Proceedings of the Seventh Conference of The Samuel Griffith Society

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Foreword

John Stone

The Samuel Griffith Society's seventh Conference, the papers delivered to which constitute this Volume in the Society's series of Proceedings, *Upholding the Australian Constitution*, was held in Adelaide, and was marked by a gratifyingly large attendance. Whether this owed anything to the fact that, in defiance of all economic doctrine, those attending the Saturday sessions did receive a free lunch, or whether (as I prefer to think) it was wholly a tribute to the once again generally excellent quality of the intellectual fare offered, must be a matter for judgment. What is clear is that, in a State in which the Society's membership is still small, the quality of the Conference arrangements was a tribute to the local organisers.

The Society was honoured by the presence at the opening Dinner on the Friday evening of the Premier of South Australia, the Honourable Dean Brown and Mrs Brown. The Premier's address, with which these Proceedings effectively commence, had clearly benefited from much thought. In the face of widely-held community opinion to the contrary, it demonstrated (as had earlier addresses to the Society by the Premiers of Victoria and Western Australia, respectively) that some of our political figures can and do make a thoughtful contribution when given an appropriate platform for that purpose.

However, because this Volume constitutes the full Proceedings of the Society's Adelaide Conference, it does contain one paper, delivered to that Conference by the Commonwealth Minister for Administrative Services, the Honourable David Jull, MHR, about which I must confess to considerable disappointment.

It is a matter of personal regret that I should have to express that view of Mr Jull's paper, *Constitutionally Entrenching our Flag*, and I do not do so lightly. I do so against the background of the high standards set by every previous contributor to the Society's proceedings, and my feeling that this paper simply does not measure up to those standards. For that I can only proffer, in the aftermath, my apologies.

The Minister's paper was one of four comprising what the Conference program described as some agenda items for the 1997 People's Constitutional Convention - a theme to which, no doubt, the Society may return in the period before that Convention actually assembles. Apart from the topic of the Republic, to which the Chairman of South Australia's Constitutional Advisory Council directed some thoughtful and extensive remarks, the need for a constitutional referendum to amend section 51(xxix) (the "external affairs" power) was addressed by Dr Colin Howard. The characteristically lapidary quality of his paper was only equalled by that of Dr Greg Craven, who cast a considerable pall over the gathering by his comments on the *modus operandi* of the present processes for the appointment of Justices of the High Court, and hence for any substantial hope of returning to its previous level of public esteem that now much diminished institution.

With the *Native Title Act* 1993 having now been in force for over two years, and with a change of Government in Canberra, it seemed appropriate at this Conference to devote a significant part of our time to what we have previously broadly termed "the Aboriginal question". The resulting

papers from Dr John Forbes (a sequel to his brilliant earlier paper to the Society's fourth Conference in Brisbane) and Mr Chris Humphry set down in damning detail the pass to which the *Native Title Act* has already brought us. The accompanying paper by Mr Ray Evans provides a more general philosophical backdrop to what, in his concluding remarks, the Society's President, the Rt. Hon. Sir Harry Gibbs, described as the question "which threatens to divide Australian society and to shake the foundations of the nation".

Everyone wishing to inform themselves about the current and prospective debate on constitutional issues in Australia will find much to interest them in this Volume. Like its six predecessors, it is to that debate that it is dedicated.

Dinner Address

Challenges, Chances and Choices : The Future of the Federation

Hon. Dean Brown, MLA

A couple of weeks ago I sat in the State Cabinet room and spoke to a South Australian astronaut as he flew overhead in a space shuttle, at 70,000 kilometres per hour.

We truly live in exceptional times -- and I hope I never lose my sense of wonder, excitement and privilege at being where I am at this point in history.

We also live in a time of exceptional opportunities to link with the world, at home, at work, in cafes, libraries and community centres -- opportunities and lifestyles far removed from those of the people who framed the Federation and watched its implementation in 1901.

This time of exceptional opportunity also brings with it opportunities which could fundamentally affect the future of Federalism.

Overwhelmingly, the challenge for governments anywhere today is to create environments that allow people to make choices about their own lives -- which give maximum freedom -- while at the same time responding to their alienation from governments and governments' institutional arrangements.

Fundamentally, people want freedom to be individuals but they also want a sense of belonging and security.

One of the biggest drivers of change today is technology, which will continue to push us towards what have been described as `virtual governments'.

The increasing capacity of information technology and telecommunications, matched with lowering of costs and the enthusiastic uptake of the Internet, means that the world is now 60 milliseconds wide.

The impact on governments, as people operate as citizens of the world, has yet to be fully realised.

The impact on Australia as a nation creates quite natural tensions between us in identifying ourselves within a national boundary -- and as a nation operating in competition with other regions -- and in the global marketplace.

So it becomes more critical that we define now how we want to progress our institutional arrangements -- the choice between accepting regional diversity, freedom and difference in the way government is run -- as opposed to centralism.

In other words -- diversity versus uniformity.

This means resisting the creeping centralism of power in Canberra.

What I want to argue tonight, as part of the challenges, chances and choices of the next few years, is not an anti-Canberra stance -- but more a call for an appraisal of where we are as a nation and where we want to be in the next century.

Modern media and community expectations will require government as *close* as possible to the people it represents.

It will require also government which is specific in its promises and outcomes.

That, I believe, remains the strongest argument for States to hold their own reins - with national uniformity where appropriate.

That means guarding against further erosion of the States' control over their own destinies -- and arresting some of the decline in the power of the States.

To this audience, I don't have to chart the decline -- you're all very familiar with the inroads and the forces behind them.

For State politicians this presents a three-pronged challenge of acting as agents of change, coming to grips with new power blocs which are not necessarily aligned to countries or regions, and resisting any further erosion of the States' ability to manage their own affairs.

How do you ensure that the democratic process is not subsumed by the economic process? As governments increasingly move out of service delivery, how do they ensure they fulfil their moral responsibility for the well being of the people they serve?

One big chance which is emerging from the change of emphasis from service deliverer to facilitator is, that when not totally focused on service delivery, governments can spend more time thinking about how the links across society work - and do something about strengthening them.

One of the challenges is how State Parliaments maintain their role with the increasing use of uniform legislation.

Recent examples are the Competition Policy, Trans-Tasman

Recognition, Gun Control and the National Electricity Market, where the policy generally is not an issue but the legislation is developed with no real opportunity for scrutiny by the State Parliaments.

The Parliaments have no effective means of amending legislation which has been drafted by bureaucrats, often in another State, and which requires national uniformity.

From the outset I want to emphasise that South Australia welcomes the policy direction of these reforms.

- Sorting out the processes is equally important in other areas affecting the responsibilities of the States, such as native title and gun law reform.

The important role of the State Parliament in putting into place complementary laws of national application has been illustrated in the native title process.

The problems which some States have had with this federal legislation are well known. After all, control over land titling and ownership has been a traditional State Government responsibility.

This is one piece of legislation which has much greater impact in some parts of Australia, including South Australia, than elsewhere.

That is why the federal Government should hand responsibility for native title on pastoral leases to the State Governments.

In South Australia we have enacted State legislation which has sought to give practical application to the federal laws and to make them more workable within the constraints of the federal Act.

There is still a long way to go with native title.

But South Australia has been prepared to take the lead to

unravel some of the complexities and uncertainties inherent in the federal legislation.

It is an example of where Canberra needs to be much more aware of the potential for varying regional impacts when it makes decisions and enacts legislation.

In this State we have supported the application of the restrictive business practice rules in the *Trade Practices Act* to State government business enterprises.

We are committed to developing a more competitive business environment.

The process of microeconomic reform is one that we commenced in this State well before the Council of Australian Governments (COAG) Agreement on Implementing the National Competition Policy, and it goes well beyond the requirements of that Agreement.

However, there is a marked difference between the Commonwealth and the States agreeing on broad policy outcomes, and the Commonwealth using its leverage under the various COAG agreements to obtain constitutional outcomes.

It can only achieve this, of course, by use of its purse-strings power and by threatening to use its existing heads of constitutional power if the other jurisdictions do not agree to its desired outcomes.

In many situations the use of the Commonwealth's constitutional power may be insufficient to apply the policy outcomes to all market participants, for example, to unincorporated persons and partnerships. In those situations, the Commonwealth needs the assistance of the States.

There are a number of constitutional outcomes that can be identified. First, those that restrict the broad policy-making role of the State and so affect its room to manoeuvre in areas traditionally within the State's competence, such as economic development incentives. Secondly, those that affect the State's parliamentary sovereignty. And thirdly, those that interfere in a detailed way in an area traditionally regulated and controlled by the States, such as petroleum exploration and production licensing, exploration acreage decisions and so on.

State sovereignty and parliamentary sovereignty are in jeopardy when we are required, upon threat of financial penalty, to adopt a particular form of legislation by the Commonwealth. This has occurred with competition policy.

Of course, the starkness of the threat is usually hidden in some intergovernmental agreement, or maybe the implicit threat, "The Commonwealth will legislate or withdraw funds if you don't".

The standard example of being forced into a legal straightjacket is through Applications of Laws schemes, where one jurisdiction is the Lead Legislator and other jurisdictions pass a law that simply picks up and applies the Lead Legislator's law as it is from time to time. Thus, the Lead Legislation can be amended by the Parliament of the Lead Legislator, and it then applies in South Australia without reference to the South Australian Parliament.

Papers published by The Samuel Griffith Society have, over the years, highlighted the seemingly inexorable expansion of federal power over aspects of Australian life.

The drafters of the Constitution - and perhaps more important, the people who adopted it - could never have envisioned this
expansion.

The steady erosion of responsibilities of the States has resulted from a number of factors, not the least of which has been the role of the High Court and the use - or, I should say, misuse - of the foreign affairs power.

But, as we look to the future, we should realise that undermining the Constitution can take many forms.

The Constitutions of the Commonwealth and of the States all embody *parliamentary* democracy. The principle of the supremacy of Parliaments is central to our system of government.

The implementation of national legislative schemes does reduce parliamentary sovereignty because the very process usually reduces the opportunities for parliamentary scrutiny of legislation.

Thus, State Cabinet is presented with the *fait accompli* of a draft intergovernmental agreement and accompanying legislation with little scope to seek changes.

- Parliaments are forced to become little more than rubber stamps and, in many instances, find they have no say in amendments to their laws which occur through Ministerial agreement.

This is a real intrusion upon State sovereignty, and certainly not one anticipated by the founding fathers of the Australian Constitution.

To date, only one Australian Parliament has sought to address the challenge to parliamentary sovereignty posed by intergovernmental agreements and other national legislation schemes.

