of rights because they are concerned to protect rights which everyone would support in principle, but which they fear governments are inclined to whittle away. Their concerns may be valid, but they may under-estimate the disadvantages which may flow from the declaration of rights in general terms. Others admit that they see a bill of rights as a means of transforming public attitudes, and of allowing the courts to rush in to effect social and economic change where Parliaments fear to tread.

There are others, I am sure, who rightly perceive that a bill of rights, enacted by the Commonwealth Parliament, would enhance central power. Anyone who wishes to preserve the position and powers of the States from further attrition will see the need to resist the enactment of such a law by the Commonwealth Parliament.

Endnotes :

1. Jeremy Bentham, Anarchical Fallacies, cited in De Smith, The New Commonwealth and its Constitution (1964), p.164.
2. Lochner v. N.Y. (1905) 198 U.S.45; Adkins v. Children's Hospital (1923) 261 U.S.525; Hamer v. Dagenhart (1918) 247 U.S.251; Weaver v. Palmer Bros. (1926) 270 U.S.402.
3. West Coast Hotel Co. v. Parish (1937) 300 U.S.379.
4. Roe v. Wade (1973) 410 U.S.113; Webster v. Reproductive Health Services (1989) 492 U.S.490.
5. Blyew v. U.S. (1872) 80 U.S.581; Bradwell v. The State (1873) 83 U.S. 130; Plessey v. Ferguson (1896) 163 U.S.537.
6. Brown v. Board of Education (1954) 347 U.S.483.
7. Swann v. Charlotte-Mecklenburg Board of Education (1971) 402 U.S.1; Columbus Board of Education v. Penick (1979) 443 U.S.449.
8. New Rider v. Board of Education (1974) 414 U.S.1097; Spence v. Washington (1974) 418 U.S.405.
9. Schad v. Mt. Ephraim (1981) 452 U.S.61.
10. Abrams v. United States (1919) 250 U.S.616; Debs v. U.S. (1919) 249 U.S.211; Gitlow v. N.Y. (1925) 268 U.S.652.
11. Cole v. Whitfield (1988) 165 CLR.360.
12. Brown v. The Queen (1986) 160 CLR.171; Cheatle v. The Queen (1993) 177 CLR.541.
13. (1995) 69 ALJR 423.
14. The Queen v. Oakes (1986) 26 DLR (4th) 200.
15. M.O.T. v. Noort (1992) 3 NZLR 260.
16. Brewer v. Williams (1977) 430 U.S.387. He was convicted on other evidence after a new trial; Nix v. Williams (1984) 81 Law Ed. (2nd) 377.
17. The State (Trimbole) v. Governor of Mountjoy Prison (1985) IR 550.
18. Soering v. U.K. (1989) 11 EHRR 439; noted 68 ALJ 453; and see Pratt v. Attorney-General for Jamaica (l994) 2 A.C.1.
19. (1992) 175 CLR 1.
20. Mabo v. Queensland (1988) 166 CLR.186.

Chapter Eight

Constitutional Mania : A Preliminary Diagnosis

Kenneth Minogue

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

For my money, the most interesting question in politics is: what is happening?--or more exactly: what is really happening? It is, of course, a doomed question, because we cannot really cheat the historian of his advantage of hindsight. We are at any given moment locked into our own point of view and dominated by our own preoccupations. Much is concealed from us, often deliberately, and it will emerge in future time. Consequences, of course, are crucial bits of evidence about the real character of actions, and some consequences take a long time to emerge. Indeed, it often takes time before they can be actually recognised as consequences.

So my question is: what is going on? And my answer is that we are increasingly falling into the grip of what I have called "constitutional mania." My next problem as a philosopher must be, if not to define this term, at least to make tolerably clear what I am talking about. Constitutional mania is the belief that society can be reformed by the agency of rules. Yet we already have an activity which orders and sometimes even reforms society: it is called politics. What is this new thing ?

Constitutional mania is the elevation of political issues to the constitutional sphere. It is the proposal to reform not merely society but politics itself by not merely passing but entrenching laws that will guarantee a good society.

There are many forms of constitutional mania, as we shall see, but before I discuss them, let me explain what a mania is. The term is a psychiatric technicality, and I am being rhetorical in appropriating it for polemic. A mania is an abnormal mood shift or excitement which afflicts people in the grip of an idea. You might compare it to the way in which eighteenth Century sceptics used the term "enthusiasm" (which means possessed by gods) to denigrate the religious fanatics of the previous Century. Constitutional mania is a similar type of unnatural excitement which characterises some people on the fringes of public life. They talk of a new Constitution the way speculators talk of new goldfields, or inventors promote the perpetual motion machine.

Their excitement results from the conviction that a new Constitution will solve a problem--indeed, all problems. Politics, for example, is an endless succession of unsatisfactory compromises negotiated by slightly dubious people acting on distinctly shaky principles. It has failed to deliver what we all know is possible, namely a decent, egalitarian, environment-protecting and compassionate society. If only we had a set of entrenched rules to exclude a schedule of admitted evils, then the business of public life would become mere detail, and could safely be left to the democratic representatives in our Parliaments.

Constitutional mania is to be found at all levels of contemporary life. In every profession, the discovery of any moral dereliction is followed by calls for a new code of ethics to guide practitioners. In New South Wales there was a recent call for a new code of ethics to guide even judges, and in Britain, the Nolan Committee has just been considering the issue of how Members of Parliament should disport themselves.

Then there is the mushroom growth of mission statements. How did we ever get on without them? They have spread from business to universities, which are now lumbered with banal declarations of commitment to scholarship, teaching and pushing back the frontiers of knowledge. Poor Trinity College, Cambridge! It has carried off more Nobel prizes than France. How, then, did it manage without having a mission? Now it will have to gird its loins: colleges all over the world have constitutionalised their purposes and will be in hot pursuit of its glory. Dons have been particular victims of this mania, because in the wake of mission statements come Teaching Audit committees and the equivalent of men in white coats with stop watches to control their teaching practices.

Which of us is now not subject to "guidelines"? These are codification in civvies. And most famous of all is political correctness, a heroic attempt to constitutionalise good manners, at least as they affect relations between the various "minorities" which alone are recognised in ideological discourse. Constitutional mania is one aspect of a drive deeply entrenched in our civilisation, and it is becoming increasingly visible.

The vanguard of the movement is, of course, in the realm of the Constitution itself. A Bill of Rights (so it is argued) would put our liberties beyond challenge, and guarantee equal rights for all. Oppressive majorities would be blocked from enacting the unenlightened prejudices of the moment. Sexism and racism, along with religious and ethnic intolerance, could be banished from public life. And judges would guard us against an overmighty executive on the basis of explicit rational principles (rather like natural law), instead of having to tease out the substance of political probity from formal principles of justice. And yet--as well as protection, there must be the power to achieve all good things: government must also be enabled to override obstructive special interests so that it could protect the environment and enforce our international obligations. This kind of Constitution is a way of having your cake and eating it too.

It might be thought that many of these objects might be achieved by the ordinary politics of the democratic process, but that thought would reveal a misunderstanding of what is at issue. Like revolutionaries, with whom they have much in common, constitutional maniacs (as we may conveniently call them) want comprehensive and irreversible reform. We now at last know what is right. The problem is merely to enact it.

Constitutional mania is thus a principle of salvation by fiat--let it be done! It is first cousin to New Year's resolutions, and these generally last about as long as Bosnian cease-fires used to. Salvation will follow from an act of collective will, henceforth backed by the majesty of law. And if you ask me who actually thinks in this way, I may cite those in Australia who see in the year 2000 an occasion for replacing the present "horse and buggy" Constitution by something more appropriate to the 21st Century. They are usually republicans, and their ambitions are combined with a conviction that a new Constitution will inaugurate a new era, a positive transvaluation of values, in Australia.

In Britain, Charter 88 and other organisations seek to sweep away the whole British ancien regime which has unaccountably stumbled from the thirteenth into the twentieth Century. The voting system, the House of Lords, the Monarchy, the Church of England and much else is up for grabs. In New Zealand, they have already been at it, and Canada has known little else for the last few decades. George Bush sought re-election in 1992 on the basis of no less than four proposals for constitutional reform. And to see the process at its most creative and ebullient, just focus on the European Community.

So, as with influenza, there's a lot of it about. Let me now make one or two observations which may help us in our diagnostic labours.

The first is that this line of thought responds to a widespread disillusion with politics in our time. It seeks to move the guarantees of our freedom away from democracy into the field of--law ! Law, of all things !

It is said that generals are always prepared for the last war, and it does not take a cynic to think that this is an untimely move. A couple of generations ago the ideas of law on the one hand, and justice on the other could be conjoined without obvious hilarity, but those days are gone. Instead, lawyers find themselves forever embroiled in political controversy, and suspected of covert legislative ambition. We haven't quite reached Jack Cade's position--"Let's kill all the lawyers !", but their popular status today is only marginally superior to that of astrologers and alchemists.

My second observation is that, in believing that agreement on hotly contested political issues would happen more easily in a constitutional convention than in the rough and tumble of politics itself, constitutional maniacs would seem to be showing themselves, as they say in the vernacular, several sandwiches short of a picnic.

Every day some new right is added to an endless schedule of desirabilities--desirable at least for some people. In Britain, the disabled recently complained that, while wheelchair facilities were provided at the Queen's Gallery, they had to be arranged in advance and were not always on tap, thus violating an important right: "the right to spontaneity." My favourite new right is called "top freedom" and originates in North America. It is the right of women to strip to the waist in public places on hot days just as men (or at least some men) do. Last year in Waterloo, Ontario, in what must have been incontestably the most popular protest movement in history, hundreds of topless ladies marched through the streets in support of this new right, and no constitutional maniac would regard the new Australian Constitution as satisfactory, we may guess, unless it were recognised in one form or other.

There are rights galore, then, and much disagreement about them--it is the substance of our politics. Surely what will happen in any constitutional convention is that such disagreement will re-surface. Worse, indeed: it will appear in even more violent forms, as has happened in Canada, because constitutionality raises the stakes. Lose a battle here, and you will be out in the cold for generations to come.

It is true indeed that constitutional maniacs are perhaps dotty in this way, but they are mad north-north-west, as Hamlet was. They can perhaps tell a hawk from a handsaw.1 For they may well calculate that the populace at large will be confused about the impact of new laws, especially if these are packaged as motherhood propositions.

Those of us who have watched the European Community grow, or even reflected on the way international committees work, which are remote from the discipline of low level democratic repudiation, can be in no doubt that this new constitutionalism might well benefit from the confusing remoteness and technical obfuscation of abstract rules. Such has certainly been the European experience. Margaret Thatcher, with a good nose for these things and quite a lot of expert advice, has admitted that she did not understand what the treaty on the Single Market committed Britain to, and British politicians, from John Major down, have made statements about the Maastricht Treaty which directly contradict its actual effect. The current formula for political success is democratic talk and dictatorial practice. Bonapartism is alive and well, and set for a grand career in the next century.

A third observation: The flight from politics into constitutionalism parallels other powerful tendencies in our society.

Consider the welfare state. In giving expression to the idea of social justice, such a state creates a set of rights--to an income whether we work or not, to a pension, guaranteed medical help, the costs of schooling, sometimes even to an actual job.

The underlying principle to which a welfare state tends to move is that human needs are the domain of the state, while the individual is a creature free to indulge desires and whims to whatever extent the state, with its onerous responsibility for needs, thinks suitable. The individual steadily loses the basic human right to ruin his life by indulging in one or other of the seven deadly sins, because even as he falls, he will find himself being picked up, dusted off and saved by agents of the state. Most states these days have, after all, a policy on suicide.

With modern taxation policies, we are approaching the point where what a person earns is to be treated as pocket money, and is to be disposed of on hedonistic rather than on morally responsible principles, for consequences have been abolished as much as possible. Most recently, the key development has been state provision of compensation for victims of crime, with consequent disputes on such profound questions as whether parents should get the same compensation for a murdered child as children should for the loss of a parental breadwinner.

Constitutional mania works to produce the same effect in politics. A Constitution which spelled out everything important in the constitution of society would begin to reduce politics to the level of household or local government. It would merely be concerned with detail. National sovereignty would have disappeared into an apparatus of rules. (We might observe in passing that to destroy national sovereignty, with which democracy is inextricably linked, is a widespread ambition in modern public discussion.) What this point reveals is something obvious and fundamental about all constitutionalism: that it responds to mistrust. The reason rules have to be entrenched is that other people cannot be trusted not to change them, or misuse them.

Now where, previously, have we heard of this reduction of politics to administration? Where else but in Lenin's ambition of "every cook a politician." What else is it, indeed, but the withering away of the state? In this, as in other respects, constitutional mania reveals the same dynamics as those of revolution. As Burke remarked of the French:

"I confess to you, Sir, I never liked this continual talk of resistance, and revolution, or the practice of making the extreme medicine of the constitution its daily bread: it renders the habit of society dangerously valetudinary: ..."2

My discussion of constitutional mania is everywhere haunted by medical metaphors, and when I cite Burke using them, I ought to make the point even more explicit. Constitutional mania is a form of hypochondria, and constantly changing the rules, which amounts to becoming in the most literal sense rule-governed, is taking a kind of medicine every time we feel a draught.

We might, I suppose, take a more lenient view of constitutional mania, and regard it merely as an expression of contemporary hyperbole. As we know, today everything is hype, and every public sentence must be diluted by scepticism lest it poisons us. When we hear today of a "superstar", we know that it is probably someone we've never heard of, and who certainly has but a fraction of the talent we enjoyed in the mere stars of yesteryear. Growing up in an age of hyperbole, we reach for the most fundamental thing there is, and in politics, it's the Constitution--Superdocument, instead of Superman, the last appeal. And in this atmosphere, the solution to every problem consists less in playing the game better than in changing the rules. This is why the amount of regulation in our society--even as judged by the crude measure of pages generated by legislatures--keeps on increasing.

My view is that constitutional mania is profoundly reactionary, but before I come to consider this, let me ask: how did this thing come about ?

Any serious answer would take us deep into the realms of social inquiry, but for my purposes, we may simply suggest that as an idea, constitutional mania derives from a misplaced analogy between government and production. Making anything can be analysed into a series of steps leading to an outcome. In the area of production, this rationalist understanding of a practice has generated in our time the idea of quality control, which is now part of the environment of international trade.

If we transfer this idea to politics, we have an account of government as the practice of producing order by the use of rules. To every evil, there must correspond a rule to correct it. How do we "produce", as it were, safety ?--by rules of procedure. Efficiency can be seen as the result of rules which, if adhered to, would diminish or remove the random inattentions and contingencies of human actions. The idea irresistibly develops that even such elusive features of human life as moral probity can be "produced" if only we formulate the rules and enforce them. We see this in the area of road safety. Instead of relying upon personal responsibility as backed by the sanctions of law, we switch to enforcing rules to determine the conditions which are believed to determine death and injury on the roads--such as the amount of alcohol in the blood, or the use of seat belts.

Thinking along these lines, it becomes irresistible to regard the whole business of government as the production of desirable conditions of society, and this is understood most commonly in negative terms: that is, how do we prevent poverty, sexism, heteronormativity, racism, prejudice, smoking, dogs fouling the streets, and whatever else happens to rise to the top of the moral agenda? By constitutionalising it, of course! I have suggested that the explanation of this development lies in a misplaced analogy. Why is it misplaced? Again, the reason is complicated, but we may say several things.

Firstly: production of artefacts can be regular and reliable because nature has a uniformity that people don't. People are different. For one thing, they have variable impulses. For another, they have a kind of rat-like cunning which, if they choose, can defeat the best laid regulations of authority. As Walter Mattau once remarked in a Billy Wilder movie: "What they forget when they build a better mousetrap is that the mice get smarter too."