The Western Australian Parliament has established a Standing
Committee on Uniform Legislation and Intergovernmental Agreements.

Representatives of all Australian Parliaments are presently meeting to devise some mechanism to preserve a measure of parliamentary sovereignty.

So, my message to the Prime Minister and his Ministers is, "Do not allow yourselves to be seduced by the perceived power of dominating the nation, and therefore the States and Territories, from Canberra. Do not allow the bureaucrats to persuade you to ignore the role of Parliament within the Federation, or believe that everything must be uniform".

All of these tendencies by the Commonwealth, of any political persuasions, will lead to undermining the very diversity and creativity we celebrate as the mortar which makes this nation strong.

It is, indeed, the very antithesis of our diversity -- a smothering kind of uniformity which undermines the competitive edge of the States and therefore the competitive edge of Australia.

Take the Australian Securities Commission. There is currently a move to downgrade the capacity of the regional offices in Adelaide, Brisbane, Hobart and Darwin to deal with takeovers and mergers.

I have no quarrel with the ASC becoming more efficient and lean, but that will not come from concentrating resources in Melbourne, Sydney or Perth.

This is still the subject of discussion between the States and the Commonwealth in the hope that necessary services can be maintained in centres such as Adelaide to provide a critical mass for the provision of services to South Australian business.

The States have to be respected for their knowledge of their people and their individual needs and their capacity to encourage a critical mass for efficient conduct of business.

The best picture I could paint of a flourishing Australia as a federation in a global marketplace, would be dominated by the States thriving as competing regions, sparring with one another, constantly pushing one another to achieve better performances - in much the same way as our sportsmen and women do.

In fact, you can use the sports analogy : the strongest team is the one with the biggest number of high performers - striving for "personal best" performances - but doing it for the ultimate good of the team, which is all the stronger for the internal competition.

So that's a key choice for the future : just how good do we want to be as a nation? - and how prepared are we to let our individual regions strive for competitive excellence?

One of the on-going challenges to federalism is developing a successful model for the distribution of revenue.

This may have as much constitutional significance as vertical fiscal imbalance, which has developed as a result of those controlling the purse strings - the federal Government.

In this, as in many areas, the Commonwealth tends to act as if the words "Commonwealth" and "national" mean the same.

In my dictionary, they don't.

We have a chance now, when the nature of Federalism is under scrutiny, for the States to help shape the agenda and the priorities for reform as major Commonwealth-State interactions.
One of the most important challenges here is managing the
Premiers' Conference.
This Conference has been a dominating feature of Commonwealth-State relations for almost 100 years.
As well as the declared intention of the new federal Government and the Premiers and Chief Ministers to work for a more co-operative relationship, the proximity of the Centenary of the first such meeting of Premiers in 1899 makes it timely to review this annual ritual.
As a reflection of the maturity of relations between different levels of government in Australia, I do not believe it serves us well.
There is the common perception that the Premiers and Chief Ministers go begging to Canberra to be beaten up by an increasingly powerful federal Government.
As such, these annual meetings have become little more than media events. There is no meaningful negotiation about shares of the financial cake, or the direction of the national economy, and other important issues affecting intergovernmental financial relations in Australia.
The Prime Minister comes to the meeting given little room by his Cabinet to manoeuvre.
The Premiers and Chief Ministers are always left to complain that the Commonwealth has not been fair.

- As such, for a long time these meetings have served little purpose in encouraging the Commonwealth and the States and Territories to work cooperatively to deal with financial issues.

They have tended to alienate the States from the Commonwealth and impede the opportunity to resolve social and economic issues requiring national consensus.
My view is that the national interest would be better served if the reality were recognised by all participants at Premiers' Conferences that the meeting is not a negotiating session.
Rather, it is an exchange of views about the programs of the participating governments, their outcomes and the economic and financial constraints within which those programs are being undertaken.
The States and Territories are seeking longer term certainty in the funds they receive from Canberra. However, this does not mean that an annual meeting of the States and Territories with the Commonwealth does not have a place in dealing with important financial and economic issues.

- The States, increasingly, are bringing in early budgets to assist in their annual forward planning.

It is to be hoped that the new federal Government will do the same from next year.
There is little purpose served in going to Canberra in June when all the key budget decisions for the following twelve months have been taken.
I suggest that the annual Premiers' Conference should be held early in the calendar year and certainly by early February.

- At the meeting, the Commonwealth and the States and Territories should discuss the progress of their respective budgets and the financial and economic outlook for the following financial year.

This should be a genuine exchange.
The State and Territory leaders should be given the opportunity to have input to the federal Budget process.

This would give the process a regional focus it tends to lack at present.
It would allow the State and Territory leaders to provide valuable input to national economic and financial settings.
The States and Territories would have a clearer picture, at a much earlier stage in their budget cycles, about the financial and economic objectives of the Commonwealth to maintain or increase their share of the financial cake.
Having been informed of the position of the States and Territories, the Commonwealth would then make public by early March its proposed funding allocations to them for the following financial year.
This could be done through a statement to federal Parliament which could be the subject of debate in the States' House, the Senate.
Such a debate would allow issues in the individual States and Territories to be canvassed before the federal Government finalises its funding allocations by the end of March.
In this way, financial issues of significant regional and national importance could be debated in a much more mature way.
The ritual of Premiers and Chief Ministers having to lament outside the federal Parliament about the cold and mean financial winds of Canberra would become a thing of the past.

- The federal Government would have to give more serious and sustained consideration to the information provided by the States and Territories, rather than go through the charade of punch and counter-punch around the table at a Premiers' Conference lasting only a few hours.

The federal Government would then have to account fully to its Parliament through the States' House, for the decisions it makes.
In my view, after almost 100 years of Federation, there must be a much better way to conduct the important financial affairs of our nation and the States and Territories.
I thank The Samuel Griffith Society for the opportunity to address it tonight at what is a unique stage in the evolution of federalism in Australia. The Commonwealth wants to cut duplication, the States want to stop the Commonwealth looking over their shoulders with tied grants, and the Commission of Audit has the capacity to bring about the biggest changes to Federal-State relations in the past 20 to 30 years.
In closing, I remind you of the words of Sir Samuel Griffith during the first of the Constitution debates :

> "We must not lose sight of an *essential condition* - that this is to be a Federation of States and not a single Government of Australia ... the separate States are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a joint Government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves."

And I urge you all to keep up the fight for the preservation of federalism within Australia.

Introductory Remarks

John Stone

Ladies and gentlemen, welcome to this, the seventh Conference of The Samuel Griffith Society. It is just over four years since the Society's formation, and our relatively small membership in South Australia has meant that, until this time, our meetings in this State have been confined to only the "launchings" of two volumes of our Proceedings. Successful though those functions were, it is a great pleasure for the Board of Management to have been able finally to arrange a full-scale Conference here in Adelaide.

I think it may be appropriate, in that connection, to say that one factor instrumental in our decision to hold this Conference here was the enthusiasm - and to some extent financial backing - for doing so provided by Bob Day, who of course needs no introduction to this Adelaide audience. The Board of Management will, I think, at its meeting later today record its collective gratitude to Mr Day, but I have thought it appropriate to anticipate that in these public remarks this morning.

At our opening Dinner last night we were honoured by the presence of the Premier of South Australia, the Honourable Dean Brown, MLA and Mrs Brown, and were privileged to have the Premier address us on the topic *Challenges, Chances and Choices : The Future of the Australian Federation*.

When the Board set the date for this Conference last January it had, of course, no means of knowing either that, by this time, we would have a new Government in Canberra, or that the Council of Australian Governments (COAG) would be meeting next Thursday and Friday, 13-14 June, for what promises to be one of the most important meetings of Australian Heads of Government for many years. Against that background, however, it has proved to be a notably fortuitous time for the Premier of this State, which played such a significant part in the creation of our Federation, to be addressing us on these matters.

As the Premier said:

> "Overwhelmingly the challenge for Governments anywhere today is to create environments that allow people to make choices about their own lives - which give maximum freedom - while at the same time responding to their alienation from Governments and Governments' institutional arrangements."

In those words, it seems to me, Mr Brown summed up the themes which underlie the work of this essentially federalist Society, with our belief that freedom is best ensured by the division of power rather than by its concentration, and that Governments govern best when they are near the people - as they are in the States - rather than remote from them in Canberra. Or, in the Premier's words again, we stand for "regional diversity, freedom and difference in the way Government is run, as opposed to centralism." The words "Commonwealth" and "national", he said, are often used by federal politicians as though they meant the same; in the Premier's dictionary (and in that of this Society), they don't.

The Premier closed his address to us last night with some

words of Sir Samuel Griffith himself, uttered during the first of the constitutional debates over a century ago. So well do they sum up so much of the constitutional debate now confronting us that they are worth again recalling here:

> "We must not lose sight of an *essential condition* -- that this is to be a Federation of States, and not a single Government of Australia ... the separate States are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a joint Government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves."

With the election of the Howard Government, a number of matters which had previously been, so to speak, in the discard - in particular, the whole question of Commonwealth-State financial relations, and the inseparable question of the appropriate roles for the federal and State Governments, respectively - have once again returned to the centre of debate. We had planned two papers tomorrow morning on that general topic, but unfortunately a serious last-minute illness on the part of one of their authors, Professor Cliff Walsh, will prevent his being delivered.

Another such matter which has also, since the election, returned to the centre-stage of debate, is the *Mabo* judgment and its *Native Title Act* 1993 aftermath. This afternoon we shall hear first from two practitioners - one from academia, one from private legal practice - on the nature and workings (or non-workings) of that particular piece of legislation. We had also planned to hear again, after an interval of almost four years, from Mr Hugh Morgan,

who delivered to our Inaugural Conference the first of the many papers which this Society has heard on what we have termed "The Aboriginal Question". Again, however, it is my lamentable duty to inform you that, at the last moment, Mr Morgan has found himself unable to be with us today to deliver his paper on the topic, *Mabo : Where Now?* In place of that paper we shall have one from Ray Evans on the closely associated topic *Reflections on the Aboriginal Crisis*. Our thanks are due to Mr Evans for his assistance in stepping into the breach in this way.

Yet a third area where the advent of a new Government in Canberra has, so to speak, changed the landscape of constitutional debate relates to the republic issue, and in particular to Mr Howard's proposal to hold in 1997 a so-called People's Constitutional Convention for the purpose of discussing that, among other issues.

On the assumption that, next year, such a gathering will duly come to pass - although I may say in passing that the mechanics whereby it may be constituted seem to me to pose some rather formidable problems - the Board of Management of this Society is strongly of the view that the opportunity should be taken to advance a number of other constitutional issues, in our view much more worthy of the people's attention, for discussion at that Convention.

Thus, in our opening session this morning, we have listed papers on three topics other than the republic. The first of those papers, which follows up our symposium at our fifth Conference last year in Sydney on a proposed constitutional amendment of section 51(xxix) - the "external affairs" power - will be delivered

by Dr Colin Howard, and as I happen to be chairing this opening session I shall accordingly bring to an end these introductory remarks and move on to introduce him.

Chapter One

The Proposed External Affairs Referendum

Colin Howard

At our Melbourne conference last year I prefaced my paper with a disclaimer to the effect that the views I expressed were mine alone and were not to be taken in any sense as those of my Minister or the Victorian Government. I still hold the position of Crown Counsel. Accordingly the same disclaimer applies.

My subject today originated at our Sydney conference last year. I observed on that occasion that section 51(xxix) of the Constitution, the power to legislate with respect to "external affairs", had become "a source of power to legislate upon an ever-widening variety of topics the significance of which is overwhelmingly domestic, not external". I went on to argue for a constitutional amendment to correct a situation so manifestly out of keeping with the intended federal character of the Constitution.

I did not, you may recall, confine myself to argument in the abstract but advanced for consideration the precise amendment which I thought, and still think, should be made. Before revealing it I briefly debated whether I could safely assume that everyone present was conversant with the nature and extent of the external affairs problem. I concluded that I should not make that assumption, even if for some of my listeners an introductory review of the situation might seem superfluous. Passing boredom for some seemed to me to be a lesser risk than lasting confusion for others. The case is different today. Everyone has now had the opportunity to read the Proceedings of that conference and, no doubt, will have duly read them. My assumption today therefore is that you are all well aware of the nature of the problem. You may recall also that my presentation was followed by addresses from Professors Winterton and Coper on the same subject. There was then a brief free for all in which the speakers took questions from the floor and commented on each other.

In November we had the further benefit of a paper from SEK Hulme, QC entitled *The Foreign Affairs Power: the State of the Debate.* There have to be taken into account also two contributions from former Senator and federal Minister Peter Durack, QC, one in 1993 as an address to this Society and the other as a paper published in 1994 by the Institute of Public Affairs.

A major event since those commentaries were published has been the federal election. This brought with it the virtual certainty of a constitutional Convention of some description in 1997. The idea of such a Convention originated in the diffuse and superficial exchange of ill-informed opinion which has come to be known as the republic debate, but I share John Stone's view that there is no reason why it should be limited to that topic. Apart from anything else, it will be an expensive exercise and we might as well get our money's worth.

In the hope of influencing opinion in that direction my paper today seeks to take account of the commentaries that I have mentioned and otherwise take up from where I left off last time. I start by setting out the text of the amendment that I previously presented. You will note that it has not

changed. You may safely conclude from that that I have not been noticeably influenced by my various colleagues' observations.

Leaving aside the opening general words of section 51 of the Constitution, the external affairs power in sub-section (xxix) consists only of the two words "external affairs". What I propose is not to change them but simply to add a proviso as follows:

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

In the latest volume in the series recording the Proceedings of this Society under the general title *Upholding the Australian Constitution*,(1) SEK Hulme is good enough to say that he would like to hear my views on another suggested amendment which is philosophically similar to mine but differently worded. Unfortunately the warm glow of satisfaction induced by such an observation emanating from so distinguished a quarter is somewhat chilled by the further revelation that he prefers the competitor.(2)

For the moment, if he will forgive me, I do not pause to take issue with him on that point. I will first take up some of the opinions expressed in Sydney. The two other speakers assigned to this topic were Professors Winterton and Coper of the University of New South Wales and the Australian National University respectively. SEK Hulme has summarised the general trend of these two papers in the commentary that I mentioned earlier and I have no wish to paraphrase his observations. I do wish however to make some of my own.

The first is that I sincerely regret having previously overlooked the singular and entirely persuasive manner in which Professor Coper illustrated the capacity of the external affairs power to stimulate people's imagination. Until he proved me wrong I should have thought it scarcely possible not merely to start a paper on the subject with an arresting vision of the High Court building going up in flames, to the sound of Carl Orff's *Carmina Burana*, but also to end it on the same apocalyptic theme. I entirely agree with his tactful omission to call *Carmina Burana* music. If I saw the High Court building going up in flames whilst I was ruminating on the external affairs power, I should probably think first of Wagner's *Ride of the Valkyries* and cheer them on.

In between these two entertaining episodes Professor Coper sets forth 18 pages of comment of which about three sentences are devoted to my suggested amendment. He is right in his conclusion that we disagree. The basic reason for that, as it seems to me, is that he is happy with the High Court's interpretation of the external affairs power and I am not. If I read him aright, all that he would like to see by way of improvement is a greater degree of political consultation. He seems to be untroubled by the unscrupulous manner in which successive federal governments have resorted to the power in order to implement entirely domestic programs.

Perhaps Professor Coper's position is best illustrated by the following sentence:

> "When it comes to the balance between Commonwealth and State legislative power in the implementation of treaties, experience demonstrates that the greater the necessity or occasion for State legislation, the greater is the potential for delay, lack of uniformity, and even for action by one State to put Australia in breach of an international obligation."(3)

That sentence is worthy of scrutiny. For a start, it is hardly necessary to invoke experience to support the proposition that the more legislatures that are involved in the implementation of a treaty, the greater the potential for diversity of response. Moreover it is not necessarily the case that delay is a bad thing, still less, in a land area as vast as Australia, lack of uniformity or even a refusal to comply with a course of action which happens to suit the Commonwealth. To call that last possibility putting Australia in breach of an international obligation begs the question at issue, which is the proper distribution of legislative power to enact international agreements into domestic law.

Apart from a spot of philosophical relativism, and his second invocation of the *Carmina Burana* bonfire, Professor Coper concludes by opining that my proposed amendment is too narrow in scope. He too prefers the alternative which appeals to SEK Hulme, even though he disagrees with its author (and I quote) "on some fundamental points". I may have made this position appear self-contradictory. It is not. Professor Coper does not favour any constitutional amendment. He simply regards my amendment as the greater of two evils.

I turn now to Professor Winterton. He approaches the subject by seeking to identify what is wrong with the present situation and concluding, I think it is fair to say, nothing much. The following key statement appears:

> "Constitutional reform should be based upon constitutional and political realities, not exaggerated apprehension of potential, but as yet unrealized, exploitation of power. The reality is that a few *causes célèbres* have raised the external affairs power to unwarranted prominence in Commonwealth-State relations."(4)

Those observations follow a quotation from former Liberal Senator Peter Durack, QC to the effect that the Hawke and Keating governments had "not made much use of the external affairs power", and that the Senator could not envisage a federal Labor government deliberately using the power to destroy the federal system.

With respect, I find this reasoning by Professor Winterton thoroughly unconvincing. I too doubt that even an ALP government would adopt a policy of deliberately destroying the federal system by manipulating the external affairs power. What I do not doubt is that if, pursuant to its domestic policies, such a government is advised that it has a legislative power problem which can be solved, or at least ameliorated, by an entirely artificial resort to external affairs, it will not be dissuaded by any adverse effects such a course of action may have on the federal system. No-one can doubt that proposition who has suffered the misfortune of having to study the *Industrial Relations Reform Act* 1993, otherwise known as the Brereton Act, which came into operation on 30 March, l994 and with a bit of luck will go largely out of operation again any time now.

The argument that ALP governments (for Gough Whitlam can be bracketed with Hawke and Keating) have made little use of section 51(xxix) subordinates quality to quantity. My view is that statutes reliant on the external affairs power which have been enacted on the initiative of ALP governments in recent times have had an impact on Australian society out of all proportion to their numbers. Conspicuous examples are the *Racial Discrimination Act* 1975, the *Sex Discrimination Act* 1984 and the *Human Rights and Equal Opportunity Act* 1986.

Major statutes like these, the blatant opportunism of the Brereton Act and the legislative world heritage mishmash on which the *Tasmanian Dam* decision(5) largely relied, cannot be simply dismissed, which Professor Winterton seeks to do, as relatively isolated events the significance of which has been exaggerated. Such an approach to the problem is in my view not only wrong in itself, but also quite overlooks the interaction between such statutes as these and other Acts. The result of the interaction is to extend Commonwealth power even further.

As only one instance, but a spectacular one, perhaps I may recall to your memory my discussion, at the third Conference of this Society,(6) of the relation between the High Court decision in *Mabo v Queensland* [No.2],(7) the *Native Title Act* 1993 and the *Racial Discrimination Act*. The upshot, greatly aided as usual by the High Court in the latest native title case, about which I spoke at our last conference, was the complex and far-reaching provisions of the *Native Title Act* which override State land law and administration.

If the extent of that intrusion into State functions had been advanced only a few years ago as an example of Commonwealth legislative power, it would have been rightly ridiculed. No longer. It now exists as an impressive example of an excess of intellectual ingenuity applied to the legislative process.

Professor Winterton goes yet further. He seeks to invalidate the entire line of thought which I and others have brought to bear on the interpretation and legislative use made of the external affairs power. He does so on the basis that our concerns relate only to future potential, not to anything that has actually happened or is at all likely to happen. As to what has actually happened, he is able to take this position by downplaying the significance of events which, as I have just illustrated, are in my view far from insignificant. On that therefore we simply disagree.

Future potential is another matter, and one not to be set aside as mere exaggeration unrelated to constitutional or political realities. SEK Hulme has commented adversely on this argument.(8) I wish to add only the following. Professor Winterton seems to be arguing here that if on rational grounds one foresees future harm, one is departing from constitutional or political facts because the perceived harm has, by definition, not yet happened. But surely, if nothing becomes a relevant fact until it has already happened, the consequence is that no foreseeable harm can ever be prevented by constitutional amendment.

I need not labour the point that an argument capable of supporting such a conclusion does no harm to my proposed amendment. I think that Professor Winterton gets himself into that position by adopting the tactic, which he regards as the "most logical" one, of first seeking to identify deficiencies in the current position, deciding next on criteria for improvement in light of the deficiencies and only then evaluating my reform proposal against those criteria.

Without arguing about the logical status of such an approach, it does seem to me to be an excellent method of constructing a heads-I-win, tails-you-lose framework of debate. All you do is scrutinise the situation, decide there is nothing much wrong with it, develop criteria consistent with that conclusion and discover that the reform proposal does not fit the criteria. If the evidence advanced by supporters of the proposal causes any concern you characterise it as unrealistic and exaggerated.