Perhaps we need a more high-toned example of the way in which rules may be defeated. Let us resort to Tacitus. He is dealing with the Romans, a notably legalistic people, even in their decadence. He tells us that under Tiberius, Libo was accused of treason on the basis of a paper containing mysterious signs attached to the names of Caesars and Senators. "...it was decided that his slaves who recognised the writing should be examined by torture. As an ancient statute of the Senate forbade such inquiry in a case affecting a master's life, Tiberius, with his cleverness in devising new law, ordered Libo's slaves to be sold to the State-agent, so that without an infringement of the Senate's decree, Libo might be tried on the evidence."3

Libo, we learn, committed suicide.

One is reminded of W.C Fields, who was once found reading a copy of the Bible. "Well, Fields, this is not the sort of thing I expected to find you doing", remarked his friend. "I'm looking for a loophole," replied Fields. There is no known technology for closing loopholes--except, of course, knives and guns.

I return to my fundamental question: What is going on in all this?

Remember Bacon. The project of the Organon was to put all mens' wits on a level. It was in other words to equalise talent. It was to break down the barrier by which some people are clever and successful, while others are not very clever and not very successful. More profoundly, the point is to introduce a new conception of a human being.

In the individualistic world in which we live, individuals of varying talents and desires associate with each other under rules, and society is the outcome, changing with each generation as people change. But here in Bacon, and in constitutional mania, we have a simpler conception of a human being as an embodied skill. It is a dualistic doctrine in which each of us is firstly a body, an organism, the mere raw material of what we do, on the one hand, and on the other hand as part of society (to which we owe everything), the carrier of a skill. The link between the body and the skill is called education, or more properly, training, one of the key concepts of this new conception of human life. And a skill is something that fits into some "national strategy", and it results from current forms of technology and social organisation.

The inhabitants of this new world resemble the young man who was persuaded by the arguments for philosophical determinism, and said :

"Damn !
To think that I am what I am,
A creature that moves
In predestinate grooves,
Not even a bus but a tram."

This is a conception of human life which is above all hostile to individual choice and responsibility, because it reflects a "top down" understanding of how society ought to be ordered. The contrast is with modern societies in which the shape of life responds to the changing skills and dispositions of the people themselves.

Ultimately it is logic which allows us to penetrate the real character of political enthusiasms. Revolution, for example, was a paradoxical idea because it claimed to represent change, but envisaged after its success an entirely changeless world. Its employment of the rhetoric of change and adventure turned out to be a sham. Revolution was essentially a concealed project of arresting change. Philosophers soon twigged this fact. Unfortunately, ordinary human beings had to live through several generations of death and misery before they found it out. Again, revolutionary doctrines attack the moral beliefs of existing societies in ways which assume that their own moral beliefs had escaped the relativism which they preached about the present. This logic of revolution applies no less to constitutional mania.

It assumes on the one hand that Constitutions must be changed in every generation in order to fit the society they govern--which subverts the whole idea of Constitutions. Or, it assumes that earlier Constitutions were based on false beliefs, but that now we have attained moral truth and can base our new Constitution on that. Either the incoherence of believing that Constitutions are both political, and yet also above the game of politics, or dogmatism: that is what the constitutional maniac offers us.

It is, perhaps, the change-fork which is more fundamental. For revolutions are in fact profoundly reactionary adventures in institution-creation which take for granted the beliefs and technology of the moment--as the unfortunate Russians and Chinese learned when they were subjected to the model of the conveyor belt production line, just about the moment when more advanced societies, where the dynamic of change remained alive, were abandoning it. In constitutional mania, we have son of revolution. It is profoundly dangerous for a civilisation such as our own, whose only chance of survival in a dangerous world consists in living on its wits.

Endnotes :

1. Hamlet, Act II, Scene 2.
2. Everyman edition of the Reflections, p.60.

3. Tacitus, Annals, 2. 32.

Chapter Nine

Citizen Initiated Referendums : Adjunct or Antithesis of Constitutional Government?

Harry Evans

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

"It is better that a good measure should fail than that a bad one should be allowed to pass." 1

Citizen initiated referendums (CIR) is a generic term for related schemes whereby questions of public policy, particularly proposed laws, are to be submitted to the vote of all the electors in referendums, and thereby determined, at the request of a specified number of electors. These schemes are distinguished from the submission of questions to referendums by Parliaments or governments, in that referendums would occur automatically at the request of the specified number of electors, without governments or parliaments having any choice in the matter, and the questions in issue would be finally determined by the electors' votes, without any further action by Parliaments or governments to put the decisions into effect.

These schemes are regarded by their supporters as self-evidently good because they provide a more democratic method of decision-making, but they are also regarded as a renovation of the system of government.2

The purpose of this paper is to examine the relationship between CIR and constitutional government, that is, government conducted in accordance with constitutional rules and subject to constitutional safeguards against the misuse of government power.

For the purpose of this analysis, it is necessary to draw distinctions which were once clear but which have become obscured, and to refer to a debate which was decisively concluded in the past two centuries. The distinction is between, and the debate was about, democracy and representative government.

Democracy and Representative Government

In that past debate terms were used which then had reasonably clear and precise meanings, but which have since been largely emptied of meaning by misuse. One such term is "democracy", which has lost all established meaning through its appropriation by every type of regime known in modern times. The term once referred to a specific and distinct type of government, a system in which public policy issues, and particularly proposed legislation, are determined by the entire body of the citizens voting on such issues; in effect, government by referendums. This system was contrasted with representative government, whereby decisions are made by the chosen representatives of the citizens elected to institutions adapted for that purpose. There was then no misunderstanding that representative government is the same thing as democracy.

This distinction being clearly understood, there was in the 18th and 19th Centuries a debate about the relative merits of the two systems, a debate which was resolved decisively in favour of representative government. In order to analyse properly the relationship between CIR and constitutional government, it is necessary to revisit that debate.

Representative government was preferred in theory and flourished in practice because it was thought to have three great advantages.

In the first place, it was thought that democracy could be practised only with a relatively small number of people in a relatively small territory. Only representative government made possible popular participation in decision-making over wide territories and among large populations.3

This consideration may be regarded as being removed by developments in communications technology. As that technology develops, it will become possible for referendums to be held more often and on a larger number of questions. The spread of CIR itself following its introduction in Switzerland in the last century is largely a product of communications technology developments which have already occurred, beginning with mass circulation newspapers and progressing to television and networked computers.

Be that as it may, the other advantages which were urged for representative government as against democracy may still be regarded as worthy of consideration.

The second perceived advantage of representative government was that representation provided a quality control "filter" through which decisions were passed, and which allowed informed deliberation to be brought to bear on those decisions. It was thought that the people would elect as their representatives persons of above-average abilities and moral standards. Assembled in the legislature, these representatives would be able to deliberate, that is, to hear and be influenced by different arguments and to have their views formed and informed by that process. Such deliberation is difficult, if not impossible, with large numbers of people. Representative assemblies would thereby crystallise the informed view of the people rather than an uninformed view lacking the benefit of deliberation. The deliberations of the representatives would also help to form and inform the views of the citizens. Those views would ultimately prevail, but only when enhanced by the deliberations of their representatives.

"[It is the function of representative government] to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves ...

"As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers, so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?"4

The third and most important consideration was that representative government makes constitutional government possible, that is, it provides the opportunity to subject government to constitutional safeguards.

The essence of constitutional government is that every authority should be forced to consider "whether its acts will be concurred in by another constituted authority", and should not be "exposed to the corrupting influence of undivided power, even for the space of a single year".5

If decisions are made directly by the whole people, how are any safeguards to be imposed on those decisions? What body can intervene between the decision-makers, the whole people, and the people who are affected by the decisions?6 If, however, the people delegate their powers to representative bodies, they can delegate different powers to different bodies and allow each to be a check on, and a balance of, the other. The allocation of different powers to different institutions is the primary form of constitutional safeguard, and where governments are chosen by the

electors can be rationalised only on the theory that the electors, as a safeguard, do not entrust all their powers to any one institution.7

The primary form of the division of power in modern times has been the allocation of the executive, legislative and judicial powers to different bodies. Older than this device, however, is the division of the legislative power between two assemblies.

One of the prevailing themes of political thought throughout the ages has been that the legislative power, the power to make laws, the most fundamental and dominant power in the state, is too awesome and dangerous to be exercised by one body of persons alone, and should be divided between a number of duly constituted authorities, so that the consent of more than one body is necessary before the law can be changed.

The division of the legislature, by the institution of bicameralism, is almost a first deduction from the premise of representation :

"The history of mankind clearly shews, that it is dangerous to entrust the supreme power in the hands of one man. The same source of knowledge proves that it is not only inconvenient, but dangerous to liberty, for the people of a large community to attempt to exercise in person the supreme authority. Hence arises the necessity that the people should act by their representatives; but this method, so necessary for the support of civil liberty, is an improvement of modern times. Liberty however is not so well secured as it ought to be, when the supreme power is lodged in one body of representatives. There ought to be two branches of the legislature that the one may be a check upon the other. It is difficult for the people at large to know when the supreme power is verging towards abuse, and to apply the proper remedy. But if the government be properly balanced, it will possess a renovating principle, by which it will be able to right itself."8

Bicameralism, the requirement for proposed laws to be passed by two differently constituted assemblies, is not possible with democracy, that is, law-making by the whole people.

The other form of division of power which provides a safeguard is federalism. Apart from allowing the union of self-governing states without abolishing their separate governments, federalism has always been seen as a congenial method of dividing power consistent with popular control of the separate governments.9 Federalism and bicameralism as safeguards come together in the institutional device, adopted by the Australian Constitution-makers, of having the States in a federation represented in proportion to population in one house of the legislature and equally in the other.

All long-lasting systems of representative government employ these constitutional safeguards, the separation of the three categories of power, bicameralism and federalism, to a greater or less extent.

The question which arises is the effect of CIR on these constitutional safeguards.

CIR and Constitutional Safeguards

It is necessary to distinguish between two forms of CIR. The first, called the legislative petition referendum, or people's veto, involves submitting to a referendum, at the demand of a certain percentage of the electorate, a law already passed by the legislature, so that the electorate has an opportunity to veto that law.10 This amounts to adding another procedure to the process for making legislation, so that any law has another potential filter to pass before it can be enacted. This device may thus be regarded as an adjunct to constitutional government, because it adds an additional check or safeguard on the exercise of the legislative power. In effect it involves giving the electorate a veto over the works of politicians. Like all vetos, it may be used to frustrate good laws as well as foil bad ones, but that drawback applies equally to every division of legislative power, and every constitutional safeguard ever devised.

The other type of CIR, however, has exactly the opposite effect. Called the legislative initiative, it provides that any proposed law may be put to a referendum, and thereby enacted, at the request of a prescribed percentage of the electorate. This device of legislation by referendum by-passes the constitutional safeguards on the legislative power, and potentially places that power in one place, the electorate at large, defeating any division of the legislative power.

Either of these types of CIR can be used for changes to the Constitution as well as the enactment of ordinary legislation. In effect, Australia already has an enhanced version of the first kind of CIR for constitutional changes, because all proposed amendments of the Constitution must be put to a referendum. It is of great significance that built into this requirement for endorsement of constitutional change by referendum is a constitutional safeguard of a federalist character: proposed amendments, to be carried, must achieve the special majority specified by section 128 of the Constitution, majorities in a majority of States as well as an overall majority. This precedent for constitutional safeguards in referendums is referred to again below.

The second type of CIR applied to constitutional amendment would involve a proposed amendment being carried by a majority of the electors (whether a simple majority or a special majority) without the consent of the representative legislature.

It may therefore be concluded that the first type of CIR supports constitutional government by providing an additional safeguard on the law-making power, while the second type undermines constitutional government by bypassing such safeguards. In particular, the second type defeats the division of the law-making power.

It may be argued that bad laws may be passed however the legislature is constituted, and that no Constitution is proof against unwise legislation. The point is, however, that if such a law is passed by one house of a legislature, it may be rejected by another house of a different composition, particularly if there has been time for some sober consideration between the two deliberations and the two votes, or it may be significantly amended to cure its defects in the course of its passage through the legislature. A law enacted by referendum passes through only one process, one stage and one vote, with no opportunity for amendment, and with a terrible finality about it.

This is the basic problem with direct democracy: there can be no appeal from the whole people. It is this unique finality of the plebiscite which has made it so useful to dictators since the example was so well established by the two Napoleons, whose steps to absolute power were endorsed by referendums.

- The enactment of laws by referendum must be distinguished from the popular election of office-holders; one can with consistency oppose the former and support the latter, especially as the election of different office-holders gives them the authority and independence to provide a check upon each other. In other words, direct election of office-holders can support constitutional government, government with safeguards. Direct enactment of laws by popular vote can undermine safeguards.

A large part of the case for CIR, however, rests on the failure of representative institutions and the consequent failure of primary constitutional safeguards.

Failure of Representative Institutions

It is now very difficult to maintain the two classical arguments for representative government which have been expounded above.

In relation to a representative assembly providing a filter, interposing deliberation between the people and decision-making, recent developments may be regarded as having destroyed this advantage. The rise of the professional politician, displacing the true representative who seeks

the votes of the electors only after some other career, has notoriously resulted in legislators of somewhat lower calibre and standards than the average of the general population. To a person whose sole and life-long career is politics, winning elections rather than carrying out policies becomes the dominating goal. Partly because of professional politicians, legislatures have become less and less representative. The narrow bases and factional character of political parties are notorious and obvious in Australia. Intense party discipline, also most obvious in Australia, severely reduces the capacity of the representative to reflect the views of his or her constituents. As for deliberation, parliamentary debate has notoriously been supplanted by partisan shouting matches, blackguarding of opponents and scaremongering.

In relation to constitutional safeguards, party discipline has largely destroyed the legislature as such a safeguard. The theory of the British system of cabinet or responsible government was that the lower house would control the ministry; now the ministry, indeed, in Australia in recent times, the Prime Minister, controls the lower house. Bicameralism provides a partial safeguard only so long as the electorate returns different party majorities in upper houses, and the operation of such houses depends on parties which vote as blocs.

In these circumstances it is not surprising that CIR, even of the second type, is regarded as a corrective to degenerated parliamentary government. Part of the case for CIR is that the conventional legislative mechanism has become clogged by "debris", particularly in the shape of disciplined and factionalised political parties, and is therefore not able to function as it should. It is also said that conventional political procedures are too easily captured by vested interests and pressure groups, which may be defeated by referendums.11 Even the most uninformed votes by the people may produce better decisions than those of their representatives.

It is difficult to refute this case for CIR. Some counter-arguments may be raised. It may be argued that institutions which are not working should be reformed rather than bypassed, particularly as, in their reformed state, they would provide constitutional safeguards which CIR of the second type lacks. The substitution of a single-stage, simple process of legislating for a multi-stage, complex process may make it more likely that misconceived proposals, including those propounded by special interests, will slip through. Moreover, while it may justly be observed that parliamentary reform has proved slow and difficult, particularly as it involves breaking the stranglehold of the ministry over Parliament, the promotion of CIR as a remedy may have the effect of further retarding parliamentary reform. Such considerations, however, do not get around the fact that representative institutions do not achieve their stated advantages.

Effect on Judicial Review

One aspect of the effect of CIR on constitutional government which should be considered, and which has not been considered to any extent in the literature, is its effect on judicial review.

The phenomenon of increasing "judicial activism" is a feature of all systems of representative government, and has been particularly conspicuous in Australia in recent times. The High Court, not waiting for the conclusion of public debate over a bill of rights, has found implied rights in the Australian Constitution, and has expressed a willingness to change long established law when policy considerations appear to the judges so to require.12 The courts generally are more ready to review and overturn decisions of the political branches of government. This expanding judicial review is explicitly stated by judges to be a response to the failure of legislatures as safeguards of the rights of citizens.13

Where ordinary laws are enacted by referendum, it is still possible for such laws to be held unconstitutional by the judiciary. This has occurred in a few cases in the United States. For example, a referendum-approved State law to guarantee the right of persons to sell real estate to

whomsoever they chose, i.e., to override fair housing laws aimed at racial integration, was overturned because it violated the equal protection provision of the US Constitution.14 In such cases the electors of one State are restrained from infringing minority rights contrary to the federal Constitution. The absence of CIR at the federal level avoids conflicts between the judiciary and the whole people.