It seems to me that an approach more likely to produce a constructive result would move in exactly the opposite direction, starting by looking at what is proposed, and the arguments in support, and only then turning to the question whether the result would be an improvement. The advantage of going this way about is that one's attention may well be drawn by the proposers to relevant circumstances which might not otherwise have come to mind. If that does not happen, no harm is done, but at least nothing is excluded because it does not fit comfortably into a framework constructed *a priori*.

Professor Winterton concludes, in agreement with Professor Coper, that my proposed amendment is too narrow. This is a theme common not only to these two commentators but also to SEK Hulme. I shall take it up when I return to his observations, which I shortly shall. In the meantime I turn next to Senator Durack's contributions. The first appears in the second volume of the Proceedings of this Society under the title *The External Affairs Power - What is to be*

Done? (9) The second is his paper *The External Affairs Power* published by the Institute of Public Affairs in October, 1994.

I take this opportunity to say how much I have enjoyed re-reading Senator Durack's discussions of the problem, notwithstanding their largely pessimistic conclusions. Fortunately all I have to do today is take into account his alternative suggestion for an appropriate amendment to section 51(xxix) should an amendment be attempted.(10) This is the one preferred by SEK Hulme.

Senator Durack's amendment would exclude from the scope of the power 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 note also that Senator Durack recalls a contribution made by Sir Rupert Hamer back in 1988.(11) Sir Rupert, and I quote, "proposed a simple amendment to section 51(xxix) to prevent the Commonwealth's legislative power under it [from going] beyond the enumerated powers". I am much encouraged to be reminded that I can count Sir Rupert among my supporters. I would readily attribute my own proposal to him were that the case. Unfortunately all I can do is confess that the idea came to me a good four years or so after it came to him.

In the same passage Senator Durack recalls another aspect of Sir Rupert's 1988 contribution. I quote again:

> "He dealt a powerful refutation to the claim all through this debate that Australia would be an international cripple if it could not implement the obligations it assumed under a treaty. He pointed out that this has not occurred in Canada, Germany or the United States. None of these countries can guarantee the implementation of treaties entered into by their national governments."

I quote that passage because the same groundless assertion surfaced again in Sydney and had to be corrected from the floor. (12) I sometimes wonder if the remarkable staying power of a declaration so manifestly wrong derives from the dogmatic confidence with which it is invariably trotted out.

It reminds me of something the late Bertrand Russell wrote in the course of a discussion of human reluctance to accept scientific knowledge, or something of the kind. He remarked that one of the Greek sages, Aristotle I believe, asserted that humans had only 28 teeth. He could have discovered his mistake by simply looking in someone's mouth.

Sir Rupert Hamer's reference to Canada, Germany and the United States however has greater relevance to today's debate than simply underlining the absurdity of the international cripple argument. It seems to me to go to the heart of the difference between Senator Durack's approach and my own. We are I think all agreed that that difference is conceptual and not merely a matter of phraseology. The commentators are agreed also that the difference can be described as the Senator's formulation being wider than mine in the sense that it would accord to the Commonwealth more legislative power than mine would.

One of the ways in which it achieves this result is by being a good deal less precise than mine. The Senator and I evidently agree that the mode of drafting most likely to yield a useful result is what I have called the negative approach. This means not trying to reformulate the central description of the power, but instead attaching to it provisos or exceptions which describe the

kinds of laws to which it nevertheless does *not* extend. I note that this technique also had the support of the former Commonwealth Parliamentary Counsel, Charles Comans, whom I remember with affection.

Beyond agreement on technique, however, I part company with Senator Durack. There may be those, in fact there evidently are, who believe that whatever weaknesses the Durack amendment may exhibit, it would be a great improvement on the present situation. I do not think so. Or to put the matter differently, I think that if that is the case, my own amendment would be a great improvement on the great improvement. My reasons are as follows.

I think we can safely assume that for the foreseeable future a majority of the High Court will be out of sympathy with the kind of amendment that members of this Society would support. Bearing this in mind, it seems to me that the Durack amendment relies on concepts which would not prove much of an obstacle to a hostile High Court.

I see no great difficulty, for example, in circumventing the initial prohibition by confining the concept of a law which "regulates" to a very narrow compass. As an instance, it can be readily argued that a law which empowers does not regulate.

Again, the word "matters" already has an abstruse technical meaning under the judicial power to which it could be easily confined so as to narrow the prohibition even further.

Exception (a) seems to me to be even more vulnerable, although of course in the direction of expansion, not contraction. It requires that for a law to be valid under the external affairs power its subject matter must have a substantial relationship to the same subject matter outside the Commonwealth. Let us test this against the Brereton Act. Leaving aside the awkward word "matter", does the Brereton Act "regulate" persons or things and, if so, do those persons or things have a substantial relationship to persons or things outside the Commonwealth?

Notice first that the meaning of the word "regulate" in exception (a) need not be the same as in the initial prohibition. This follows from the well established principle that the legislative powers of the Commonwealth are to be interpreted in the widest sense consistent with their language. The corollary of that principle is that limitations on Commonwealth legislative power should be interpreted in the narrowest sense consistent with their language.

Applying those principles to the Durack amendment we find that the word "regulate" appears first in a limitation on power, the initial prohibition, and therefore requires a restrictive interpretation. It then appears again in a grant of power, exception (a), and therefore requires an expansive interpretation. On this basis an unfriendly High Court would surely have no difficulty in concluding that the Brereton Act is not a regulatory statute within the meaning of the initial prohibition but is a regulatory statute for the purposes of exception (a).

Having surmounted that possible difficulty by far less adventurous reasoning than it applied to native title and freedom of political speech, the Court can take up the remaining question. This is whether the persons or things regulated by the Brereton Act have a substantial relationship to persons or things outside the Commonwealth. Or, in more familiar language, which I am sure the High Court would not be reluctant to adopt if it saw fit, whether the subject matter of the Act has a substantial relationship to the same subject matter outside the Commonwealth.

I have to say that answering that question in the affirmative seems to me to be a very simple exercise. All you have to do is assert that since the Act is based to a significant extent on international treaties and covenants and suchlike, it is part of a worldwide attempt to achieve fair and reasonable laws for the protection of workers everywhere. By reason of this worldwide community of interest the requirement of substantial relationship is readily satisfied.

That example seems to me to drive a coach and horses through the Durack amendment. I believe that it would make no significant difference to the present situation. I think we should bear in mind that at best we can only hope for one chance at amendment, so we had better get it right. I do not think that the Durack amendment does get it right. This is not a matter merely of language, readily remedied by redrafting. The basic approach is flawed.

I say that for three reasons. The first is that it ignores the implication of Sir Rupert Hamer's reference to Canada, Germany and the United States. Those countries seem to me to be not merely evidence but proof that power to conduct a vigorous national foreign policy is not in the least incompatible with federal limitations on implementing that policy by way of domestic legislation. There is therefore no reason to even attempt to modify the federal limitations on that ground, which is what the Durack amendment does.

Secondly, such an attempt is in this context fundamentally inconsistent with the adoption of what I have called the negative style of drafting. Where that approach is adopted in aid of restoring a federal balance, which is the present aim, any exceptions to an initial prohibition should be strictly limited to matters which do not affect the federal balance.

Thirdly, where a significant component of the situation which one seeks to remedy is the attitude of the judiciary, particularly the High Court, nothing is gained by entrusting to the courts vaguely expressed language which will necessarily need interpretation by those same courts. This is my answer to SEK Hulme's defence of the Durack amendment's obvious reliance on sympathetic interpretation. A corollary is that I think the greater precision of my own amendment makes it far more difficult to circumvent by interpretation.

I turn lastly to SEK Hulme's concerns about treaties of a genuinely international character, a topic which conveniently enables me to deal with the Durack exception (b), and his comment that my amendment would not have supported the regulations at issue in *R. v. Burgess, ex parte Henry*.(13)

I have no faith in the concept of a treaty of a genuinely international character. By definition all treaties and comparable arrangements are of a genuinely international character. To adopt a concept which requires the courts to detect a category of treaties which are not genuinely international is not merely a contradiction in terms. It is also a pointless exercise because it puts the emphasis in the wrong place. It is not the character of the treaty that matters but how it can be implemented.

Compare the Brereton Act with the 1936 air navigation regulations. I cannot see that either is more or less international than the other. Both are in fact domestic legislation. The most obvious difference in character or attributes between them is that regulation of both national and international air navigation is universally accepted as an inevitable safety measure, whereas Brereton type industrial legislation is not.

This leads us nowhere except to reinforce my belief that there is no future in trying to solve implementation problems by dividing treaties on a case by case basis into the genuinely international and the rest.

SEK Hulme advances the further contention that under my amendment the Commonwealth could not have implemented the 1936 air navigation regulations without State assistance, which he finds unsatisfactory.

I am not sure what is the source of his dissatisfaction but I do not share it. By 1936 air navigation was already a worldwide phenomenon. The growing irrelevance of State borders to that development was manifest. By 1936 four States had passed legislation under section 51(xxxvii) of the Constitution to refer legislative power over air navigation to the Commonwealth. In the

event only the Tasmanian Act ever became operative, the others being only precautionary. It is true also that New South Wales and Western Australia took no action and that the referring Acts were limited in scope and not identical.

My point is twofold. First, if the *Burgess* challenge to the Commonwealth regulations had succeeded, it seems likely that State minds would have concentrated wonderfully on how to remedy the situation. Secondly, even if section 51(xxxvii) had not existed, I find it inconceivable that another constitutional solution would not have been swiftly found.

Australia is not constitutionally at the mercy of phenomena which were not foreseen or foreseeable in 1900 unless rescued by the external affairs power. Other countries are not, so why should we be? In my view the Commonwealth has a more than ample collection of legislative powers which collectively, and with the considerable aid of both the implied and express incidental powers, would support a comprehensive code of air navigation. The linchpin of the structure would be the inseparability for practical purposes of intra- and inter-state air navigation.

No doubt I shall be reminded that the High Court has rejected any doctrine of commingling in the trade and commerce context. I contend that, had there been no alternative route to take in order to deal with a situation of obvious and growing national danger, commingling would have been readily accepted, as would any other viable solution.

I apply the same argument to Senator Durack's exception (b). There is no difficulty in finding power (indeed, if necessary it could be readily implied) to regulate people and things moving across the national border without going anywhere near the external affairs power. Think what might be done with a combination of the following powers as expanded by the incidental powers: international trade and commerce; taxation, including customs controls; defence; statistics; international banking and insurance; bankruptcy; intellectual property; family law; immigration and emigration; and the influx of criminals.

SEK Hulme contends further that my amendment removes from the Commonwealth power to deal with such matters as war criminals and international paedophilia. That is not right. As it happens, the defence power is available for war criminals if the High Court cares to use it, but I do not rely on that. What examples like these suggest to me is that my amendment is being misunderstood.

I am not proposing to abolish the external affairs power. It stays in place for anything external to Australia, including matters incidental to it or to its execution. There is no impediment at all to creating federal offences committed overseas which are enforceable in federal jurisdiction within Australia. Whether my words "no such law shall apply within the territory of a State" prevent trial of such offences in a court of federal jurisdiction in a State without the consent of the relevant State seems to me to be immaterial.

It is hard to believe that any State would object, especially if the Commonwealth had consulted properly before it enacted legislation. Even at worst, trials could be held in federal territories. Another alternative is to test out the influx of criminals power. It must surely be incidental to that power to legislate for the trial of persons charged with an overseas federal offence.

I conclude therefore that none of the reservations which have been expressed thus far about my proposed amendment can itself withstand critical analysis.

Endnotes

1 Upholding the Australian Constitution, Proceedings of The Samuel Griffith Society, Volume 6, p.25.

2 *Ibid.*, p.32.

3 *Op.cit.*, Volume 5, p.62.

4 *Ibid*., p.21.
5. *Commonwealth v. Tasmania* (1983) 158 CLR 1.
6. *Upholding the Australian Constitution*, *Proceedings of The Samuel Griffith Society*, Volume 3, p.1.
7 (1992) 175 CLR 1.
8 *Upholding the Australian Constitution*, *Proceedings of The Samuel Griffith Society*, Volume 6, pp.29Ä31.
9 *Op.cit*., Volume 1, pp.211Ä223.
10. *Ibid*., p.219.
11 *Ibid*., p.221.
12. *Op.cit*., Volume 5, pp.78Ä79.
13 (1936) 55 CLR 608.

Chapter Two

Reforming the High Court

Greg Craven

Introduction

Discussions about reforming the High Court usually revolve around suggestions for improving the appointment process for High Court Justices, and questions as to whether that would make any difference. Accordingly, those are the matters which I propose to address in this paper.

Lawyers are always fascinated with the processes for the appointment of judges. This fascination is born of much the same sort of obsession with the remotely dirty and sordid that underlies the entire pornography industry, and numerous popular women's magazines. To lawyers, nothing could be more grubbily fascinating than the mechanics by which various of their colleagues are elevated to improbable heights of professional respectability.

It cannot be denied that this general issue of the appointment of judges raises numerous important questions. Thus, both the media and academic journals have been filled in recent years with discussions of such matters as the pool from which judicial candidates should be drawn; the openness or otherwise of the mechanisms by which judges presently are chosen; and the identification of those individuals and groups, if any, who should be consulted by the executive government before a judicial appointment is made. Similarly, various more or less concrete suggestions as to how the process of curial appointment might be improved have been floated from time to time before an indifferent public, and a rapt audience of lawyers and judges. Such suggestions have included proposals for the creation of an independent judicial commission to oversee the appointment of judges;[1] the imposition of constitutional or statutory requirements of consultation before judicial appointments are made;[2] and the ratification of such appointments by some component of the relevant legislature.[3]

However, these are not the primary issues upon which we should concentrate in discussing the appointment of High Court Justices: because of the special constitutional position of the Court, the appointment of its Justices raises far more fundamental matters. In fact, no useful consideration may be given to the issue of the appointment of High Court Justices without a close concentration upon three truly basic questions concerning that Court, only one of which relates directly to issues of appointment.

These questions are as follows. First, what is the basic role of the High Court? Second, what are the most significant deficiencies in the Court's current discharge of that role? Finally, how could changes to the appointment processes for High Court Justices assist in resolving those deficiencies? Naturally, it is this third question that is vital in the present context.

The approach of this paper will be to address in turn these three basic questions. Thus, it will first examine the role - or more correctly roles - of the High Court, and then go on to identify the deficiencies of the Court in its discharge of these roles. Having done so, it will consider the extent to which particular proposals for change in the process for appointments to the Court might alleviate these failings.

It may be noted at this stage that one consequence of the adoption of this approach is that there necessarily will be a considerable focus on the problems of the High Court, rather to the detriment of the positing of solutions to those problems. For this I make no apology. One of the great failures of Australian constitutional discussion is that the vast majority of commentators have yet to recognise that the High Court is part of the problem, rather than part of the solution, and any modest contribution to producing such a recognition is greatly to be welcomed.

The Role of the High Court

Clearly, an understanding of the intended role of the High Court is required before any attempt may be made to identify transgressions in the discharge of that role, and certainly before one can begin to formulate proposals for the remedying of those transgressions. Moreover, it is particularly vital that Australians collectively come to a clear understanding of the role of the Court now, at a time when it is consciously asserting a new constitutional mandate which is entirely different from any articulation of the function of the Court that has come before.

Essentially, the Founding Fathers envisaged the High Court as fulfilling two more or less distinct roles.[4] The first was as a final court of appeal for the whole of Australia. As such, the High Court was to be the final arbiter on matters of both common law and statutory interpretation throughout the nation. The second, and ultimately more important role, was as Australia's constitutional court. In the discharge of this brief as constitutional adjudicator of last resort, the Court was in particular to exercise the critical function of umpire over the federal division of power. Of course, it was also to have more general responsibility for interpretation of the Constitution. This paper will examine briefly both of the Court's intended roles, although it obviously will focus more upon the second, constitutional aspect of the Court's task.

In considering the role of the High Court as Australia's final court of appeal, it is absolutely clear that the Founders intended the Court to exercise judicial control over the whole of the Australian legal system, subject to the limited part to be played by the Privy Council, which need not concern us here.[5] This conception of the Court's role necessarily envisaged it as master of an increasingly local Australian common law. Consequently, the Founders would have readily accepted that the Court would be routinely involved in the identification and interpretation of common law, its occasional refinement, and even - exceptionally - its adaptation in light of changed and compelling circumstances.

To make a similar point in the context of statutory interpretation, the Founders would have recognised that this is a field in which opinions may legitimately differ, and that the construction of many statutes will never be clear. Thus, they would have been monumentally relaxed with the proposition that the High Court would need to pro-actively interpret and elucidate statutes, rather than to apply them mechanically and automatically to fact situations. The Founders, after all, were experienced in the ways of the judiciary, and none of this would have come as any surprise to eminent lawyers of the late nineteenth Century.

However, there is nothing to suggest that the Founders intended that the High Court should operate outside the construct of the traditional mode of proceeding by a British court. Thus, in interpreting statutes, it would be the fundamental role of the Court to discover the intention of Parliament, not to depart from that intention because the Court considered it inappropriate in all circumstances. In respect of both the elucidation of the common law and the interpretation of statutes, the Founders would have expected the High Court to display the great respect for precedent that was the hall-mark of the British judiciary.[6]

As regards the body of the common law itself, the Founders would have been astounded by the proposition that this should be regarded merely as a corpus of legal policy, to be changed by the

Court at will, whenever social circumstance demanded. As the Founders understood it, were a court to take the grave decision consciously to develop the common law, it would do so slowly, incrementally and with the greatest deference for what had gone before. This is not to resurrect the old furphy that judges never make law, a furphy which it should be noted only ever existed as a musty legal man of straw to be deployed by proponents of judicial activism. Rather, the question for us, as it was for the Founding Fathers, is not whether judges make law, but how they make law, and to what extent. To this question, and specifically as it applied to the High Court, the Founders unhesitatingly would have replied: cautiously; slowly; incrementally; and in obedience to the will of Parliament.[7]

Turning to the constitutional role of the High Court, it already has been noted that this has two aspects. The Court's first and primary role as a constitutional judiciary was to maintain the federal balance. The fundamental intention of the Founding Fathers was that the Court would protect the States against possible encroachment upon their powers by the Commonwealth, and it was for this reason that they repeatedly referred to the High Court as the key-stone of the federal arch.[8]

In fact, the Founding Fathers probably did not foresee the precise manner in which the Court would be required to protect the States. As the Founders tended to conceive of the Commonwealth merely as an amalgam of the two largest states (Victoria and New South Wales), they generally understood constitutional protection of the States as involving the High Court in safeguarding the smaller States from the ravages of their two larger brethren, who would be operating through the convenient *persona* of the Commonwealth. To this extent, they did not foresee what came to be the real danger for the States, namely, the ravages of a centralising Commonwealth, directed against all States equally.[9] Nevertheless, it is clear beyond all doubt that the Founding Fathers saw the central role of the High Court as being to protect the States against the Commonwealth, regardless of the precise form that any such danger might take.

As regards the Court's intended role in constitutional interpretation beyond issues of federalism, it would be a fair generalisation that the Founding Fathers showed less interest here than they did in connection with the federal division of power. While they fully accepted that the Court should have complete responsibility for the interpretation of the Constitution, and considered all parts of that Constitution to be important, they undoubtedly regarded its federal provisions as lying at the very heart of the Court's future role.

What must be understood in this context is that, just as the Founders made certain assumptions about the general role of the Court in the more mundane settings of the common law and statutory interpretation, so they made fundamental - and similar - assumptions as to the manner in which it would discharge its role as a constitutional court. Firstly, the Founding Fathers envisaged that the High Court would indeed `interpret' the Constitution: that is, in the manner of a British court seeking to discern the intention of Parliament behind an Act, the High Court would search for the intention of the Great Conventions behind a provision of the Constitution.

Secondly, the Founders believed that in this search for the relevant constitutional intent, the words over which they had laboured so long would be absolutely vital. This accorded with the practice of the English and Australian courts at the time, where British and Colonial statutes were interpreted with a heavy reliance upon the text.[10] Thirdly, the Founding Fathers would have accepted without qualm the proposition that implications have a role to play in constitutional interpretation.[11] Indeed, resort to implications was familiar to all lawyers engaged in the interpretation of British statutes, and their use was seen simply as one aspect of the interpretation of the statutory words in question. However, in conformity with the character of statutory (and

constitutional) interpretation as an exercise based upon notions of intent, such implications would themselves have to be similarly founded.[12]

The combined effect of these three assumptions on the part of the Founders was to accord to the High Court only a very limited degree of constitutional creativity. Of course, in a given case the views of different judges might legitimately vary as to the scope or meaning of a particular constitutional term, and to this extent, a significant element of judicial choice unavoidably would be present. However, that choice was itself always constrained by those fundamental precepts outlined above concerning the primacy of the search for intention and the meaning of the text.