In Australia the Constitution imposes fewer explicit limitations on law-making. The stated case for the discovery of implied rights is the protection of citizens against governments. It may be more difficult for the courts here to presume to protect the citizens against themselves, especially if CIR operates at the national level. Australian courts may then be much more reluctant to overturn referendum-enacted laws, as distinct from parliamentary enactments, on the basis of their inconsistency with the Constitution. Such action by the courts, particularly in relation to a law overwhelmingly carried at referendum, would be likely to generate considerable hostility to judicial review. Judicial restraint in respect of referendum-made laws would also protect parliamentary enactments, as the courts could hardly apply different standards of interpretation to the two categories of laws. In relation to amendments of the Constitution carried by CIR, judicial review of course provides no remedy, unless the judges interpret amendments contrary to their apparent intention, a course also perilous on which to embark.

CIR in Australia could, therefore, in the long run put a stop to judicial activism. On one view, this would be a good thing, as it would prevent unelected and unrepresentative judges usurping the legislative power. It could be regarded as restoring the constitutional balance upset by "judicial imperialism".15 It would probably not affect normal judicial interpretation and development of laws, as distinct from the discovery of hitherto hidden implications.

The adoption of a bill of rights, in conjunction with CIR, would give judicial activism a new charter. It could also lead to a head-on clash between the electors and the judges.

Building Deliberation and Safeguards into CIR

This analysis leaves a problem with the second type of CIR in relation to its effect on constitutional government, and the problem is still that set out in the classic case for representative government: the lack of deliberation and of constitutional safeguards in CIR.

The case against CIR as a means of enacting laws is basically the same today, although it is not often clearly articulated because it would be seen, correctly, as a criticism of democracy. The case is essentially that it would provide an opportunity for arbitrary and oppressive laws to be directly and finally enacted by an electorate seized by an "irregular passion", laws such as capital punishment for drug dealers, which would not be carried by a representative assembly, much less by two representative assemblies sharing the legislative power, and which, like prohibition in the United States, would be repealed only after great national travail and great damage to society. Referendums would provide a means for the speedy adoption of drastic and deceptively simple solutions to problems which lend themselves to appeals to such solutions. The situation is exacerbated by the replacement of newspapers as the primary source of information by television, with its "five second grabs" and its reliance on visual images.16

One of the few explicit statements of this case was made by a former Australian Senator at a seminar on the ailments of the current political system:

"I say that the most insane, unhelpful and destructive change that could be made to the nature of the Australian political culture is to introduce citizen initiated referenda (CIR). In my judgment, that would lead to the community permanently debating those issues which are the most socially divisive and difficult. There will always be CIR on the death penalty, abortion law reform and on those issues which are the most socially destructive and divisive, which should not, in my view,

be worked out through that process. The real political issues, not the personal ones, will always be determined in a CIR framework on the basis that the largest quotient of ignorance will prevail."17

This may be regarded as a case against democracy, but it is also a case for representative government and the deliberation and safeguards which it should provide.

The question therefore arises whether it is possible to build provisions for deliberation and constitutional safeguards into CIR of the second type.

The introduction of CIR in Australia would require a constitutional amendment, whether CIR is to be applied only to ordinary legislation or to legislation and constitutional amendment.

The empowering amendment of the Constitution could entrench provisions of the following kind:

_ A requirement that proposed laws be published in draft form with a minimum period for public comment, so that any defects in drafting could be detected and amendments could be suggested.

- A high threshold for proposed laws to be put to referendum, particularly a reasonably large number of electors' signatures on the document which would trigger the referendum, and minimum and maximum periods of time for signatures to be gathered. This would guard against factious and hasty proposals, and would prevent the electorate being so badgered by a proposal over a long period that the required number would sign simply to be rid of the matter. For CIR at the federal level, there could also be a requirement for signatures to be geographically distributed across the States (see below).
- A minimum time for debate between the completion of the triggering document and the voting in the referendum, to allow the opportunity for public deliberation.
- The distribution to all electors of Yes and No cases, as with referendums under the current section 128 of the Constitution, to bring the arguments before the voter.
- The allocation of broadcast time and space in the print media for panel debates, with questions by representative samples of citizens, and for statements of the contrary cases, to assist the process of deliberation.18
- The opportunity for each house of each Parliament to debate, and express a view on, referendum proposals, so that the people would have the advice of their representatives (provisions could be made for questions to be laid before the houses, but it would not be possible to compel them to have debates or to express conclusions).
- A special majority for proposals to be carried. The special majority provided by the current section 128 of the Constitution reflects the federal character of the nation and has the great advantage of requiring that the enacting majority be reasonably geographically spread across the country, so that changes cannot be carried just on the votes of Sydney and Melbourne.

A case can be made out for that special majority to be applied to ordinary legislation as well as constitutional change to be enacted by CIR at the federal level. The rationale for requiring that special majority even for ordinary legislation is that a similar special majority is already required for ordinary legislation through the equal representation of the States in the Senate. If it is thought that ordinary legislation should have a lower hurdle than constitutional amendment, some lesser requirement for geographical distribution could be required, such as at least 40 per cent support in four States, in addition to an overall majority.

Such provisions would go a long way towards overcoming the fundamental problem with the second type of CIR and providing for democracy with deliberation and safeguards.

An Adjunct

It may therefore be concluded that, subject to the kinds of provisions for the second type of CIR which have been outlined above, CIR in both its forms could be an adjunct to constitutional government, as well as providing for an alternative and democratic mode of decision-making.

There is still the problem of bypassing the representative institutions. It could be, as has been urged by supporters of CIR, that it would of itself lead to a kind of reform of the legislature, in that political parties in Parliament, with the constant threat of popular veto or popular initiation of legislative proposals, would conduct themselves in a more seemly and deliberate fashion.19

It must be remembered, however, that, for the foreseeable future, only a small minority of proposals would be enacted by CIR, and that representative institutions would still be relied upon for most law-making. The use of CIR will be limited by the amount of their time which people will allow to be taken up by public affairs. We should not, therefore, write off representative institutions and thereby forfeit their advantages altogether, but should persist with efforts to make them work as they should.

Endnotes:

1. Cicero, De Legibus (On the Laws), III xviii 42, trans. C.W. Keyes, Loeb, 1977, pp.508-9.
2. The principal proponent of CIR in Australia is Professor Geoffrey de Q. Walker : Initiative and Referendum--The People's Law, CIS, 1987; The Rule of Law, MUP, 1988, esp. at p.390; The People's Law: Initiative and Referendum, University of Queensland Law Journal, 15:1, 1988; Let the People make the Laws, Australia and World Affairs, 9, Winter l99l; Current Australian Legislative Proposals for Direct Democracy, The Queensland Lawyer, 12:5/6, May 1992, p.190; Constitutional Change in the 1990's: Moves for Direct Democracy, Papers on Parliament No. 21, Department of the Senate, 1993; Address, Direct Democracy Seminar, Parliament House, Canberra, 1994 (transcript).
3. This is one of the theses of The Federalist No. 10, 1787 (James Madison), Everyman ed., p.45.
4. The Federalist Nos. 10 and 53 (James Madison), pp. 45-6, 322. The second passage refers to the Senate.
5. John Stuart Mill, Considerations on Representative Government, 1861, Everyman ed., pp.325-
6. Significantly, these words refer to the necessity of bicameralism as a safeguard on the legislative power.
6. This point is made in The Federalist No. 10, p.45.
7. This theory was expounded by James Wilson: Lectures on Law, 1790-6, in The Works of James Wilson, ed. R.G. McCloskey, Harvard, 1967, pp.173-4.
8. Samuel Huntington, Speech to the Ratifying Convention of Connecticut, 9 January, 1788, in The Debate on the Constitution, ed. Professor B. Bailyn, New York, 1993, p.886.
9. The Federalist No. 51 (James Madison), p. 265; Lord Acton, May's Democracy in Europe, 1878, in The History of Freedom and Other Essays, MacMillan, 1922, p.98.
l0. The terms are Professor Walker's: Let the People make the Laws, op.cit., p.39.
11. Professor Walker: The People's Law: Initiative and Referendum, op.cit., pp.33, 45.
12. The judgments in the political broadcasts and Mabo cases, respectively: Australian Capital Television v. Commonwealth (No. 2) (1992) 104 ALR 389; Mabo v Queensland (No. 2) (1992) 175 CLR l.
13. Justice Gerard Brennan, Courts, Democracy and the Law, The Australian Law Journal, 65, January, 1991, pp.34-7; Justice John Toohey, A Government of Laws and not of Men?, Constitutional Change in the 1990s (conference), Darwin, 1992, p.15.

14. Reitman v. Mulkey (1967) 387 US 369. The US Constitution, art.4 s.4, contains a guarantee of "republican government" to the States. It has been argued that, as "republican government" encompasses representation, deliberation and safeguards, this provision could be used to overturn any referendum-made law on the basis that its passage violated these principles: Justice H.A. Linde, When is Initiative Lawmaking not `Republican Government'?, Hastings Constitutional Law Quarterly, 17:151, Fall 1989, p.159; When Initiative Lawmaking is not `Republican Government': the Campaign against Homosexuality, Oregon Law Review, 72, 1993, p.19.

15. This expression was first used by Professor Gordon Reid in 1979, long before the current outbreak of judicial activism: The Changing Political Framework, Quadrant, February, 1980, p.12.

16. According to Ms Pru Goward, ABC Radio National's principal political commentator, the "30 second grab" is obsolete and has been replaced by one of a few seconds: The Medium, not the Messenger, Senate Department Occasional Lecture, 20 October, 1995 (to be published in a forthcoming issue of Papers on Parliament).

17. Christopher Puplick, How Parliament works in Practice, Papers on Parliament No. 14, Department of the Senate, February, 1992, p.12.

18. A similar proposal to put deliberation back into American presidential elections is made by Professor J.H. Fishkin, Democracy and Deliberation, Yale, 1991.

l9. Professor Walker advances this argument: The Rule of Law, p.391.

Additional Notes:

The following additional notes on matters not mentioned in the paper may be of interest.

New Zealand: Indicative Referendums

New Zealand now has a system of indicative referendums, which are referred to as citizen initiated referendums, but which do not have one of the essential characteristics of CIR as set out in the paper.

The system, introduced by ordinary legislation in 1993, provides for referendums to be held on public policy questions at the request, made by way of petition, of 10 percent of registered voters. Thus it has the first characteristic of CIR, in that it is activated by electors without the approval of the legislature. The questions posed, however, are put in general terms rather than specific legislative proposals, and the votes in the referendums do not directly veto laws passed by the legislature or directly enact laws approved by the voters. The referendums are indicative only and not binding on the legislature, which still has the power to decide whether to implement referendum results by means of specific legislation. No doubt the government of the day, which effectively controls the single-chamber legislature, will be under strong electoral pressure to implement the results of referendums where the questions are passed.

An up-to-date account of the system is in "New Zealand's system of citizens initiated referenda", by Wayne Mapp, Agenda, 2:4, 1995, pp.445-454.

United States :

Constitutional Challenges to Referendum Decisions

Two decisions made by referendums at State level are currently the subject of challenges in the U.S. courts on constitutional grounds. One is a law passed by the voters of California to exclude illegal immigrants from access to welfare benefits. The other is a State constitutional amendment passed by the voters of Oregon to prohibit State laws preventing discrimination against homosexuals.

The grounds of challenge are that the laws violate the due process and the equal protection provisions of the federal Constitution. Both enactments have been held to be unconstitutional by lower courts. The two cases thus fall into the category referred to in the paper : State laws are challenged on the ground that they are contrary to individual rights guaranteed by the federal Constitution.

Chapter Ten

Sovereign Citizens, not Subjects

Professor Patrick O'Brien

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

The Argument

I have been invited to address you on the virtues of direct democracy. In doing so, I hope to convert each and every one of you to the doctrine and practice of the constitutional sovereignty of each and every one of us: that is, to democracy in its proper and fullest sense. Indeed, "indirect democracy" is a contradiction in terms.

I am not going to bore you with the details of CIR (which can be gained from a number of excellent books and papers on the subject). Rather, I shall develop arguments about our need to establish the sovereignty of the people within both constitutional and institutional contexts that are far more fundamental to democracy than narrowly-focused arguments about CIR. However, they will, in passing, illustrate that CIR is just one, though by no means the most important, of several, logical consequences of constitutionally enshrining the sovereignty of the people. The most important of these is the empowerment of each and every individual citizen by establishing the institutional means and constitutional protections, through which individuals can take more responsibility for their lives and give less responsibility and power to governments.

With the constitutional entrenchment of the political supremacy of we, the people, must also come the constitutional entrenchment of the institutional means for its practical expression. This, of course, is the reason why there is so much resistance to such doctrines and practices from those who cherish the absolute powers mandated to the Political Executive by virtue of a Westminster-type system, no longer constrained by respect for those traditional conventions which, in the past, did at least provide some checks on gross abuses of the constitutionally undefined and unlimited executive powers of Prime Minister and Cabinet.

In the words of The Economist (June 7, l995):

"Done with care, direct democracy works. The more political responsibility ordinary people are given, the more responsibly most of them will vote. This helps produce something closer to true government by the people. And that, after all, is the way the logic of the 20th century points. If democrats have spent much of the century telling Fascists and Communists that they ought to trust the people, can democrats now tell the people themselves that this trust only operates once every few years?"

Five Constitutional Strands

There are at least five major strands in Australia's current constitutional debate. They can be contoured as follows:

1. The positively anti-democratic, Hour-Glass Republikaners. This strand is represented by Prime Minister Keating's Republican Advisory Committee (RAC) and the Malcolm Turnbull stream of the Australian Republican Movement (ARM). Its agenda has been endorsed by those such as the editor-in-chief of The Australian, Mr Paul Kelly, expatriate art critic Robert Hughes, and the party bosses, apparatchiks and propagandists of state radio, television, publishing houses and grants-dispensing bodies and their private-sphere, business and other dependencies of the cultural hegemony. They advocate a polity centred around the axis of a strong executive and

oppose popular elections for the Heads of State and Government, constitutional entrenchment of the sovereignty of the people and a directly elected people's constitutional convention to decide how we should be governed.

Indeed, as state leader of this exclusivist and ,tatist drive, Prime Minister Keating, addressing the annual dinner of ARM on November 5, l995, described in venomous terms and tones such quintessential, democratic institutions and procedures as "some mealy mouthed thing". Moreover, and much to the delight of the Republikaner claque, he promised that the power of the state would be used to politically destroy the proponents of "such mealy-mouthed" things.

Essentially, the hour-glass Republikaners are a mix of anti-royalist oligarchs and monocrats -- latter-day Machiavellian `Princes' -- who are more concerned with the metaphysics of nationalism and the power and privileges of political, social, cultural and economic elites than with democratic constitutionalism. Most have eschewed -- and tend to publicly ridicule -- moral approaches to political activity, favouring a utilitarian/positivist-derived instrumentalism. This is justified on grounds of "realism" and "necessity".

Thus, for them politics becomes a moral-free zone. Applied, their blueprint for the governance of Australia would, at the very best, encourage the development of what Professor Richard Rose calls an hour-glass society; a republic constructed on a constitution without citizens, and a society where "there is a rich social life at the base, consisting of strong informal networks relying on trust between friends, relatives and other face-to-face groups ... [and at] the top ... a rich political and social life, as elites compete for power, wealth and prestige".

Rose says that though "such a society resembles a civil society insofar as a number of informal and even formal institutions are tolerated and ... legally recognized by the state .. the result is not a civic community but an hour-glass society, because the links between the top and bottom are very limited [and the state will] tolerate such institutions as long as activities are confined to looking after small-scale individual concerns and do not concern affairs of state."