Moreover, any element of constitutional creativity on the part of the High Court was strictly limited by a further, critical assumption on the part of the Founders. The Founding Fathers did not see it as any part of the Court's role consciously to modify the Constitution in line with changing social conditions. Such a judicially activist role, particularly in a constitutional context, was absolutely inconsistent with every notion of how a British court at the turn of the century should operate. It is quite clear from the pages of the Convention Debates, as well as from contemporary literature, that the Founders believed that the means by which the Constitution would be up-dated was through the use of the democratic amending procedure contained in section 128.[13]

Recently, however, there have been some attempts to claim that the architects of the Australian Constitution did indeed intend that the High Court should operate as an instrument by which that Constitution could be updated in line with the expectations of succeeding generations. This view, which I shall refer to throughout this paper as `progressivism', was espoused in particular by Sir William Deane during his period as a High Court Justice.[14]

It would be harsh to say that this view amounts to an egregious historical nonsense: but not too harsh. The specific evidence presented by Sir William Deane and others in support of such an interpretative hypothesis is pitifully thin, flying as it does in the face of everything we know about the general assumptions and intentions of the Founders.

That evidence tends to fall into two categories: namely, general statements made by the Founders concerning the need to maintain the Constitution's currency in line with contemporary developments - which are in reality far more likely to be statements directed towards the use of the section 128 referendum process; and isolated comments concerning the future role of the High Court by individual Convention delegates - most notably Andrew Inglis Clark - which are in no way representative of the main stream of thought within the Conventions.[15] In any event, there can be little doubt that even constitutionally `radical' delegates such as Clark would have been horrified by the use to which his comments are now being put, and the entire weight of the historic evidence is fundamentally against the admissibility of the High Court discharging any progressive role in relation to the Constitution.

The High Court's Discharge of its Role

It is at this point that it becomes appropriate to identify the principal failings of the High Court in the discharge of its roles as a final court of appeal, and as a constitutional court. Only having done this is it possible to consider whether these deficiencies might be remedied or alleviated by any alteration in the appointment process.

The role of the High Court as a final court of appeal within Australia generally has been uncontentious for most of its history. For many years, and especially under the dominance of Sir Owen Dixon, the High Court was one of the pre-eminent common law courts in the world. As such, it developed the common law of Australia in the manner outlined in the first section of this paper, that is to say, cautiously and with great regard for precedent.

In recent years, however, there has been a marked departure from this pattern. The Court has increasingly eschewed traditional common law techniques in favour of those which produce relatively rapid changes in the law which are neither incremental, nor obviously consistent with precedent, and which are often justified (at least in part) by reference to the need for this or that social change. Probably the best example of this phenomenon has been the High Court's dramatic decision regarding native title in the *Mabo*[16] case, but it also can be discerned in the growing influence of such concepts as `internationalisation' in decisions like *Teoh*,[17] where the Court held that administrators, in executing statutes, must have regard to Australia's treaty obligations, even if those obligations have not been the subject of domestic enactment.

In a paper which ultimately is about the High Court's constitutional role, rather than its role as a general court of appeal, I do not intend to pursue this matter further. However, it may be noted for present purposes that this basic change in common law method is consistent with the Court's direction in constitutional interpretation, which I will outline now.

In terms of the High Court's role in maintaining the federal balance, the dismal fate of the best intentions of the Founding Fathers is too well known to bear much repeating here. Since 1920, the High Court has embarked upon a steady centralisation of power in favour of the Commonwealth. This process has been subject to fits and starts depending upon a variety of circumstances, but the general direction has been consistently in favour of the expansion of Commonwealth power. Indeed, that leading Australian constitutional lawyer and convinced centralist, Professor Sawer, once remarked that the High Court's enthusiasm for the concentration of power in the hands of the federal government often exceeded that of Canberra itself.[18]

From the early 1980s, `mega-powers' like the corporations power[19] and the external affairs power[20] have provided a means by which the Court can expand central competence at an exponential rate. While the Court recently has had other constitutional fish to fry, there is no real sign of a slackening in its enthusiasm for the cause of centralism. The conclusion must be, therefore, that one fundamental deficiency of the High Court has been its basic failure as a protector of Australian federalism. While many would applaud the centralising course of the Court's decisions, few would quibble with this historical assessment. The question in the present context must therefore be whether there are any refinements to the process by which Justices are appointed that might work to alleviate this failure of the Court to fulfil its most fundamental constitutional role.

As regards the Court's more general role of constitutional interpretation, one may begin by remarking that, notwithstanding certain flurries concerning section 92 and the separation of judicial power, the performance of the Court has until recently been relatively uncontroversial. However, since the early 1990s, we have seen the Court embark upon an entirely new direction in terms of constitutional theory. In cases like *Nationwide* [21] and *Theophanous*,[22] the High Court has purported to discover in the Constitution an implied right of freedom of political speech, which is said to be based upon the Constitution's supposed enshrinement of `representative democracy'. This discovery by the High Court has plunged it into almost unprecedented controversy.

It must be understood that although this right invariably is referred to as an `implied' right, it in fact has nothing to do with any process of implication. Crudely speaking, an implication is a presumption, on the part of the hearer or reader of language, based upon the supposed intention of the person from whom that language - oral, written, statutory or constitutional - proceeded.[23] Thus, for example, if John Brumby says "Jeff Kennett reminds me of Attila the Hun", the

implication is, at the very least, that Jeff Kennett has a robust style as Premier, and this is precisely the meaning which Mr Brumby *intends* to convey.

In this sense, the implied rights propounded by the High Court are quite outside the realm of constitutional implication, because they are not based upon any intention of the relevant constitutional authors, namely, the Founding Fathers. In fact, we know beyond all question that the Founders never intended that the rights of the Australian people should be safe-guarded by constitutionally entrenched judicial review in the manner of the United States. On the contrary, they intended that such rights should be protected by the operations of democratically elected Parliaments. It was to these legislative institutions that the complex task of adjusting competing rights was confided.[24]

So, if not implication, what is this new process of constitutional interpretation? The simple answer is that it is progressivism in its purest form. The reality is that the High Court has decided that a modern Constitution should include guarantees of human rights, and it has therefore created them. The obfuscatory language of implication has been adopted by the Court essentially on the grounds of judicial respectability. This is perhaps clearest in the judgments of Sir William Deane, where he misleadingly and simplistically characterises the Constitution as `a living tree', the direction of whose growth is to be discerned by the High Court in accordance with the demands of modern society.[25]

This judicial espousal of progressivism, then, is the second fundamental problem of the High Court today. That it is indeed a problem cannot seriously be doubted, notwithstanding the adulatory clamour of the Court's usual socio-legal fan club. Progressivism is a problem, first, because it is intrinsically undemocratic. Quite simply, its application by the High Court in a constitutional context involves the amendment of the Constitution otherwise than under the section 128 referendum process, as Justice McHugh trenchantly observed in *McGinty*.[26]

Secondly, the new constitutional course of the High Court is basically unprincipled. This is true, not only in the sense that progressivism's proponents frequently seek to ground it on the utterly false premise that it was countenanced by the Founding Fathers, a tendency which already has been noticed, but also because the common encapsulation of progressivism in the language of implication is nothing less than a disingenuous attempt to disguise its true, extraconstitutional nature.[27]

Thirdly, and most disturbing of all, progressivism is fundamentally at odds with that part of Australian constitutional theory usually referred to compendiously as `the rule of law'. It is entirely inconsistent with any real adherence to the rule of law if judges accord Australia's fundamental legal norm - the Constitution - no more meaning than that which they are prepared to acknowledge as consistent with their own views as to the directions in which society should develop. Similar comments might be made concerning the relationship between progressivism and the doctrine of the separation of powers: that doctrine can mean nothing if the highest judicial body in the land conceives of itself as a supreme constitutional legislator.

It is true that the High Court recently has shown some slackening of enthusiasm for implied rights theory - and the progressivism which it embodies - most notably in the *McGinty* case. However, it would be unwise to view this as the beginning of a permanent retreat. In the first place, at the time of *McGinty*, Mr Justice Kirby had not yet taken his place on the bench, and he may confidently be expected to be an enthusiast for the progressivist cause. Moreover, Mr Justice Gummow, who preceded him onto the Court, showed himself in *McGinty* to be extremely muddled in his conception of the basic interpretative role of the Court.[28] It may be that, like Sir

William Deane, he will in time mutate from a conservative black-letter lawyer to a rainbow-hued judicial innovator.

Secondly, it must be remembered that the characteristic constitutional technique of the High Court is to take a series of forward steps, and then to rest a while gathering its strength for further judicial excursions. Certainly, this has been the method employed by the Court in relation to the expansion of central power, and there is no reason to suppose that a similar course will not be followed in the present context. On this basis, we are probably enjoying no more than a pause in hostilities between the forces of progressivism and its foes.

Thus, one of the major deficiencies of the High Court - if not the major deficiency - is its continuing flirtation with progressive constitutional theory. The question which thus arises is whether this deficiency could be minimised by any alteration in the method by which High Court Justices are appointed.

General Criticism of Judicial Appointments

Before considering changes to the appointment procedures in relation to the High Court which might alleviate the two fundamental problems identified above, it is appropriate to discuss briefly the general problems perceived as attending the judicial appointment process in Australia, together with the range of suggested solutions to these problems which have been proffered from time to time.[29]

Essentially, there are a number of perceived difficulties in Australia's system of judicial appointment, most of which apply as much to the High Court as to inferior courts. One is that judicial appointments are, by definition, government controlled, thereby raising the possibility of political appointments and patronage. Another is that the appointment process, carried on as it is deep within the secret labyrinths of the executive government, is opaque, it being impossible to determine the process by which a choice is made, or the reasons therefor. The result is that there exists no real accountability in respect of the making of judicial appointments.

A further concern relates to a perceived lack of consultation by governments in connection with judicial appointments. There is no statutory requirement for any person or institution to be consulted over the appointment of a judge, other than that comprised in section 6 of the *High Court of Australia Act*, which imposes the barest stipulation of consultation in relation to the appointment of High Court Justices upon the Commonwealth Attorney-General, in favour of his or her State counterparts. A final and very prevalent concern is as to the depth of the pool from which judicial talent is drawn. Many commentators, particularly from the Left, have argued that the various State bars are an impossibly restricted field from which to draw judicial candidates, and favour the expansion of the search to take in university law schools and solicitors.