2. The Unreconstructed Westminsterites. This strand has much in common with the first and includes cultural elitists and extreme constitutional hierarchists (e.g. Sirs Zelman Cowen, Ninian Stephen, Rupert Hamer and Maurice Byers and Mr Gough Whitlam), as well as economic and social reformers of both the political left (the heirs of l9th Century socialist planning) and right (doctrinaire economic rationalists), whose ideologies have a common grounding in positivist and utilitarian traditions. All welcome the hierarchical structures of the Westminster system, because they believe that the power it accords allegedly wise and superior elites (themselves) can be used to achieve their respective -- and different -- goals despite popular opposition, which they attribute to ignorance, or worse.

Believing in the sovereignty of a hierarchy of both ("eminent") persons and institutions, they prefer the Keating republican "model" to democratic ones, precisely because the former is authoritarian. As the historical and political compromise between the (Presbyterian) hierarchy of institutions and the (Anglican) hierarchy of persons, they subscribe to the Westminster system as the institutional gatekeeper of hierarchical order and authority against democratic pressures from below. Hence their empathy with Strand 1, unease with Strand 3 and rejection of Strands 4 and 5.

3. The Constitutional Monarchists, as represented by Australians for Constitutional Monarchy (ACM). ACM members, out of a combination of moral sentiment and philosophy, believe that the best protection against both monarchical and republican forms of tyranny, as well as the best means for preserving liberty, lie in constitutional monarchy. They argue that constitutional monarchy guarantees the rule of law, limited and representative government and a strong civil society. With the second strand, they support the fundamentals of the Westminster system, but,

unlike them, they favour checks and balances on executive power. They contend that constitutional monarchy, liberty and democracy reinforce each other. However, and for obvious reasons, some have difficulty in accepting the sovereignty of the people.

4. The Democratic -- and mainly Jeffersonian -- Republicans who, recognising its strengths, prefer constitutional monarchy to Strands 1 and 2. However, they believe that ultimately democracy can only be achieved through a republican Constitution that establishes the sovereignty of citizens and limits and checks and balances all power. Some are communitarians, others are not.

5. Democratic Constitutionalists, who argue that so long as the constitutional and institutional arrangements are fully democratic, viz. the sovereignty of the people and limits to, and checks and balances on, executive power, the formal title given to the polity is an irrelevance. They have much in common with Strands 3 and 4, but on balance would be closer to the fourth strand.

Hierarchical Culture and Distrust of the People

The systemic and endemic distrust of the people that characterizes the cultural biases of our hierarchical elitists, as represented by Strands 1 and 2 and some elements of Strand 3, are derived from three, interrelated British traditions that, in Australia, have been reinforced by even less benign European traditions, which are explored in detail in the present author's latest book.

These traditions have been homogenized in Australia mainly through higher educational institutions. This explains further why our elites distrust constitutional arrangements that empower the people, and why the present constitutional debate is as much a cultural phenomenon as it is a political one -- something which most contemporary Liberals and many economic rationalists have never really understood either intuitively or empirically.

The three traditions have been brilliantly and independently written about by three different authors. However, when read in conjunction with each other, they offer definitive explanations of why our elites hold the people in such low esteem. The works are Joseph Hamburger's Utilitarianism (in A Bloom (ed), Confronting the Constitution, 1987); Ferdinand Mount's The British Constitution Now, 1993; and John Carey's The Intellectuals and the Masses, 1992.

Hamburger exposes the nature and consequences of the constitutional views of the English utilitarians, James Mill, John Austin and Jeremy Bentham. Mount thoroughly scrutinizes the constitutional views of Bagehot, Dicey, Laski and Jennings. Carey exposes the anti-democratic views and contempt for ordinary people of the wastelanders, such as D H Lawrence, T S Eliot, Ezra Pound, W B Yeats, H G Wells and Bernard Shaw, et cetera.

The biases and prejudices exposed and critically analyzed in these three works have fashioned the common, cultural bias that informs the constitutional preferences of our hierarchical elitists and, when applied locally, help to explain why they cannot be properly or fairly described, to say the least, as lovers of democracy.

The above-mentioned readings also illustrate how the Keating-Turnbull school has fully internalized, and is propagandizing, the worst of British constitutional, political and cultural traditions at the expense of the best. Carey demonstrates that G K Chesterton, for instance, was one of the few, consciousness-fashioning writers of the period who fought against the grain, as so pertinently witnessed by the following lines from his long poem, The Secret People:

"And a new people takes the land, and still it is not we.
They have given us into the hand of new unhappy lords,
Lords without anger and honour, who dare not carry their swords.
They fight by shuffling papers; they have bright dead alien eyes;
They look at our labour and laughter as a tired man looks at flies.

And the load of their loveless pity is worse than the ancient wrongs,
Their doors are shut in the evening; and they know no songs.

We hear men speaking for us of new laws strong and sweet.
Yet is there no man who speaketh as we speak in the street.
It may be we shall rise the last as Frenchmen rose the first,
Our Wrath come after Russia's wrath and our wrath be the worst.
It may be we are meant to mark with our riot and our rest
God's scorn for all men governing. It may be beer is best.
But we are the people of England and we have not spoken yet.
Smile at us, pay us, pass us. But do not quite forget."

The Theory, The Reality and The Ideal

What, though, is our present constitutional reality? Does it, on balance, favour the people? In theory, our present order of constitutional priorities is: Parliament first; Executive second; people third. In reality, it is Executive first; Parliament second; people third. If we are committed to constitutional democracy and, thereby, transforming ourselves from subjects into sovereign citizens, we must make it: people first; Parliament second; Executive third. That is, we must democratise our overly hierarchical constitutional arrangements, which now make accountability of government to the people and Parliament nigh on impossible.

Accountability, Morality and Democracy

Let us go back to basics. What is accountability ? In three, simple words, it means: Telling the truth!

Why is this necessary? Because without it, there can be neither faith, nor trust, nor reciprocity. And without those things there can be neither democratic citizenship nor a democratic civic culture. Furthermore, truth, justice, the rule of law and democracy are inextricably linked, both morally and empirically.

Justice can only be done if the truth is told. In the words of Bertrand Russell, "Part of the language of lying is that it only succeeds for as long as people think you are telling the truth". This proposition was well understood by Mikhail Gorbachev and his liberal allies, who acted on the assumption that the first necessary condition for moving towards democracy in the former USSR was an end to official lying, particularly about the past.

Indeed, the symbiotic relationship between truth and justice underpins the rule of law, and hence also of democracy itself. This is a moral equation. Partinost uses of executive power in a democracy to harm the innocent, to damage political opponents, to cover up malfeasance and lying, or to confer monopolies on favourites at the expense of equality of access and opportunity to others, all undermine trust and faith in political and legal processes. Politics in a democracy is not -- and cannot be allowed to become -- a moral free zone.

This is principally because democracy is itself a moral venture. The history of democracy is the history of individuals and whole societies attempting to limit and check and balance executive power. This is necessary so as first, to create, and then, expand and protect by constitutional means that space which we call civil society, in which each and every individual, as well as collectivities, have the opportunity of living preferred ways of life as best they can without harming others and unencumbered by the onerous impositions of democracy's principal enemy, secret and arbitrary government, of which we already have a short-circuiting overload.

Arguably democracy is, in secular terms, humanity's highest moral achievement. Of all modern political philosophers, Jacques Maritain has stated this proposition most nobly. An architect of

both the democratic reconstruction of post World War II Europe and the United Nation's Charter of Human Rights, he wrote in Man and the State (1951) that:

"Something particularly significant must be stressed at this point: democracy is the only way of bringing about a moral rationalization of politics. Because democracy is a rational organization of freedoms founded upon law. We may appreciate from this point the crucial importance of the survival and improvement of democracy for the evolution and earthly destiny of mankind. With democracy mankind has entered the road to the only genuine, that is moral, rationalization of political life: in other terms, to the highest terrestrial achievement of which the rational animal is capable here below. Democracy carries in a fragile vessel the terrestrial, I would say the biological, hope of mankind."

Peter Berger brings together questions of morality, accountability, the legitimacy of institutions and democracy as follows :

" Society is not held together simply by practical needs and interests but by beliefs that explain and justify its particular institutional arrangements. Thus, a legitimation is any answer, on whatever level of sophistication, as to whether this or that institutional arrangement is morally just or proper. If no one else asks such questions two groups of people will, sooner or later: inquisitive children, or those who perceive themselves to be at a disadvantage under the particular arrangements. If an institution is to survive from one generation to another and if it is to stave off the ever-present possibility of disruption, there had better be some answers at hand, not just any old answers that someone might think up but answers that will indeed command the confidence of the people."

The ALP, Partinost Politics and Democracy

In the context of the themes of this paper, it is apparent that the ALP, like all political parties organized along unreconstructed 19th Century socialist lines, has a problematical relationship with democracy. The problem has most recently been well stated by Martin Malia in his book, The Soviet Tragedy: A History of Socialism in Russia 1817-1991 (1995). Discussing in universal terms the organizational characteristics, motivations and goals of social democratic parties, he writes :

"Organized parties were a late nineteenth Century invention of the socialists, and the most precocious in this matter were the German Social Democrats. It was they who introduced party cards, regular dues, party cells, and a hierarchy of committees leading up to periodic congresses and a standing Central Committee. They did this in part because they were an embattled, adversary party -- indeed a counter-society in Imperial Germany -- and in part because universal suffrage made such a mass party possible. But as Weber's pupil Robert Michels pointed out as early as 1911 in his classic study of the Social Democrats, Political Parties, the Social Democratic mode of organization inevitably tends to bureaucracy and oligarchy, thus thwarting egalitarianism ...

"Still, in the German case, genuine elections made the bureaucratic oligarchy more or less responsive to the base. But if ever elections atrophied in such a structure, the pyramid of power would become a dictatorship under the euphemistic designation `democratic centralism', where initiative flowed from the top down. This was Rosa Luxemburg's critique of Lenin's program. And this, of course, is precisely what happened once he came to power. To this it must be added that a similar bureaucratic centralism was adopted by parties of the revolutionary Right after the First World War in imitation of their Social Democrat and Communist adversaries, and the Communists transmitted the same type of organization to China's Kuomintang. Thus, in every Social Democrat party there is a Leninist Party in potentia."

Anyone who has participated in, experienced, or properly studied ALP politics will immediately recognise the relevance of Malia's analysis to the Australian situation. Moreover, the problem has been intensified in recent years through the movement into the ALP of ex-Communist and trade-union power-brokers who, though having largely abandoned Marxist-Leninist ideology, still employ Leninist-derived methodologies to wage factional warfare inside the party, to counter outside critics and opponents, to promote and implement the party's policies and, not least, to keep the party in power. They have bolstered the party's post-Whitlam organizational strategists who, for the reasons given by Malia, employ similar methods, which have also become part and parcel of organizational studies in the social and political sciences.

Moreover, and as Malia observes, the same organizational methodologies were adopted by radical right wing parties and movements, many of which, like Mussolini's Fascists and Adolf Hitler's Nazis, had their origins partly in radical Social Democrat movements. Ideology and goals were integrated into the organizational mode, with the party becoming the principal organizational weapon. What "true believer" means in this context is the person who subjects his/her individual will to the general will and tactics of the party, as defined by the hierarchs on any issue at any given time, even if it involves daily contradictions.

Partinost principles decree that one's highest duty is to the organization and its formations, whose function, when the party is in government, is to put the state and its agencies under the care of the party, its agents and fellow-travellers so as to maximize its controls over the levers of power and patronage and, thereby, to extend the weight and power of its presence in civil society through exploitation of the "demonstration effect". This requires submission of party members, particularly among the politically ambitious, to the will of the leader. In this context, "the natural party of government" argument is an argument for a one-party state, a partocracy. The unnatural cannot be tolerated. Hence the use of the language of pest control to condemn critics and opponents, and the waging of hate campaigns against them. Language is here our guide.

As J H Hexter observes:

"The language men choose in the public forum to serve their ends is usually a pretty sound indicator of some of their intentions, and an even better one of their habits of thought."

As a consequence of such influences as outlined above on its history, traditions, ideology and organizational methods and style, when in power the ALP tends to govern the nation as it governs itself. Briefly, state power is used to reward or punish individuals and whole electorates according to partinost criteria. In the words of the late Aaron Wildavsky, "As you organize, so shall you behave". All of this, needless to stress, has profound implications not only in terms of how Australia is presently being governed but, even more critically, for the future of the Constitution, if Mr Keating is allowed to get his way.

The Defenders of Secret Government

The arguments advanced before the WA Supreme Court and the High Court of Australia by Dr Carmen Lawrence -- and fully endorsed and financed to the tune of $1,000,000 of taxpayers' money by the Keating Government -- that the survival of our "democracy" would be threatened by former cabinet ministers giving evidence to the Marks Royal Commission about what may or may not have been said at a State cabinet meeting concerning party-political strategies to be employed to destroy political opponents, and that our system of government is structured on secrecy, are ominous harbingers of what we can expect if the Keating Republikaners determine our constitutional future. They are offering a triple whammy in the form of the mad, the bad and the ugly.

In defending cabinet secrecy the way they are, Labor's spokespersons are advancing what can be best described as the Politburo Model of government. In the former USSR, the Politburo was the peak body of both the ruling party and the government. All its deliberations were secret and it was above the law. This was justified in the name of democracy, the salvation of the system and the best interests of all who lived in the Soviet Union. In reality, however, what it all amounts to is government by inquisition.

Patronage and Punishment

You will be handsomely rewarded if you are deemed to be a member of the "elect" or are prepared to follow the party's "general line", particularly in matters the party defines as priority areas. However, state power will be used to positively discriminate against you if you are considered to be of the "damned", as all those, including Commissioner Kenneth Marks and Ms Anne Vanstone, have discovered to their great discomfort for failing to heed the unveiled threats of Prime Minister Keating and Attorney-General Lavarch concerning the consequences of refusing to abide by the party's "general line" in the matter of the Lawrence-Easton scandal. What they seek from us is servility and not civility. Under their proposed Constitution we would cease to be subjects of a Crown pledged by oath to protect our rights and liberties, and become subjects of an immensely fortified Executive pledged by oath to advance its own exclusive partinost interests. However, now preoccupied with the terms of its own survival, the Crown will not protect us -- place not your trust in Princes ! Consequently we, the people, have no option but that of protecting ourselves through constitutionally entrenching our sovereign right to govern ourselves.

Trust, Civility and Civic Culture

Without faith, mutual respect, trust and reciprocity there can be neither citizenship nor a civic culture. James Hunter illustrates how democratic citizenship bridges that gap between private and public activities which must be overcome if civility is to prevail over servility:

"Ideally, public culture and private culture would seem to complement each other. As spheres of symbolic activity, each provides a context for the other. Public culture functions as a legal and political context for private culture by demarcating the boundaries of permissible personal behaviour ... At the same time, personal interests and aspirations rooted in private culture become expressed as political claims in the public realm ... In this way, private culture provides the context in which public culture becomes a reality intelligible and personally relevant to ordinary people. Public culture becomes a realm that can be understood and influenced, a sphere of activity in which individuals and communities can present and advocate their particular interests, the place in which the various voices of private interest can press their particular claims as public discourse. To the degree that public and private culture interact in this way, the authority of democratic regimes achieves its measure of popular consent. Such is the moral foundation of the modern liberal state. Of course, this is how political life is supposed to work in theory. While some of the time practical reality fits the theory, much of the time it does not. The special language of public discourse, for example, often seems muddled, obscure, and incomprehensible. The impenetrable nature of legal rhetoric and bureaucratic verbiage is well known."

Hunter then discusses the relevance of the matters he raises in terms of citizenship:

"These factors are obstacles that private citizens and local communities face in entering public debate. When the obstacles are too great, public culture remains distant and unapproachable; private culture becomes isolated and the voices of ordinary citizens remain publicly silent. When private culture remains estranged from public culture, and individuals and communities retreat

from political expression, personal lives become irrelevant to the course and conduct of civic affairs. Why is all this important? Because the right to shape the public culture, or at least the right to have a voice in how public culture will be shaped, confers enormous benefits. The essential benefit is the right to pursue individual and community interests. Those who have no voice may be defined as illegitimate -- and their interests may be deemed irrelevant. The very survival of minority moral communities is at risk, unless all have the right to help shape public culture. In real life, of course, the many different voices that contribute to the shaping of public culture are not of equal volume or authority. Many voices may be heard, but the historical tendency has been for one voice to dominate. This was certainly true in the ... nineteenth Century. In this case and in others, the values and interests of one moral community overshadowed and oftentimes eclipsed those of other communities. This is what social scientists would call cultural hegemony, and the benefits that accrued to it are nothing less than power and privilege."

The late Professor Aaron Wildavsky related the virtues of faith, initiative and transcendence of self-centredness and self-interest from the moral perspective of democracy as follows:

"So far as people can live well without feeling compelled to participate, recognition of the right to be left alone speaks well of a society. But if citizens are left out of consideration in making important decisions, to define life as democratic would be deception ... To be ruled by another, paradoxical as it may appear, requires no faith, only forbearance. To be a subject requires only being an object; the rulers substitute force for faith, ruled acquiescence for initiative. To rule oneself, however, is not only to affirm but also to subdue the self, because reciprocity as well as autonomy is required for self-government. Citizens owe allegiance to others before they receive results for themselves. Citizenship is, first, an act of faith (a willingness to act in the absence of things seen) in political processes."

Unaccountable and Bad Government

The empirical evidence presented to officially-appointed commissions and committees of inquiry into the official conduct of public affairs by governments in all the Australian States and federally over the last decade proves that Australia is not governed civilly, and that the negative aspects of political systems which treat people as objects, as described by Hunter and Wildavsky in the above quotations, have predominated, thereby undermining civic culture.

Trust and stewardship have not been honoured, governments and their agencies have not sufficiently accounted for themselves (if at all), and the faith of the people in the ways and means by which they are governed has been betrayed. That is, we, the people, are being treated immorally by our governments through constitutional arrangements which permit and encourage them to do so.

The same evidence illustrates how, where, why, by whom or what, and to what degree, trust and faith have been betrayed. It is also clear the problems are endemic and systemic.

That it was all done so easily by members of governments and their agents -- or permitted by them -- reveals fundamental weaknesses not only in Australia's administrative and decision-making arrangements and procedures (which some authorities and commentators would have us believe is the whole extent of the problem), but also in the law, its structures of government and public institutions. At the base of all this lie our federal and State Constitutions. This leads logically and empirically to the inevitable conclusion that they are not sufficient providers of democratic, moral, responsible and publicly accountable government.

There can be no escaping this conclusion, which must be the central focus of all our enquiries into what must be done if we are committed to constitutional democracy.

However, mountains of evidence are being ignored by both our Republikaners and staunch defenders of the status quo in an extraordinary, self-protecting and pathological act of forgetting, which brings to mind the Czech writer, Milan Kundera's warning that: "The struggle of man against tyranny is the struggle of memory against forgetting." We must not be fooled by either those who have betrayed us, or their handsomely rewarded courtiers in the public and private media and our publicly funded cultural and educational institutions, into forgetting.

In this context, it is also worth recalling Berthold Brecht's statement that, "If you're against politics, you're for what politics will do to you." In democratic politics, Constitutions cannot be enabling acts permitting hierarchs to impose arbitrary ways and means of governing upon the people. They must enshrine the means by which people can live and participate freely in civil association.

Analysis and the Craft of Citizenship

The activities of government, politics, citizenship and analysis in a democracy are complementary and interacting. The method and role of analysis most suited to such tasks as reviewing our Constitutions and the means by which we are governed, and their impact upon people's lives, liberty, prosperity and happiness have been well adduced by my late friend and colleague, Aaron Wildavsky. He places them firmly in the contexts of trust, social interaction, moral values and accountability in such a way that he could have had our circumstances in mind, particularly as outlined immediately above, when he wrote, under the heading, "Analysis as Craft":

"Because the task of analysis ... is to try and alleviate practical problems, the analytic enterprise, Martin Landau rightly argues, `cannot recognise the limits of any field ... By its nature it must follow problems wherever they go. It cannot ignore anything that may be relevant to a solution.' ... Trust in social interaction designed to detect and correct error reinforces reliance on individual integrity ... The analytic enterprise depends on social trust, on common recognition that the analytic activity is being carried out to secure more desirable outcomes ... with no `facts that matter' there is no evidence, no hope for contradiction and error identification. Learning through error ceases. Theory, which acts as its own cause by dismissing new hypotheses out of hand, is called dogma. History, acting as its own justification, is called tradition."

He goes on to say that:

"These tendencies support each other. The virtues of dogma -- limiting the scope of the debate, starting with initial presumptions -- are the virtues of tradition. Similarly the vices of dogma are the vices of tradition. These include shifting the burden of proof to the challenger and inhibiting learning by preventing rectification of errors. When tradition rules, recognition of error becomes anomalous, and policy acts to perpetuate itself. The tensions ... have their moral sides. Relating resources to objectives so that the promise of public policy can be kept is the mark of the responsible analyst. It is irresponsible to put resources to inferior uses, depriving others of their opportunities ... To be held responsible, as if one could control results, depends on possessing relevant resources, for otherwise accountability is a sham. Social interaction is efficacious only when autonomous individuals establish reciprocal relationships. Individual moral development requires a balance between autonomy and reciprocity, citizen and community, which at the public level, is the task of policy analysis."

Citizens as Sovereigns and 20 Minimal Principles for Constitutional Democracy

The following proposals for constitutional renewal contain no utopian panaceas. All the reforms recommended are down-to-earth and practical measures that can be set in train immediately through an exciting and cooperative exercise in citizenship involving the people, the Parliament

and the Government as joint-venturers in the great project of constitutional democracy. Such principles must be constitutionally enshrined as a bare minimum if that project is to be successfully pursued in Australia, and if we want that protection Professor Giovanni Sartori has so well reminded us in his masterpiece, Democratic Theory Revisited, is the purpose of the constitution of liberty.

These principles were used to formulate a model Constitution for the Australian States by Professor Martyn Webb in The Executive State: WA Inc. and the Constitution (1991). They are discussed in greater detail from both empirical and philosophical perspectives throughout my latest book.2 They are here outlined, with the inclusion of new material, and applied to the Commonwealth Constitution, with specific reference to the sovereignty of the people in terms of direct democracy. Hopefully, they might stimulate public debate, so that we can go beyond both the executive-owned thing of the RAC--ARM Republikaners and the Westminster system's enshrinement of absolute executive powers in the office of Prime Minister and Cabinet. They are the constitutional entrenchment by a directly-elected people's Constitutional Convention of the following:

1. The political supremacy (ie, sovereignty) of the people. Such a clause makes the people, both individually and collectively, the direct democratic source of all power in the polity. It is the quintessence of a modern liberal democracy. The people -- rather than arbitrary and exclusive definitions of national culture, or national identity, or the Crown, or the Parliament, or the Executive -- are thereby established -- and, I reiterate, directly -- as the central and unifying element drawing the nation together as a sovereign entity through the power of each and every individual. It is something to which the overwhelming majority of people can meaningfully subscribe, despite party-political, religious and other differences. Once enshrined, it becomes the axis on which the whole Constitution runs and which sustains the entire political system, transforming -- to use Professor Webb's phrase -- subjects into sovereigns.

Only if this is done will we, the people, be able to call the Constitution our own, and only then will we be able to have government directly by the people as distinct from government for the people. Irrespective of whom we decide to institute as, or what we call, the Head of State, this is a democratic, constitutional imperative. If this is not done we will remain subjects of an immensely fortified and sovereign Executive that, in recent years, has so arrogantly -- and with such impunity -- usurped both Crown and Parliament, and which is now extending its power and presence ever deeper into a diminishing civil society in Australia.

2. Limitations on the powers of the executive and legislature and the protection of political freedom and the rights and liberties of sovereign citizens. This can best be embodied in a constitutional declaration of rights by the people. This should not take the form of a shopping list, but be expressed by statutes of limitations on the powers of the Executive, the Legislature and the Judiciary. This establishes in fundamental law the subordination of the executive, the legislature and the judiciary, ultimately, to the supreme power of the people, who have the sole constitutional right to determine how they are to be governed and to whom or what they may from time to time delegate this power, and how it may be divided and/or checked and balanced.

Common law rights must remain, but the Constitution must also spell out fundamental rights such as those relating to speech, assembly, voting/political participation, movement, privacy, property, trade, trial by jury, equality before the law, and belief and worship.

The need for such a declaration was dramatically illustrated when the Commonwealth Government -- presenting its case to the High Court in support of its legislative proposal to ban all political advertising on radio and television during election campaigns -- argued that the only

rights which Australians had were those which Parliament awarded them; as Parliament had not legislated for freedom of speech, Australians had no such right. Such imperiousness by the wielders of sovereign authority over the people should stand as a warning to everyone against people in the current debate who are advocating freeing the executive from accountability to the Crown -- the nominal sovereign -- in favour of accountability to an executive-dominated Parliament.

That the High Court finally extracted a limited right to freedom of speech in a roundabout (some would say even casuistic) way serves only to strengthen the need for such a declaration of rights. This would reverse the present situation by directly empowering the people to declare that Parliament, the executive and the courts shall have only those rights and powers which we, the people, delegate to them and for only so long as we, the sovereign authority, so decide.

3. The sole right of the people to directly elect their Heads of State and Government as their representatives and not overlords -- regardless of what they are called. By any definition or by any measure this, along with the right to legislate, is a litmus test of sovereignty. This would fulfil the democratic right of every citizen not only to vote for the highest offices in the land but, equally importantly, also to contest them.

It is in this area that we presently most need the popular exercise of direct democracy in the most fundamental way: through direct ballot. If the people are to be sovereign, nothing less will do. It is preposterous to advocate executive/parliamentary appointment of such offices under a modern, constitutional democracy. These are, and quite literally in the most practicable way, sovereign rights. The best argument I have heard for the popular election by direct ballot of our Head of State is when Sir Zelman Cowen said that if such a procedure was adopted, people like himself and Sir Ninian Stephen would have neither the inclination nor resources to contest such an office.

4. A renewed federalism that examines and redresses existing imbalances of power between the Commonwealth and the States. The federal compact needs to be re-examined and renewed as a consequence of the centralist directions in the shift of power occasioned by such things as the use of the foreign affairs, taxing and patrimonial powers to increase federal parliamentary and executive authority over the people of Australia. They are now being flagrantly exercised to advance the monopolies of power and privilege of political cronies against all those individuals and collectivities, whose priorities do not conform with those of central, executive authority in just about every sphere of spiritual and material endeavour.

These and other measures in the prevailing politics of exclusion have -- without reference to the people -- altered the very nature of the Commonwealth of Australia, which the people of the Australian States originally formulated through a Constitutional Convention and enacted through referendums nationwide. This has resulted in the diminution of diversity and contributed to the suppression -- and destruction -- of creative talent and inventiveness, which are the lifeblood of any progressive people. Without level cultural and political playing fields "economic rationalists" among us can forget about level economic playing fields.

Unfortunately, some economic rationalists, despite their claims to 'realworldliness", have been putting the cart before the horse. 16th and 17th Century jurists such as Edward Coke and Thomas Fuller and Members of Parliament such as Richard Martin, however, understood the situation perfectly well:

"Arts and skill of manual occupation rise not from the King, but from the labor and industry of men, and by the gifts of God to them ... It is as unlawful to prohibit a man not to live by the labor of his own trade as to prohibit him not to live ... " (Nicholas Fuller);

" ... Monopolies are against the great charter because they are against the liberty and freedom of the subject ... The Monopolist that taketh away a man's trade, taketh away his life, and therefore is so much more odious, he is viva sanguinis." (Edward Coke);
"The principal commodities both of my town and country are engrossed into the hands of these blood-suckers of the commonwealth". (Richard Martin, MP for Reading).
The people of the States should have a direct say in formulating the terms of proposals germane to the distribution and weighting of powers in Commonwealth-State relations -- not just voting on what is put to them by "eminent persons." Such things as trading, taxing and immigration powers must be to the forefront of discussion and examination. If the Crown is to be removed from State and Federal Constitutions alike, the whole question of the power relationships at this level should be thrown open to both question and renegotiation. It is necessary to do this before the centre's centripetal and integrative "federalism" becomes irreversible. It is difficult to overemphasise the importance of this point, precisely because we are talking about the sovereign rights, qua the daily living, of individuals at the coal-face of political, social, cultural, economic, artistic and sporting life.
5. A bicameral and legislative Parliament with a strong Upper House of check and review. This is necessary for at least two vital reasons: to provide equal representation for the people of the States and as a check on the executive, particularly if there is, as now, no effective separation of the legislature and executive.
Any weakening of the powers of the Senate, for the reasons given above, also diminishes the powers of the people and checks and balances on the executive, which definitively controls the House of Representatives. Proposals to remove the Senate's powers to block Supply -- and, hence, remove the unelected, caucus-selected executive for malfeasance -- in conjunction with those empowering the executive to appoint the Head of State, as is envisaged by the Hour--Glass Republikaners and other unreconstructed Westminsterite authoritarians, would reduce the Senate to the status of a committee of the House of Representatives; ie, another arm of the executive in real political terms. By such means, the greying embers of effective parliamentary opposition and the last residues of its status as a legislature would be finally extinguished, to the full satisfaction of our Machiavellians, Positivists and Utilitarians who, despite differing party labels, share some core values and political/constitutional goals, precisely because they have learned nothing better, and have benefited grossly from what we have got by becoming masters of sycophancy and deception. If the people want something, it is by definition wrong. Only that which they want and get is right.
6. Increased freedom and independence of action from the executive of all parliamentarians. Two principal measures can help achieve this: first, the granting to chairpersons of parliamentary committees the same status and salaries as Ministers to lessen their vulnerability to executive and party bribery and bullying; second, prohibiting the use of pledges and/or oaths that require a parliamentarian to vote in a particular manner or accept party discipline, and making it a criminal offence for anyone attempting to apply such measures. By requiring that all votes taken in Parliament be free, or conscience, votes, we will encourage the practice of that morality at the parliamentary level which we normally teach the young: to have the courage to act on the strength of one's convictions. Such a measure will also help the transformation of our Parliament into a true legislature.
7. The supremacy of the legislature over the executive. While this is clearly established through the embodiment of several of the principles discussed here, it needs to be specifically spelled out in a democratic Constitution, particularly if government is to be formed from the majority party

in the lower house of Parliament. Though general theory claims that in Westminster-type polities Parliament is the effective sovereign authority, practice tells us otherwise. The barely limited -- and undefined -- powers of an Australian Prime Minister hold within them the potential of transforming our system into a mammoth favours-dispensing machine, in which those who have been given the right entry cards, or who have paid enough party dues, have every chance of punching jackpots for themselves until the general revenue is exhausted.

Thus government can easily become a giant "pork barrel" greased by the Prime Minister and cabinet and the polity turned into an Australian version of La Cosa Nostra, with the sovereign authority effectively representing not public interests but private ones -- Il Partito Nostro. Indeed, there are many ominous signs that we are possibly well down this path already. If accountability to the nominal sovereign -- the Crown -- is to be abandoned and the executive, through the Parliament, is empowered to appoint the Head of State (Il Capo?), the polity will be fully opened to capture by the corrupt and unscrupulous, leaving force as the only ultimate means available to the people for protection.

The institutional separation, as well as division, of the Parliament and executive must be seriously considered as a necessary means for achieving this goal, as well as combining the offices of head-of-Government and Head of State into the one popularly elected office. The latter would eliminate the ongoing jurisdictional conflicts that dog those polities which maintain separate offices, particularly in many republics. Such a measure is, moreover, entirely consistent with the sovereignty of the people. By such means both the Parliament and the executive would be made directly responsible to the people, whilst the former would be transformed into a genuine legislature . The Polish historian and statesman, Bronislaw Geremeck, who knows through the dehumanizing experiences of two totalitarian regimes what democracy is not, has pointed out that "in Central Europe, after World War I, parliamentary institutions were exceptionally weak and in the context of the authoritarian temptation, genuine Parliaments in Poland, Romania and Hungary disappeared from the scene". Thus he concludes that Parliaments as true legislatures give "citizens an opportunity to be engaged, to have a role in politics, and to be active in public life [because] Parliament is a concrete realization of the idea of freedom". This leads logically to the next step towards the institutionalisation of direct democracy.