All of these concerns have some degree of validity, but in the context of appointments to the High Court ultimately are peripheral. As has been emphasised throughout this paper, the real question in relation to the appointment of High Court Justices must be whether there are mechanisms which might resolve the basic deficiencies of the Court in relation to its profoundly anti-federal stance, and its recently embarked upon course of progressive interpretation.

Nevertheless, it is worth noting here some of the solutions most commonly proffered in relation to the perceived difficulties of the judicial appointment process generally. The first, and generally the least favoured, is legislative ratification. This would involve judicial appointments being ratified either by Parliament, one House of Parliament, or a representative parliamentary committee. The perceived benefits of such a procedure are that it would prevent cronyism and political appointments. The best known example of legislative ratification is the ratification of

the appointment of Justices to the United States Supreme Court by the United States Senate, after examination by a Senate Committee.[30]

Another proposal is for the imposition of statutory or constitutional requirements of more or less full consultation.[31] Thus, it has been suggested that governments should be required in appointing judges to consult everything from state governments, bar associations and law societies to academics and other judges.[32] It also has been suggested that the requirement of consultation could be an onerous one, potentially including a right in some consultees to veto the proposed appointment.

Finally, there has been significant support for the concept of a Judicial Appointments Commission. This would be an independent body, which either would recommend a list of judicial candidates to government, from among whom a choice could be made, or which might even be accorded the right to choose the appointee itself.[33] It is usually envisaged that such a body would be composed of judges, lawyers, academics and lay persons.

For present purposes, it should be noted that there obviously is at least some possibility of one or more of these solutions being adopted to address the fundamental problems previously identified in the specific context of the High Court.

Judicial Appointments and the High Court's Antipathy to Federalism

The first task in this context is to attempt to understand the reasons underlying the Court's long-standing hostility to federalism, before proffering any suggestions as to how an altered appointments procedure might improve the situation. This is a highly complicated question, and necessarily will be treated only superficially here.[34]

A wide variety of considerations underlie the historically centralist bent of the High Court. Traditionally, the Commonwealth has always benefited as the natural magnet of nationalistic feeling in Australia, in judges as much as in school children. Nor should it be forgotten that the High Court is, after all, a central institution, a fact emphasised by its relatively recent location in the central capital. In a sense, therefore, centralism is in its blood.

Such inherent tendencies were reinforced strongly by the early history of the Commonwealth. Nationally traumatic events such as the First and Second World Wars, as well as the Depression, tended to convince many Australian thinkers - lawyers among them - that strong central authority was simply part of the equation for survival. Such views found support in the strongly anti-federal British constitutional tradition, founded as it was upon the deeply perceived virtues of strong unitary government, and the historic necessity of controlling such peripheral dissident elements as the Irish, the Welsh and the Scots. These wider constitutional tendencies in turn fed into a profoundly literalist tradition among British and British-Australian lawyers, who early seized upon literalistic trends in British theories of statutory interpretation to deny the drawing of implications from federalism.

Throughout this process, centralist judges were applauded by like-minded academics, who made up (and continue to comprise) the great bulk of Australia's university constitutionalists.

The result has been that while it cannot be denied that the stance of the High Court has been profoundly anti-federal, nor that it has adopted this stance in despite of the best intentions of the authors of the Australian Constitution, the Court's performance has nevertheless received highly favourable reviews from the critics.

Moreover, there is no reason to suppose that the High Court's antipathy to federalism is in any sense lessening. In fact, one logically would expect it to grow more intense. The constitutional law now taught in Australian law schools generally regards the States as an irrelevance, and the argument for enhanced central power as being almost too obvious to require articulation. As the

Court's novel implied rights theories arouse more and more excitement among academics and students alike, the bizarre likelihood exists of a new generation of lawyers who are not merely opposed to federalism, but who scarcely have even heard of it. From among these students will come the High Court judges of 30 years time. It is against this depressing background that one must set any proposal to mitigate the anti-federal bias of the High Court through a reform of the appointment process.

The present practice concerning the appointment of High Court Justices, as it relates to the role of the component integers of the Australian federation, revolves around section 6 of the *High Court of Australia Act*. This provision requires that the Commonwealth Attorney-General consult the State Attorneys before recommending the appointment of a High Court Justice to the Governor-General. While this is encouraging, so far as it goes, it must be recognized that section 6 comprises only the leanest requirement of consultation. Thus, section 6 can be complied with through the Commonwealth Attorney-General merely seeking names of possible appointees from the States at the outset of the process, and then following his or her own inclinations, without the slightest exchange of ideas or information.

Indeed, until last year, this appears to have been the practice that was followed. The Commonwealth Attorney would solicit names from the States, and then - after a long silence - loftily advise his fellow Attorneys of the Federal Government's decision. Last year, however, saw a marked (though possibly ephemeral) change in procedure. One State Attorney-General, irked by the ritualistic nature of the consultative process, responded to the standard invitation of Commonwealth Attorney-General Michael Lavarch by proposing that the Commonwealth indicate the names of the possible appointees it had in mind, in order that the States might respond to more or less concrete proposals.

Mr Lavarch acceded to this request, with the result that instead of the States merely proposing names and in the fullness of time being advised of the eventual appointment, they instead commented upon possible appointees identified by the Commonwealth. One of those possibilities - Mr Justice Kirby - was in due course appointed. Of course, it remains difficult to assess whether a meaningful process of consultation did in fact occur in this case, and it is highly doubtful whether the comments of most of the States concerning Mr Justice Kirby were favourable to his appointment. Nevertheless, the procedure followed in 1995 clearly represents an improvement upon that which preceded it.

Over the years, there have been a range of suggestions as to how a more federal element might be injected into the process for the appointment of High Court Justices, with the ultimate aim of producing a Court more supportive of the decentralizing character of the Australian Constitution.

In 1973, the Victorian Government proposed that the Commonwealth should appoint only every second High Court Justice, with each individual State acting alternately to choose a Justice on other occasions.[35] The effect of this would have been that a particular State would have filled every twelfth High Court vacancy. In 1975, New South Wales proposed to the Australian Constitutional Convention that appointments to the High Court should be recommended to the Governor General by a `judicial council', to be composed of Commonwealth and State Attorneys-General, with the Commonwealth enjoying two votes.[36] A similar recommendation was endorsed by a Committee of the New South Wales Parliament in the same year.

In 1978, Victoria proposed to the Australian Constitutional Convention that the Constitution be formally amended so that no appointment could be made to the Court without consultation of the States by the Commonwealth.[37] Five years later, Queensland argued in favour of a proposal that High Court Justices be appointed by the Governor-General on the recommendation of the

Commonwealth Attorney-General, but only once the agreement of a majority of the States, or at least of three of them, had been obtained.[38]

In 1988, the Constitutional Commission appointed by Prime Minister Bob Hawke rejected any proposal for a constitutional requirement that the States be involved in the appointment of High Court Justices. In particular, the Commission disdained the suggestion that the agreement of three States be required before such an appointment could be made, on the grounds that this would produce `compromise candidates', and would give `undue prominence to regional considerations'.[39]

In fact, the issue of State involvement in the High Court appointment process has been a very sensitive one for antifederalists. They have hotly opposed any suggestion of a consultative process that goes beyond mere tokenism, for the precise reason that it might indeed result in a Court less sympathetic to the ambitions of central power. This tendency is, perhaps, well-illustrated by the haughtiness of the rejection by the Constitutional Commission of Queensland's not unreasonable proposal that the consent of three States be required for a High Court appointment.

It should be noted in this context that some degree of regional involvement in the appointment of judges to the constitutional court of a federation is not unknown under other federal and quasi-federal Constitutions. In the United States, for example, Article II Section 2 of the Constitution requires the appointment of Supreme Court Justices to be approved by the Senate. As the Senate is composed of an equal number of representatives from each State, and as it operates rather more effectively as a States' House than our own Senate, at least a limited element of federal involvement may be discerned in this arrangement.

The position in Germany is rather more favourable to the involvement of sub-national governments in central court appointments. There, the Federal Constitutional Court is chosen with the involvement of the Bundesrat, the Federal Upper House.[40] As the Bundesrat is composed of representatives directly appointed by the Governments of the Lander (i.e. the States), and as the Lander can direct their representatives as to how they vote, the Lander necessarily have a significant collective influence over appointments to the Court.

Perhaps ironically, even the draft Constitution of the Russian Federation is more sympathetic to the claims of regional governments in the present context than our own constituent document. Article 28 requires judges of the Constitutional Court to be appointed on the suggestion of the President of the Federation, but the actual appointment can be made only by the Council of the Federation, which is composed of two representatives of each unit of the Federation. Less prescriptive, but still tending in a similar direction, is section 122B of the Malaysian Constitution, which requires the Prime Minister to consult the Conference of Rulers - that is, the rulers of the component States of Malaysia - before recommending the appointment of a Supreme Court Judge to the King.

Finally, perhaps the most striking recognition of the interest of sub-national governments in the appointment of judges to the constitutional court of a federation is comprised in section 6 of the Canadian *Supreme Court Act*, which specifically requires that three out of nine Supreme Court Judges must be drawn from the Province of Quebec.[41] The failed Charlottetown Accord would have gone further, with Quebec's constitutionally guaranteed representation being maintained, but with the federal Government being required to name future judges from lists submitted by all the Provinces.[42]

The general conclusion, after a brief examination of other federal and quasi-federal Constitutions, must therefore be that a degree of sensitivity to federal considerations in the

appointment of judges to central constitutional courts is far from atypical or outlandish. Consequently, it is not possible to justify the present unbridled discretion reposed in the central government in this country as merely representing the invariable norm in comparable Constitutions, and a consideration of potential improvements to the Australian system is thus highly relevant.

However, in undertaking such a consideration, it has to be accepted at the outset that most of the suggestions commonly put forward for the improvement of judicial appointments in general, and noted previously in this paper, would do nothing to alleviate the particular difficulty presented by the anti-federal bias of the High Court.

To begin with the most obvious possibility, the approval of High Court nominations by a Senate Committee, or for that matter by the Senate itself, would be unlikely to have any significant effect on the composition of the Court from a federal aspect. The Senate has not operated as a States' House in living memory, and it would be as unlikely to protect the States' interest in the context of High Court appointments as in any other. Rather, a requirement of Senate approval would simply create the opportunity for the political examination along party lines of any unfortunate candidate for judicial office. Indeed, given the likely political composition of the Senate into the foreseeable future, and the attitudes to federalism of parties like the Australian Labor Party and the Australian Democrats, legislative ratification of this sort would be more likely to operate against the production of a federalist High Court than in favour of such an outcome.