8. The supremacy of the electorate over the legislature and citizens -- initiated legislation. Just as (7) provides for the legislature's supremacy over the executive, this principle takes the further important step of enshrining the people's sovereign rights as legislators. Simply put, all political theory equates sovereignty with the right to legislate. Where democratic theory and practice differ from the alternatives is that they assign sovereignty to the people. While the sovereignty of Parliament is preferable to the sovereignty of the executive, a Parliament with absolute power can be as dangerous as an absolute executive and, indeed, can amount to the same thing for the most obvious reasons that do not need to be discussed here. Consequently, this measure needs to be specifically embodied in the Constitution and enacted through the principles proposed in this essay.

Furthermore, as sovereigns, it is vital that the people have the constitutional right to initiate legislation through referendums. The sovereign citizens may also allow the Parliament to put legislation to the people for popular vote. Where this does occur -- particularly in Switzerland and a majority of U.S. States -- consensus tends to outweigh conflict, and governments become more cautious about legislative impositions and more prone to consult, in the knowledge that the people effectively wield the ultimate legislative weapon through CIR whose strength, like that of most reserve powers of sovereigns, lies not so much in the scorecards of success and failure on

particular measures, but in its very existence as the ultimate symbol and embodiment of citizens' sovereignty.

9. Direct accountability of members of the executive and legislature to their sovereigns, through referendums empowering the sovereign citizens to impeach, recall and dismiss those to whom they have temporarily delegated the exercise of some of their sovereign powers This is the embodiment of principles (7) and (8). Moreover, all laws passed by Parliament must apply equally to members of all branches of government, including laws such as making chief executive officers of public companies (and members of Cabinet) accountable to voters to minimise outbreaks of national equivalents of WA Inc. Parliament must have powers of impeachment over all members of the executive and judiciary; and, by the same token, as the expression of their sovereignty, the people must have powers of impeachment, recall and/or dismissal over all members of the three branches of government through citizen-initiated referendums specifically geared to this.

The failure of all political parties when in government to honour the traditions of ministerial responsibility (ie, to resign when Parliament has been misled or lied to, or administration is careless or corrupt) reinforces the necessity of such measures. So do the recent declarations by most of the Keating cabinet that our system of government is dependent upon secrecy, that lying by politicians to Parliament and the people is not a serious matter, and that members of the judiciary and legal profession who do not toe the line of the ruling party will be punished.

10.Checks and balances in the introduction, passage and enactment of all bills in Parliament. This can be best achieved by strengthening the committee system to provide for open public hearings and scrutiny of all legislation.

11.The requirement that all legislation passed by Parliament be enacted within 90 days, unless otherwise specified in the legislation. This is to prevent governments from failing to enact Opposition-amended legislation or passing legislation for "window-dressing" purposes only.

12.Senate approval of all treaties, long-term deployments of troops, declarations of war, ambassadorial and other major executive and judicial appointments. For treaties and appointments, confirmation proceedings must be open to public hearings and submissions. These measures are necessary to impose limitations by way of checks and balances on the powers of patronage of Prime Minister and cabinet, which combine the former monarchical powers of patronage with those, even more commodious, powers of patronage of the modern bureaucratic state. The powers of patronage have been used to such an extent by Labor since 1983 that it is questionable whether Australia can any longer be described as a genuinely pluralist society in face of the monopolies it has bestowed upon its members, financiers, claqueurs and courtesans in just about every area of human enterprise and endeavour.

13.Line by line scrutiny of the Budget by Parliament and a greater role for state audit as the people's watchdog. At the moment the Budget is passed en bloc. This measure, involving a cost-benefit analysis of all parts of the Budget, would take near absolute control of the purse-strings away from the executive and would further entrench, along with other measures enumerated above and below, principles (7) and (8). Such scrutiny would be delegated by the people to parliamentary committees conducting open public hearings. Simply put, it is the sovereign's right not only to tax but also to decide the levels and uses of taxation.

Let us not forget history in such matters. For instance, in 1610 the House of Commons:

"[I]nsisted that taxation could take place only with the consent of Parliament and that subsidy bills had to be initiated in the Lower House. Many in the Lords accepted both of these principles. The fact that Lords were not exempt from taxation (unlike many continental countries) led to a

community of interests between the two Houses on this all important question and provides one reason for the failure of Stuart absolutism."

Nearly four hundred years later, the wheel has turned almost full circle. Rather than requesting Supply from Parliament, our modern executive demands it as if a Divine Right. Substitute "Prime Minister" for "King" in the 1621 statement of a royalist sycophant that "Parliament ... possesses no power except from the King under the King", and the similarities between 17th Century royalist claims to absolutism and those of our present Executive are obvious. Consequently, it needs to be unequivocally laid down that Parliament has the indisputable, people-delegated right to grant, or refuse, Supply. For either House to give up that power -- as the likes of the misnamed Australian Democrats, Sir John Gorton, Mr Whitlam and the ALP are all demanding the Senate do -- is to give over Parliament to the absolute rule of the executive. Therefore, we need to re-establish -- and not further disestablish -- the superior powers of the people and Parliament over the executive in these vital areas, as democratic theory and practice demand.

Likewise, the role of the Auditor-General as a means of encouraging greater accountability of all public expenditures by the executive needs to be re-examined, so that it can fulfil its proper function of being, in the words of Le Monde, "the great investigator of the failings of the state mechanism."

These matters cannot be divorced from moral questions. Professor Gerald Caiden most convincingly argues that, when properly constituted and properly respected by government and society, state audit's function is promoting good government:

"State audit comes closest of any public body to being the public's watchdog over governmental activities, the one most wedded to concepts of honesty, legality, frugality and service in public administration, most sensitive to public needs, and most promotive of economic, efficient, effective and responsible government. It is a leading force for good government, independent of partisan political domination and executive control, even though it is formally linked to the legislature and legally viewed as its agent. It is one of the few bodies able to evaluate governmental programs, master complex relationships between public programs and issues, pinpoint priorities, recognise neglected and emerging problems, and provide administrative expertise in policy implementation and governmental reorganisation. It stimulates political and public initiatives and coaxes public officials to do better. And it does most of these things openly, in full consultation with those it audits, and with the knowledge of the legislature, the public and mass media ... Special reference should be made to the role of state audit in strengthening legislatures. The growth of the administrative state has shifted the balance of government firmly into the hands of the executive, reducing the legislature to impotence in one-party states and greatly reducing its power in other regimes. The expansion of state audit activities has some potential in revitalising legislatures and restoring some initiative to individual legislators. State audit provides considerable information about government operations which the legislature cannot otherwise provide for itself and has not been able to obtain voluntarily from the executive and individual public agencies, and does so in a readily useable form. It provides guidelines and measures by which governmental programs can be gauged, and points out defects in public sector administration. It provides an alternative evaluation of agency performance, independent of the executive, and can supply individual legislators with an investigatory body of their own."

Benjamin Geist elaborates further on the moral dimensions of state audit under the heading Morality as follows:

"The normative activity of state audit is based ... upon principles of propriety, even of morality. State audit institutions tend to be highly aware of the state apparatus's duty to maintain at all times, a high degree of justice, fairness and equity in its dealings with the people it serves. They also tend to postulate high standards for judging such dealings: in particular they tend to take a jaundiced view of raison d' ,tat, expediency or shortage of resources, used to excuse improper acts or lack of consideration towards citizens ... On a case-by-case basis, its duty is to criticize improper decisions and, in the process, establish new norms of behaviour for the prevention of improper decisions in the future."

In brief, properly constituted and properly respected by government, state audit is a means of conducting permanent inquiries into the propriety of government. Had state audit been properly constituted and respected, the billions of dollars lost by Australian State and federal governments on useless or partisan causes over the last decade would have been minimised, if not actually prevented.

The contempt displayed towards the damning reports of Auditors-General by our governments is not merely disgraceful, it also amounts to a form of political corruption. The public interest demands that urgent action be taken to make our governments accountable to state audit which, because it monitors expenditures and proprieties, is in many respects more important to good government than is the actual setting of the budget and the budget itself. State audit is a vital means for the detection and correction of error and corruption before their effects become endemic and systemic.

14.The right of Parliament to institute, and set the terms of reference of commissions of inquiry without reference to the executive. This would make Royal Commissions and/or their equivalents responsible to Parliament and not the executive which, by existing arrangements, is the inheritor of monarchical powers and thereby can avoid implementing, or even considering, commission recommendations, set the terms of reference and appoint the commissioners.

15.Making Parliament and the executive subject to higher law and adjudication by the courts to ensure that neither any area of government activity nor any individual is exempt from the laws.

16.Constitutional recognition of an independent and competitively appointed Public Service to guard against party-political stacking, as has been increasingly the practice at both federal and State levels in recent years.

17.Complete and final separation of the judiciary and the executive and increased independence of the judiciary from the executive. Thus the practice whereby Chief Justices sometimes act as Heads of State (eg, when a State Governor is seriously ill or otherwise indisposed) will be rendered unconstitutional, and through the provisions outlined in (12) the executive's present powers to reward party loyalists and apparatchiks with judicial posts (thereby politically stacking the courts) will be made more difficult by constitutional fiat.

18.Prohibition of employment of former MPs to offices of profit in either the public service or in a government agency for at least one year after resignation or defeat at the polls.

19.The sole right of the people to alter, amend, revise or change in any way their Constitution through democratically elected people's constitutional conventions and/or citizen-initiated referenda. This is a logical and necessary expression of the sovereignty of the people and reverses the present and ridiculous requirement that deprives the people of the fundamental right to be the authors of proposals for constitutional change, and which leads to the present undemocratic practice whereby committees and commissions of executive-appointed and remunerated "eminent persons" are empowered to dictate the terms of constitutional debate and, even more important, the very proposals which are to be put to the people by way of referendum.

20.New oaths of office for all parliamentarians, public officials and citizens based upon the observance of the Constitution and its principles -- especially the sovereignty of the people.

There are several problems with the new Oath of Citizenship officially introduced on Australia Day, 1994. First, it was imposed upon the people by government and Parliament without popular approval. This alone makes it a travesty from a democratic perspective. Second, in swearing allegiance to the Crown under the old oath, citizens were swearing allegiance also to the Constitution of which the Crown is an integral part and to which it is bound under its own oath of office. Third, under the new oath citizens are not bound to uphold the Constitution. They are required to swear allegiance to amorphous entities described as "the nation" and the "Australian people": the volkstadt and volkstum. It is thereby meaningless in content but nationalistic and undemocratic in form. The reason why "citizens" are not required to swear allegiance to the Constitution is obvious. The present Government and its Republikaner supporters have publicly dedicated themselves to abolishing it and replacing it with one without citizens, and which an executive-dominated Parliament can effectively change by parliamentary-executive decree. The conclusion is as inevitable as it is logical. When contracts are so worded and can be so easily changed and manipulated for partisan political and ideological purposes by power elites, they are not worth the paper they are written on and constitute an assault on civility and democracy.

Conclusion

In his second inaugural address, Thomas Jefferson, one of the original fashioners of the principles of constitutional democracy, said:

"Entertaining a due sense of our equal right to the use of our faculties, to the acquisitions of our industry, to honour and confidence from our fellow citizens ..., what more is necessary to make us a happy and prosperous people? Still one thing more, fellow citizens -- a wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labour the bread it has earned. This is the sum of good government, and this is necessary to close the circle of our felicities."

It is easy to give notional assent to such altruism. Let us give real assent by placing the royal mantle of government which has passed from the monarch to the political executive on the shoulders of those to whom it belongs: the people of Australia and their heirs and successors in perpetuity. Thereby, in the 100th year of our Commonwealth the people of Australia will have just cause to celebrate the great constitutional achievements of the past through the exercise of their sovereignty, whilst honouring in the most fitting manner the debts we owe all those who sacrificed their lives for the advancement and ideals of democracy.

That is our challenge. Accept it, and future generations will bless and honour your memory for having fought, and won, the good fight. When all is said and done, democratic constitutionalism is the best protection against the mad, the bad and the ugly, precisely because it is the people's means of controlling, both directly and indirectly, political power by civil means.

Chapter Eleven

The Engineers' Case : Seventy Five Years On

John Nethercote

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

1995 marks the twentieth anniversary of the demise, in extraordinary circumstances, of the Labor Government led by Gough Whitlam, and the seventy-fifth anniversary of the High Court's decision in Amalgamated Society of Engineers v Adelaide Steamship Co., generally known as the Engineers' Case. It is the latter anniversary which occasions the preparation of this paper, but the coincidence of these anniversaries is fortuitous and of the greatest interest in the way in which Australians think about the governance of their nation.

One factor which contributed so much to the political vicissitudes of the Labor Government, 1972-75, was its inability to accept that the Senate, the second house of the Commonwealth Parliament, whose members are "directly chosen by the people" of each State "voting, until the Parliament otherwise provides, as one electorate", is, subject to some effectively minor exceptions, a fully equal part of the Parliament.

Not only is it not a House of Lords, but the Parliament Act 1911, whereby the powers of the House of Lords over money bills were virtually eliminated and its powers otherwise significantly circumscribed, is irrelevant to Australia's situation.

The Parliament Act, as the Preamble states so unambiguously, was an interim measure pending substitution "for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of a hereditary basis". Australia's Commonwealth Parliament was equipped, from its origins, with just such a second chamber. The premises upon which the Parliament Act 1911 was based do not exist in Australia, and never have.

Australia is a federal nation, and for this among other reasons it is wrong to try to examine its structures and methods of government through a British prism. Britain is a unitary state, and while its institutions of government will always hold a fair measure of interest for Australians, they should not be seen as constituting a governing model. Other considerations apart, Australia now has sufficient experience of government to make its own judgments and arrangements according to its own experience, requirements and preferences.

Unhappily much (but not all) literature on Australian government is heavily influenced by British concepts. This is the case with much that has been written about 1975 : for example, Sawer, Federation Under Strain (1977); Winterton, Parliament, the Executive and the Governor-General (1983); and Coper, Encounters with the Australian Constitution (1986); but not Odgers, Australian Senate Practice, 5th ed (1977); Reid & Forrest, Australia's Commonwealth Parliament (1989); or Brian Galligan, A Federal Republic (1995).

Interpretation of the Engineers' Case is likewise affected by what may be regarded as the British approach to Australian government.

The decision itself is the occasion of much applause because it provided judicial sanction for greater centralisation of Australian government which was implicit in the financial provisions of

the Constitution (as we know from a much-quoted statement by Alfred Deakin) and the national sentiment fostered by Australia's engagement in the Great War. Essentially the High Court shifted from a federalist perspective, in which it interpreted the provisions of the Constitution so as to maintain the viability and autonomy of both the Commonwealth government and the State governments, to a centralist perspective, in which, unless there were express provisions to the contrary, the powers of the Commonwealth were to be interpreted in a full and plenary way, leaving any residue to the States.

The objective was achieved by returning the Constitution to British methods of statutory interpretation, by treating it as an ordinary statute of the Imperial Parliament, without any recognition of its provenance in the inter-colonial conventions and negotiations of the 1890s and the fact that it was legitimised, not by the parliamentary proceedings at Westminster, but by the various referenda which preceded them.

The Griffith Court The inaugural High Court was composed of three justices who had been major figures in development of the Commonwealth Constitution. It may be said of Sir Samuel Griffith, Chief Justice, and his brother Justices, Sir Edmund Barton and Sir Richard O'Connor, that they were not simply present at the creation but were, indeed, creators.

For them the Constitution was in the nature of an agreement among sovereign powers. The States were not subordinate to the Commonwealth, nor the Commonwealth to a State, when each was acting within its area of authority, except that in the case of concurrent legislative powers Commonwealth law prevailed over State law if the laws were inconsistent (Constitution, section 109).1

The Court's approach essentially had two arms, based on implications from the Constitution as a whole rather than expressly stated.

The first was the reciprocal immunity of instrumentalities doctrine. Under this doctrine, the Court held that "the Commonwealth could neither subject the States to Commonwealth law, nor could the States subject the Commonwealth to State law".2 It was this doctrine which was especially at issue in Engineers for it concerned application of Commonwealth law to employees of a State trading concern.

The second was the doctrine of implied prohibitions or reserved State powers. As first stated (in Peterswald v Bartley (1904)), it asserted, in Sir Zelman Cowen's words, that "in general Commonwealth power should be narrowly construed; that the scheme of the Constitution, in leaving the general residue of powers with the States, implied that that residue was very large, that it embraced the `private or internal affairs of the States'..."3 In a series of cases which came before the High Court in its first decade and a half it sought to give effect to these ideas. Thus it found that a Commonwealth official was not bound by a State requirement to affix a two penny duty stamp to a receipt for his salary (D'Emden v Pedder (1904)); and, in Deakin v Webb (1904), that Commonwealth officials were not liable to pay State tax on salaries. On the other hand, in the so-called Steel Rails Case (1908), the Court held that the New South Wales State Railway was liable to pay customs duty on imports.

Griffith was especially scathing of suggestions that the Constitution should be construed, as he put it in 1907, "merely by the aid of a dictionary, as by an astral intelligence, and is a mere decree of the Imperial Parliament without reference to history ...." That view, he considered, was "negatived by the preamble to the Act itself."4 In reaching their judgments the members of the early Court continued to be guided by American practice, especially McCulloch v Maryland (1819) and Texas v White (1868).5

The Court, however, was under challenge from an early stage from the Judicial Committee of the Privy Council. In Webb v Outtrim (1906) which went directly from the Supreme Court of Victoria, the Judicial Committee held that a State government could tax Commonwealth officials and criticised D'Emden (the High Court had refused leave to appeal against its decision in that case). (The Judiciary Act was subsequently amended to render it more difficult for such cases as Webb v Outtrim to go to the Judicial Committee.) In Baxter v Commissioner (1907) and Flint (1907) the High Court reasserted its views on this matter and prevented further Privy Council consideration.

A more serious challenge came, however, from within. In 1905, two additional Justices were appointed, Sir Isaac Isaacs and HB Higgins. Both were more centralist than the foundation Justices and, although present during creation of the federation, they were late arrivals. They did not accept the federalist doctrines of the founders, and steadily adopted approaches which were strongly critical of the doctrines of implied immunities and implied prohibitions. Isaacs labelled these approaches as "contrary to reason" (in R v Barger (1908)), whilst Higgins' approach was that "[w]e must find what the Commonwealth powers are before we can say what the State powers are. The Federal parliament has certain specific gifts; the States have the residue" (R v Barger (1908)).6 Doctrinal differences were aggravated by personal incompatibilities. Griffith and Isaacs never developed much rapport.

Dr Evatt wrote of their "exceedingly fierce" clashes.7 And in 1913, when Griffith was abroad, Barton complained to him about "how little decency there is about these two men [Isaacs and Higgins] - All the same, I think they hate each other, although they conspire".8 Barton especially complained of Isaacs: "It is plain to me, and I think to others, that Isaacs is building his hopes on your remaining in England and is trying to make such a big splash that he will make himself manifest as the right CJ....

His judgments are swelling to bigger proportions than ever - in fact they are very weighty - in respect of paper: and he has assumed an oracular air in court that is quite laughable."9 The inaugural Court was dissolving. In 1912 O'Connor died. In the same year, the Court was expanded to its present number of seven. The old firm of Griffith and Barton were in a clear minority and their ascendancy was certainly waning before Griffith retired in 1919 and Barton died in January, 1920, disappointed that he had been passed over for the Chief Justiceship in favour of Knox, a Sydney silk.

(It is suggested that Griffith was partly responsible for this decision; so anxious was he that Isaacs not succeed to the Chief Justiceship that he urged an appointment from outside the Court.

Barton himself wrote that Griffith's "dominant desire was to requite in deadly fashion the man [Isaacs] who had injured him, and that to make this certain he did not care if he killed the man [Barton] who had helped him".10 Throughout its history it has always been the case that the ranking Justice has been elevated when an appointment of Chief Justice has been made from the existing membership of the Court - Isaacs in 1930; Duffy in 1931; Dixon in 1952; Gibbs in 1981; Mason in 1987; and Brennan in 1995. In 1919 Griffith was not to know that this would be the case.)

The end was signalled in what is known as the Municipalities Case of 1919. It was the last case on which Griffith sat, and he and Barton were in a minority of five to two.

Griffith in his judgment drew upon American authorities ("historical expositions of the unwritten law" brought by the thirteen colonies from the Mother Country and "entitled to very great weight"), and concluded that where municipal bodies discharged State functions they were "entitled to the same immunity from Commonwealth interference as the State itself would be in

the discharge of similar functions".11 Barton took the opportunity to say that it would be "a waste of time" to attack the Railway Servants Case (which decided that railway employees did not come within the Commonwealth industrial power), but it was a warning which only had a short life.12 The Engineers' Case What was signalled in Municipalities in 1919 came to pass in 1920.

The opportunity arose in an industrial case which involved, inter alia, a small number of workers employed in an enterprise in the portfolio of the Western Australian Minister for Trading Concerns. The case was referred to the High Court by Higgins in his capacity as President of the Conciliation and Arbitration Court.

The majority decision in the case was read by Isaacs on behalf of the Chief Justice, Rich, Starke and himself. Higgins prepared his own, clearer judgment. Duffy dissented and Powers was absent. The essence of the majority judgment is contained in this abridgment of Geoffrey Sawer's summary:

1. The Constitution should be regarded primarily as a British statute, to be interpreted by reference to its explicit terms; where there are express powers and express prohibitions or restrictions on power relevant to an issue, these are prima facie conclusive.
2. Decisions of the Supreme Court of the United States are a weak authority. The Constitution of the Commonwealth embodies responsible government; and executive government is carried on in the name of the Crown which is one and indivisible.
3. It is for Parliament rather than courts to devise restrictions not expressed in the Constitution in order to prevent abuse or oppressive use of powers given by the Constitution; such questions are for the Parliaments and electors.
4. Restrictions on Commonwealth power cannot be implied from the allocation of residuary powers to the States.
5. The Constitution binds the Crown, and this means in right of the States as well as the Commonwealth.
6. There are no relevant express provisions in the Constitution restricting application of the industrial arbitration power; the Conciliation and Arbitration Act is expressly applicable to government employees.
7. Federal officials are liable for State taxes except in specified circumstances (for example, inconsistency of State tax with some Commonwealth law).
8. In no case can powers be restricted by implications from a general theory of federalism.13

The case has always been famous, for its sway in interpretation of the Constitution has been pervasive. A quirky illustration of its significance can be found from an account of Sir John Kerr's first day at the Sydney University Law School in 1932. According to Richard Hall, Sir John Peden, Dean of the Faculty, "welcomed them with a harangue which nearly fifty years later sticks in the memory of those who heard it".

The volume of the Commonwealth Law Reports containing the Engineers decision had been stolen. Peden told the students that the offender if found would be expelled and hounded from the profession of law.14 Hall's biography of Kerr is a dark story, but its citation in this context is peculiarly appropriate because what strikes a lay reader of the majority judgment in Engineers is its vituperative language.

There cannot be any doubt that Isaacs dipped his pen in vitriol before drafting the judgment. It came within a month of Griffith's death: there would not have been any irony (as there was with Mark Antony at Caesar's funeral) had Isaacs told his listeners that he had come to bury Griffith, not to praise him.

Referring to the antecedent judgments of the Court, Isaacs said: "The more the decisions are examined, and compared with each other and with the Constitution itself, the more evident it becomes that no clear principle can account for them. They are sometimes at variance with the natural meaning of the text of the Constitution; some are irreconcilable with others, and some are individually rested on reasons not founded on the words of the Constitution or on any recognised principle of the common law underlying the expressed terms of the Constitution, but on implication drawn from what is called the principle of `necessity', that being itself referrable to no more definite standard than the personal opinion of the Judge who declares it.

The attempt to deduce any consistent rule from them has not only failed, but has disclosed an increasing entanglement and uncertainty, and a conflict both with the text of the Constitution and with distinct and clear declarations of law by the Privy Council." 15 Isaacs at this juncture heads off on a long homily about: ". . the chief and special duty of this Court faithfully to expound and give effect to [the Constitution] according to its own terms, finding the intention from the words of the compact, and upholding it through it precisely as framed."16 In this context, it might be wrong to suggest that lsaacs implies that hitherto the Court had strayed from this "chief and special duty", but it would not be surprising to find that some readers have drawn such an inference.

Later in the judgment Isaacs, to use a colloquialism, names names, in particular Sir Samuel Griffith, in Attorney-General for Queensland v Attorney-General for the Commonwealth (1915). Griffith's judgment in that case he finds to be : "... an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognized principle of the common law of the Constitution ....

This method of interpretation cannot, we think, provide any secure foundation for Commonwealth or State action, and must inevitably lead - and in fact has already led - to divergencies and inconsistencies more and more pronounced as the decisions accumulate." 17 It briefly suited Isaacs to cite some American judgments, including some by Marshall, to support his argument. 18 But within a paragraph he declared: "But we conceive that American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our Constitution." 19

American authorities are not appropriate because Australia's system of government is markedly different from that of the United States, for two reasons - the common sovereignty of all parts of the British Empire and the principle of responsible government. Isaacs quoted Lord Haldane's view that the Australian Constitution resembled that of the United States only "in its most superficial features".20 There is no explicit reference to federalism and whether it might form a basis for utilising American jurisprudence in interpreting the Constitution.

The Engineers decision has had a mixed reception. Geoffrey Sawer states: "The joint judgment is one of the worst written and organized in Australian judicial history. Isaacs was given to rhetoric and repetition, and here he gave these habits full rein." 21 Sawer also writes: "Dixon J. disliked Engineers; its literary style set his teeth on edge, and he never mentioned it without a touch of asperity. As early as A.R.U. (1930), he `restated' the case in a manner which gave as part of its decision a rule preventing the Commonwealth from discriminating against the State and its agencies, although that subject is nowhere mentioned in Engineers.

He also said that Engineers did not enable the Commonwealth to deal with States and their agencies as if they were subjects, nor provide as against States the full range of remedies and sanctions which are available against subjects. ... he said that there would still be problems of

Commonwealth-State relations which could not be solved without recourse to `principles of the Constitution which are not immediately discoverable in its words'....
He also said: `I am not prepared to accept all the obiter dicta in the Engineers Case as having achieved the impossible task of anticipating every future difficulty in the working of our Federal constitutional scheme.'" 22 Leslie Zines writes in like vein: "The joint judgment is in large part very loosely reasoned and badly organised. It is written with more fervour than clarity."23 And in a telling observation he states: "Much of the reasoning is difficult to understand; for example, the reasons given for not following United States decisions. It is true that Australia differed from the United States in having responsible government and the monarchy, but how was the difference relevant to the problem?.... Australia, while differing in those respects, resembled quite strongly the United States in the division of legislative powers and the manner in which that was done, namely by conferring express and enumerated powers on the federal government and leaving the remainder to the States." 24
Zines likewise puzzles about the significance of the reference to responsible government in the decision.25
An immediate consequence of Engineers was a dramatic shift in the Commonwealth industrial jurisdiction. In 1920, 670,000 unionists worked under State awards; only 100,000 worked under Commonwealth awards. By 1924 the comparable figures were 225,000 under State awards; 550,000 under Commonwealth awards. Although some unions moved back and forth between jurisdictions, it is clear that the Commonwealth had made substantial inroads into State authority in industrial relations. 26 The broader consequence was a High Court jurisprudence which had returned to the fold of English law in the name of nationhood.
Important and invaluable as English law has been for Australian life and liberty, its value in constitutional matters is less self-evident.
England is a unitary state with strong predilections in favour of the Crown. In constitutional matters Australia is a federal nation and a robust practitioner of federal democracy. The Court's influence hereafter was strongly weighted in favour of the central government.
Under Griffith, the Constitution-maker, the starting point was the States. After Engineers, the starting point was the Commonwealth.27 Judicially speaking, and notwithstanding occasional gallant exceptions, the Constitution has been moulded to meet the convenience of the Commonwealth, with the States and their instrumentalities subject to Commonwealth law.
But according to Sir Owen Dixon the immediate effect of the decision was ambiguous. On one occasion he wrote: "The substance of the decision has been hardly impugned, but its result was to reduce still further the power of the State and its importance in the eyes of the community. At the same time the authority of the Court suffered. A tendency grew among the States to look to the Judicial Committee of the Privy Council.
Moreover, the legal profession for a time appeared to feel that a more stable development of our constitutional law might come from that body. It was a vain hope." 28 The uncompromising character of the decision had the effect of delegitimising references to American law in the evolution of our federation. As R.T.E. Latham wrote in 1937: "It cut off Australian constitutional law from American precedents, a copious source of thoroughly relevant learning, in favour of crabbed English rules of statutory interpretation, which are one of the sorriest features of English law, and are ... particularly unsuited to the interpretation of a rigid Constitution." 29
For ordinary citizens of the Commonwealth, a general knowledge of the significance of Engineers is leavened by its association with many leading political personalities, of whom Sir Robert Menzies is not the least. The Court included two later Chief Justices, Isaacs (1930- 31)

and Duffy (1931-35), the sole dissenter. Duffy's successor, Sir John Latham, was at the bar table representing Victoria. In the fifteen years between the case and his elevation to the Chief Justiceship, Latham had a career in Commonwealth politics as, variously, Attorney- General, Minister for External Affairs and Leader of the Opposition.

Another at the bar table was Dr H.V. Evatt, destined for a later career which embraced the New South Wales Legislative Assembly, the High Court of Australia, the Commonwealth House of Representatives (Attorney-General and Minister for External Affairs, 1941-49; Leader of the Opposition, 1951-60) and the Chief Justiceship of New South Wales.

But it was upon Menzies that the light on this occasion shone so brightly. He described his situation as follows: "I was the sole counsel for the successful party. I was very young, twenty-five years old, and a success meant a great deal to me. In fact, I got married on the strength of it." 39

A late starter in the case, he did not, from the perspective of the centralist advocates on the bench, miss a cue. Counsel for the Amalgamated Society of Engineers, Menzies endeavoured to secure victory for his clients by arguing that the functions involved were trading, not governmental, and thus not affected by Griffith's federalist legacies. Starke, one of the plainer speaking Justices, complained that Menzies' argument was "a lot of nonsense!". Menzies agreed, "in what [he] later realized to be an inspired moment".

The relatively new Chief Justice, Knox, wanted to know why he was putting an argument he admitted was "nonsense". As Menzies recollected: "`Because', said the young Menzies (the old Menzies would not have dared to do this) `I am compelled by the earlier decisions of this Court. If your Honours will permit me to question all or any of these earlier decisions, I will undertake to advance a sensible argument'. I waited for the heavens to fall. Instead, the Chief Justice said: `The Court will retire for a few minutes?', and when they came back he said, `This case will be adjourned ..... Each government will be notified so that it may apply to intervene. Counsel will be at liberty to challenge any earlier decision of this Court!'" 31

(It is typical that Manning Clark treats the case only vaguely, his main interest, certainly in terms of length, is to use the opportunity to take a gibe at Menzies' first major success.32)

In his recent address on Engineers the present Chief Justice, Sir Gerard Brennan, on the basis of research in the records of the High Court, states that while Menzies lit the fuse, and Justices Isaacs and Rich had prepared the charge in the 1919 Municipalities Case, it was the argument of counsel for the Commonwealth, Leverrier, KC, which "seems to have had the greatest impact on the putative author of the majority judgment".33

This proposition is very plausible, for he would have been briefed by another of the founders of the federation, Sir Robert Garran, Solicitor-General for the Commonwealth since 1916 and Secretary to the Attorney-General's Department since its inception. Garran it was who, in Prosper the Commonwealth, wrote about Engineers under the sub-heading of "Revolutionary" Year 1920.34 The essential meaning of the case for Garran was "Back to the Constitution".35 "This seemed on the first view to be a complete revolution in the principles of interpretation".36

One strand of the Engineers decision stressed literal reading of the Constitution in contrast to one based on implied doctrines. Garran did not altogether agree: he considered that implications were still valid so long as they were necessary implications. He would no doubt have regarded the references in the majority judgment to "responsible government" to be a necessary implication of section 64, which provides that ministers should be Members of Parliament.37 And it is quite clear, as several recent decisions of the High Court show, that implications are now playing a

considerable role in interpretation of the Constitution, though tests of the necessity of the implications do not seem to a lay observer to be especially strict.

Isaacs' biographer, Sir Zelman Cowen, reports that Isaacs "also insisted that in interpreting the constitution it was necessary to take account of changing circumstances, and in particular that the Court should acknowledge the needs of the nation".38 This is an approach which appears to have considerable currency in the Court, not least by use of the external affairs power.

To conclude as I began. There may have been a case for settling the 1920 matter on terms favourable to the engineers; this could have been achieved by characterising the function as trading rather than governmental. There may also have been a case for placing a greater stress on the actual words of the Constitution in its interpretation. But what needs more searching examination is the wisdom of discarding the federal basis of the Constitution and adopting interpretative approaches derived from the legal system of a unitary state.

In 1975, by contrast, political matters in dispute between the Government and the Opposition were settled by insisting on the bicameral structure of the Parliament and resisting philosophies seeking to impose British concepts on what is an institution in all respects federal, elective, democratic and Australian.

The sub-heading for this paper is that Australians should be as familiar with the Federalist Papers as with Bagehot (although I have been told that university students in politics today are unlikely to know about either Bagehot or the Federalist Papers). To study Australian government mainly using only British government as a point of international reference is quite misleading, as it is to concentrate upon the internal structure of the Commonwealth without addressing the daily workings of the federation.

The deeper point beyond the epigram is naturally that the origins of the federation and its early years warrant much closer study and appreciation. They were genuinely creative years in Australia and the leading figures, especially Griffith, were notable for the breadth of their learning.

For some, Engineers represents a move in judicial interpretation from a federal to a national approach. My review of the case is that it also marks a narrowing of the judicial perspective after a more exacting and enterprising style displayed by the Court when it was in the hands of the three foundation judges, a retreat from the complexities and diversities of federalism towards the relative simplicities and rigidities of a unitary state.

Endnotes : 1. This paragraph is based on Leslie Zines, The High Court and the Constitution, 2nd ed., Butterworths, 1987, 1.

2. Michael Coper, Encounters with the Australian Constitution, CCH, 1986, 188.

3. Zelman Cowen, Isaac Isaacs, Oxford University Press, 1967, 154.

4. Roger B. Joyce, Samuel Walker Griffith, University of ueensland Press, 1984, 269.

5. Brief summaries of these cases may be found in Kermit L. Hall (ed.), The Oxford Companion to the Supreme Court of the United States, New York, 1992, 536-8 and 869 respectively.

6. Cited in Zines, op.cit., 7.

7. Quoted in Joyce, op.cit., 296.

8. Quoted in Coper, op.cit., 147.

9. Ibid.

10. See Roger B. Joyce, op.cit., 357.

11. Ibid., 337.

12. Quoted in John Rickard, HB Higgins, Allen & Unwin, 1984, 277.

13. Geoffrey Sawer, Australian Federalism in the Courts, Melbourne University Press, 1967, 130-1.
14. Richard Hall, The Real Sir John Kerr, Angus & Robertson, 1978, 20.
15. Amalgamated Society of Engineers v Adelaide Steamship Company, 28 CLR (1920-21), 141-2.
16. Ibid., 142.
17. Ibid.
18. Ibid., 145.
19. Ibid., 146.
20. Ibid., 147.
21. Geoffrey Sawer, op.cit., 130.
22. Ibid., 133.
23. Zines, op.cit., 10.
24. Ibid.
25. Ibid., 10-11.
26. Stuart Macintyre, The Oxford History of Australia, Vol 4, 1901-1942, The Succeeding Age, Melbourne, 1986, 235.
27. Zines, op.cit., 13.
28. Quoted by Sir Gerard Brennan, Three Cheers for Engineers, Canberra, 31 August, 1995, typescript, 8.
29. Quoted in Peter Hanks, Australian Constitutional Law - Materials and Commentary, 4th ed., Butterworths, 19,394.
30. Sir Robert Menzies, Central Power in the Australian Commonwealth, Cassell, 1967, 37-9.
31. Ibid., 38-9.
32. C.M.H. Clark, A History of Australia, vol. VI, Melbourne University Press, 1987, 153.
33. Sir Gerard Brennan, op.cit., 7.
34. Sir Robert Garran, Prosper the Commonwealth, Angus & Robertson, 1958, 180.
35. Ibid., 181.
36. Ibid., 182.
37. Ibid., 181.
38. Zelman Cowen, op.cit., 150.

Concluding Remarks

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

Copyright 1996 by The Samuel Griffith Society. All Rights Reserved

---

It seems to be my role to say a few words about the course of this Conference, although I cannot attempt to do justice to all that has been said or to recapture the force and colour of some of the speeches.

I hope that you will all agree that we have had another very successful Conference. We have again been singularly fortunate in our after dinner speakers, and are most grateful to the Honourable Jan Wade for her thoughtful address and to Professor Ken Minogue for the brilliant wit with which he sweetened his message. All the papers delivered during the sessions have been of high quality, so that the next volume of Upholding the Australian Constitution will make a contribution to the constitutional debate as impressive as that made by its predecessors.

I doubt if the general public understands the extent to which federalism in Australia has been dismantled and to which the authority of the States, which were originally intended to have dominant power in the Federation, has been reduced. It is an aim of our Society to inform the public of constitutional issues, and it may be that our efforts have been successful in creating a dawning awareness of the consequences of the effect that has been given to the external affairs power. Clearly we must continue the debate on that topic, with the dual objectives of ensuring that the procedure for making treaties is subject to effective scrutiny, and if possible control, by the Parliament, and that the power of the Parliament to legislate under section 51 (xxix) of the Constitution is confined within proper limits.

Mr Des Moore has thrown a new light on another provision of the Constitution whose abuse has tipped the federal balance against the States, namely the power given by section 96 to make conditional grants. He has illustrated how special purpose payments made by the Commonwealth to the States have little substantive purpose and serve the main function of political grandstanding. Such grants have swollen the bureaucracies of the States as well as that of the Commonwealth. His paper provides further arguments in favour of competitive federalism.

Another constitutional provision which has compounded the financial difficulties of the States is section 90, which forbids the States to impose duties of excise. I hope that Dr Craven is wrong in his pessimistic suggestion that the High Court will not change its views as to the restrictive nature of that provision. I hope that the Court will be convinced by the judgments of Dawson, Toohey and Gaudron JJ. and will follow them. I hasten to add that I have no special knowledge that sustains me in my optimism.

One of the gravest issues of today does not directly involve federalism. It concerns the position of the Aboriginal people. There is, of course, a natural sympathy for the dispossessed and a proper wish to improve the deplorable conditions under which some of those people live. These understandable, and indeed admirable, sentiments seem to have been perverted by the combined efforts of humanitarian idealists, self-seeking carpet baggers and political opportunists. Hence the confused and unsatisfactory law with regard to native title which has been discussed by Dr Howard, and the ridiculous tendency to elevate superstition above western culture and scientific

method about which Professor Gough spoke. One cannot exaggerate the danger to Australian society if this tendency continues.

More basic questions were raised by Mr Harry Evans and Professor O Brien. Both spoke of the decline of our representative institutions. Mr Evans gave us a very balanced view of the possible part which citizen initiated referenda with proper safeguards might play in stemming this decline, although he made clear that the value of such referenda must necessarily be limited and that the practical obstacles to their adoption are formidable. I need hardly remind you of Professor O'Brien's stirring and convincing address; we must share his concerns at the tendency to abuse patronage and power, and his wish that the power of the Executive should be confined and sovereignty of the people made effective.

At the end of the Conference we returned to federalism with a discussion of the Engineers Case. In spite of Mr Nethercote s invitation, there are no corrections to his address I would wish to suggest. Never has a judgment which was so badly written had so influential an effect on constitutional development as that written by Sir Isaac Isaacs in the Engineers' Case. It was no doubt right for the Court in that case to reject the doctrines of reserved powers and the immunity of instrumentalities as they had previously been formulated. Where the judges went wrong was in deciding that the provisions of the Constitution which conferred power on the Commonwealth should be construed literally, with little or no regard to the context provided by the fact that the Constitution was a federal one. However, that decision is the basis on which the law has developed.

We owe our thanks to all those who have read papers during this Conference, to Mr John Stone who arranged the programme so well, to Dr Nancy Stone for all the help she has given in organising the Conference, and to you all for your attendance.

Appendix I

Contributors

---

1. Addresses

The Hon. Jan WADE, MLA was educated at Sydney High School,. Firbank CEGGS (Melbourne) and the University of Melbourne,. gaining her LLB in 1959 and a BA (History) in 1979. She is. married, with five children. After being called to the Victorian. Bar in 1962 and tutoring in Law at Melbourne University (1963-. 1964), she became a self-employed solicitor (1965-67) before. entering the Parliamentary Counsel's Office (1967-78). She then. served, in turn, as Assistant Chief Parliamentary Counsel (1978-79),. Commissioner for Corporate Affairs (1979-85) and President of the. Equal Opportunity Board (1985-88). Elected to the Victorian. Parliament in a 1988 by-election as the Liberal Member for Kew,. she was re-elected in 1988 and 1992 and, since the latter date, has. served in the Kennett Government as Attorney-General, Minister. for Fair Trading and Minister for Women s Affairs.

Professor Ken MINOGUE was born in New Zealand and, after. arrival in Australia, was educated at Sydney High School and the. University of Sydney (BA (Hons), 1950) before continuing his. studies at the London School of Economics. Appointed to a. teaching position at LSE in 1956, he has taught there since that. date, becoming Professor of Political Science in 1984, a post from. which he retired this year. Apart from numerous articles both in. scholarly journals and elsewhere, he has published a number of. books, including The Liberal Mind (1963), The Concept of a. University (1974), and most recently Politics : A Very Short. Introduction (1995). In 1986 he produced for the BBC a six-part. television series on free market economics, The New Enlightenment,. which was repeated on Channel 4 in 1988.

2. Conference Contributors

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.

Dr Greg CRAVEN was educated at St Kevin s College, Toorak. and the University of Melbourne (BA, 1980; LLB, 1981; LLM,. 1984). He has taught at Monash University (1982-84), and was. Director of Research for the Legal and Constitutional Committee. of the Victorian Parliament (1985-87). After having served for. three years (1992-95) as Crown Counsel to the present Attorney-. General for Victoria, he has now returned to his previous post of. Associate Professor and Reader in law at the University of. Melbourne. He specialises in constitutional law, and has written. and edited a number of books in that area, including Secession : The. Ultimate States' Right (1986) and Australian Federation : Towards the. Second Century (ed.) (1991).

Harry EVANS was educated at Lithgow High School and the. University of Sydney (BA Hons, 1967). After a brief period in the. Parliamentary Library, he has served on the staff of the Senate. since 1968, including as Secretary to a number of major Senate. Committees, such as the Regulations and Ordinances Committee. and the Select Committees on the Conduct of a Judge

and. Allegations Concerning a Judge. After periods as Clerk Assistant. (1983-87) and Deputy Clerk (1987-88), he has been Clerk of the. Senate since 1988. He is the author of numerous articles on. parliamentary and constitutional matters, and has recently edited. the 7th edition of Odgers Australian Senate Practice.

Professor Austin GOUGH was educated at Xavier College,. Melbourne and, after a period editing the Coonamble Times and. Walgett Spectator (1946-52) and as a Commonwealth public servant. (1953-60), completed degrees at the Universities of Melbourne (BA. Hons, 1960) and Oxford (D.Phil., 1965). After teaching at the. University of Warwick (1965-67) and as Reader in History at. Monash University (1967-70), he was for 21 years Professor of. History (now Emeritus Professor) at the University of Adelaide. (1970-91). He is the author of two books on 19th Century. European history and, since 1991, of numerous newspaper and. other articles.

The Rt. Hon. Sir Harry GIBBS, GCMG, AC, KBE, was educated. at Ipswich Grammar School and Emmanuel College at the. University of Queensland (BA Hons, 1937; LLB, 1939; LLM,. 1946), and was admitted to the Queensland Bar in 1939. After. serving in the A.M.F. (1939-42), and the A.I.F. (1942-45), he. became a Queen's Counsel in 1957, and was appointed,. successively, a Judge of the Queensland Supreme Court (1961-67),. a Judge of the Federal Court of Bankruptcy (1967-70), a Justice of. the High Court of Australia (1970-81) and Chief Justice of the. High Court (1981-87). Since 1987 he has been Chairman of the. Review into Commonwealth Criminal Law and, since 1990,. Chairman of the Australian Tax Research Foundation. In 1992 he. became the founding President of The Samuel Griffith Society.

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 1972. Although recently appointed as. (part-time) Crown Counsel to the Attorney-General for Victoria,. he remains 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.

S E K HULME, AM, QC, was educated at Wesley College,. Melbourne and at the University of Melbourne (LLB, 1951) and. Magdalen College, Oxford (BCL, 1955). He was Rhodes Scholar. for Victoria in 1952 and the Eldon Scholar, Oxford in 1955. He. was admitted to the Victorian Bar in 1953 and at Gray's Inn,. London in 1957. Since 1957 he has practised as a barrister-at-law,. becoming Queen's Counsel in 1968. He has published in various. legal journals, and is a Director of several public companies.

Des MOORE was educated at Geelong Grammar School, the. University of Melbourne (LLB, 1954) and the London School of. Economics (BSc (Econ), 1958). He joined the Commonwealth. Treasury in 1958, serving in various positions covering most of the. main policy areas before becoming a Deputy Secretary in 1981.. Since his resignation from the Treasury in 1987 he has been a. Senior Fellow with the Institute of Public Affairs, Melbourne, in. charge of its Economic Policy Unit. In that role he has published. numerous papers on a wide range of economic policy issues and. has been a prolific commentator on public affairs generally.

John NETHERCOTE was educated at Blakehurst High School,. Sydney and the University of Sydney (BA, 1968) and is currently. completing his Ph.D. from the London School of Economics. He. has been a member of the Commonwealth public service since. 1970, working at

different times for the Public Service Board, the. Royal Commission on Australian Government Administration, the. Public Service Commission of Canada and the Defence Review. Committee. He joined the staff of the Senate in 1987 and his. assignments there have included Secretary to the Senate Standing. Committee on Finance and Public Administration and overseeing. publication of Odgers Australian Senate Practice (6th edition). He. edited Parliament and Bureaucracy (Hale & Iremonger, 1982) and. was a joint editor of The Constitutional Commission and the 1988. Referendums (Federalism Research Centre, 1988) and The Menzies. Era (Hale and Iremonger, 1995).

Professor Patrick O'BRIEN was educated at St Kevin s College,. Toorak and, after working in journalism, teaching and other. occupations, at the University of Melbourne (BA Hons, 1967).Since 1968 he has taught at the University of W.A., where he is. now Associate Professor of Politics. In 1991-92, as a Fulbright. Scholar, he was a Senior Visiting Fellow at the University of. California (Berkeley). He is a prolific writer and commentator on. public affairs and was particularly prominent, and courageous, in. that role during the W.A. Inc. years in Western Australia. His. books include The Burke Ambush : Corporatism and Society in. Western Australia; Burke's Shambles : Parliamentary Contempt in the. Wild West; The Executive State : WA Inc. and the Constitution; and. The People s Case : Democratic and Anti-Democratic ideas in. Australia s Constitutional Debate.

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 IMF 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 Chairman of J.T..Campbell & Co. and contributes a weekly column to The. Australian Financial Review.