Much the same may be said of proposals for the establishment of a judicial appointments commission, or some similar body. Such Commissions exist in most of the American States, and have been proposed at various times in Canada, the United Kingdom and New Zealand.[43] In Australia, they have been favoured by commentators as far apart in constitutional outlook as Sir Garfield Barwick[44] and Professor George Winterton.[45] Taking Winterton's proposal as a typical example, the Commission would be appointed by the Commonwealth Government, and would be required to prepare a list of names for presentation to the Commonwealth AttorneyGeneral. The Attorney-General, who could demand further names from the Commission, would then consult with relevant parties. These would include judges, practicing lawyers, academics and - along with all the rest - the States.

The general point which must be made concerning judicial commissions in the present context is that they would be highly unlikely to operate so as to moderate the centralist bias of the High Court. If one considers the Winterton proposal even briefly, one quickly comes to suspect that any commission would follow an appointments agenda as little sympathetic to federal considerations as have been the agendas of successive Commonwealth Governments. Critically, as an appointed creature of the central Government, a judicial appointments commission confidently could be expected to reflect at one remove precisely the same centralising views which presently dominate the appointment of High Court Justices. To adapt the old cry of "Who guards the guardians?", "Who appoints the appointers?" Indeed, the creation of a seemingly independent Commission by the Commonwealth might well operate to objectify and legitimise in the eyes of the public precisely those basic deficiencies of method and approach which presently plague the Court.

The result therefore must be that the only immediately obvious means of addressing the anti-federal character of the High Court via the appointment process is to involve the States directly in that process. It is clear, of course, that because the High Court is ultimately an organ of the Federation as a whole, appointments should continue to be made formally by the Governor-

General. It would not be constitutionally appropriate that any other method of appointment be adopted.

The best proposal seems to be that of Queensland to the Australian Constitutional Convention in 1983, or some variant thereof. It will be recalled that this proposal was for the Commonwealth Attorney-General to propose a name to the collective State Attorneys-General, and for the agreement of at least three of the States to be required before that name could proceed to the Governor-General. This requirement for the consent of half of the States inevitably would impose a real and onerous obligation of discussion and consultation upon the Commonwealth, without presenting the significantly more difficult hurdle involved in the gaining of a majority. Notwithstanding the historic spinelessness of the Australian States on almost every conceivable constitutional issue, a requirement that three of their number consent to any High Court appointment would at the very least cause the Commonwealth to ponder long and hard before making an obviously unacceptable nomination.

Of course, criticisms could be levelled against such a proposal. The first would be that it would lead to an orgy of political horse-trading behind closed doors. This may well be at least partially true, but surely no more true than is presently the case within the Cabinet room (and possibly the party room) whenever the Commonwealth Government appoints a High Court Justice. To take just one recent example, rumours were rife at the time of the appointment of Mr Justice Kirby, that Cabinet was significantly split between his nomination and that of Chief Justice Doyle of South Australia. In any event, the requirement that four Governments effectively agree before a nomination can go forward would undeniably involve a greater degree of accountability and interchange of views than the present unilateral process.

A second objection is that raised by the Constitutional Commission in 1988, that such a process would produce compromise candidates.[46] This may be true, but it is not clear why it is undesirable. It may well be that the best candidates in practice are those who enjoy a significant degree of confidence among a wide range of Governments and their Attorneys, rather than those who arouse the unbridled passion of the Commonwealth Government alone. Indeed, the general point must be that it is far from clear why we should be so eager to rely upon the judgment of a single government in choosing a High Court Justice as the best guarantee of quality, rather than the collective wisdom of a number of governments.

A further objection of the Constitutional Commission to the Queensland proposal was that it would give undue prominence to regional considerations.[47] The broad answer to this point is that it all depends upon what prominence one believes should be given to regional considerations. The assumption made in this paper is that the High Court is not only the supreme judicial authority within the Commonwealth legal hierarchy, but that it occupies a similar position in respect of the law of each of the States. To this extent, the High Court is as much a court of the States as it is a court of the Commonwealth. This is without even considering the role of the Court as final constitutional arbiter in disputes between the States and the Commonwealth. On this basis, one could be forgiven for believing that `regional considerations' should be given a very great prominence in the appointment of High Court Justices, on the grounds that the States and the Commonwealth in reality have a roughly equal interest in the operation of the Court.

It is intriguing to speculate as to the effect that the adoption of such a proposal might have had upon the appointment of Justices to the High Court in the recent past. In the case of Mr Justice Gummow, it is difficult to hazard any informed guess. Certainly, his name was not prominently raised prior to his appointment, and thus it may be that a body of the States would have insisted upon the nomination of another, more obvious candidate. On the other hand, they might have

been persuaded. In the case of the appointment of Mr Justice Kirby, it is probable that a very different result would have prevailed. It is hard to imagine a majority of States (four of which possessed conservative governments) agreeing to the appointment of Mr Justice Kirby over what is believed to have been their preferred candidate, Chief Justice Doyle of South Australia.

In summary, then, my proposal would be as follows. The Commonwealth Attorney-General would ask the State AttorneysGeneral for nominations of persons suitable for appointment to the High Court. At the same time, he or she would also indicate to the States the name or names of the persons already under consideration by the Commonwealth. The States would consider the matter, and then furnish to the Commonwealth Attorney-General the names of their own candidates, together with comments upon the candidates already put forward by the Commonwealth. After deliberating upon this material, the Commonwealth would propose a name to the States. In the event that three States agreed, this nomination would be passed by the Commonwealth Attorney-General to the Governor-General. If less than three States could be persuaded to agree, then the Commonwealth Government would be required to provide another nomination, and the process would continue until at least three States could be persuaded to agree to the appointment of a person so nominated.

Progressive Interpretation of the Constitution and High Court Appointments

The first question which must be addressed here, albeit briefly, is why the High Court has moved in the space of ten years from a more or less literal interpretation of the Constitution, to the position where a number of its Justices sturdily advance the position that it is the role of the Court to interpret that Constitution so as to adapt it to the demands of modern society. All that will be attempted here is the most basic of outlines.

It cannot be denied that one force behind such a progressive view of the Court's constitutional role is the undeniable intellectual bankruptcy of the old strict literalism. Literalism is neither an intellectually sustaining constitutional theory, nor can it be applied plausibly in any number of important contexts, most obviously whenever the constitutional text is seriously ambiguous.[48] A further difficulty lies in the fact that the appeal of literalism to judicial objectivity is essentially superficial, in the sense that constitutional literalism in Australia has always masked the hidden political agenda of centralism, and to this extent many High Court Justices have long been involved in the making of covert policy choices in a constitutional context.[49]

Nor can one ignore the enormous influence that has been exerted in recent years by theories of legal realism upon the minds of Australian lawyers. The now prevalent assumption that judges routinely make law has seriously undermined the concept of judicial restraint in constitutional law, as in virtually all other areas of jurisprudence. Coupled with this has been the profound impact of specifically constitutional ideas derived from the United States. Two entire generations of Australian constitutional lawyers have now looked largely to America, and not to the United Kingdom, for intellectual inspiration. There they immediately have been impressed by the glowing example of the Bill of Rights, with all its attendant judicial activism.

This American constitutional influence has dovetailed with the perplexing phenomenon of a prevalent and growing contempt on the part of Australian lawyers for government. This contempt appears to derive not only from legitimate concerns over the excesses of executive government during an era of declining parliamentary authority, but also from a wider belief that governments in general (though elected) are themselves inherently untrustworthy, and that they should be controlled in the wider interests of humanity by clever, civilised lawyers.

Nor should one ignore a more thoroughly cynical analysis, which suggests that a large part of the High Court's new judicial imperialism is about nothing more complicated than the acquisition of

power. We often forget that Courts are composed, generally speaking, of middle aged men who have risen to the top of their highly competitive profession, acquiring an exceptionally high opinion of themselves along the way, and who are as prone to the seductions of power and influence as any one else. Once such persons are freed from the traditional inhibitions imposed by judicial office, there is no obvious restraint upon the natural human tendency to seek to recast society in one's own image.

Perhaps the most important point to derive from all this is an understanding that progressivism is not a tendency which has arisen peculiarly upon the bench of the High Court. In reality, constitutional progressivism is one aspect of a basic change in attitude on the part of many of Australia's most influential lawyers. This change can be discerned in the obsession of such lawyers with Bills of Rights; their disdain for Parliament as an instrument of liberty; their mania for `human rights' generally; and their unreasoning support for every imaginable international covenant, regardless of content. In short, everything that will allow the constitutional legal elite to determine the basic structures and values of society, and sideline more populous institutions such as governments and Parliaments, is hailed as indispensable to a new, principled and shining social order.

It may be noted that some constitutional commentators breathed a sigh of relief after the decision of the Court in *McGinty*, and regarded that case as evidence that the Court's flirtation with implied rights and progressivism was over. In my view, this is a forlorn hope. In the first place, the implied freedom of political speech continues to exist, and merely awaits the ear of a more sympathetic future Court for its elaboration and extension. Secondly, the general concept that the Constitution is to be modified by the High Court in light of changing circumstances is to some extent embedded in most of the judgments in *McGinty*, even those of so-called conservative judges such as Justices McHugh and Gummow.[50]

Finally, as has been argued elsewhere in this paper, the High Court rarely abandons a novel line of constitutional reasoning. Rather, the Court may lie low for a period, but the relevant direction is always liable to be resumed upon the arrival of a more propitious moment.

Obviously, progressivism as described in this paper is to a very large extent the product of past appointments to the Court. However, no academic or political consideration has hitherto been given as to how this phenomenon might be dealt with through the appointments process, largely because progressivism is not yet acknowledged to be a problem. On the contrary, the vast majority of constitutional commentators, and particularly academics, are of the view that the philosophy of progressivism and its associated implied rights theory are the most favourable developments in Australian constitutional law since Sir Isaac Isaacs put down the States in the *Engineers Case*. With this view, a great many judges and practising lawyers cordially agree.

The question in the present context, therefore, is whether any change might be made to the appointment process which would reverse or at least confine the spread of progressivism on the Court. In this connection, this paper makes the unashamed assumption that progressivism is indeed something to be halted, if necessary, by constitutional amendment. This is because, in the words of Mr Justice McHugh, its application involves nothing more noble than the unauthorised amendment of the Australian Constitution.[51] In short, it comprises not constitutional law, but unconstitutional law. It thus behoves any government genuinely committed to constitutionalism to do all in its power to prevent the appointment of High Court Justices who would foster this illegitimate method of constitutional interpretation. A number of possibilities exist.

On an informal basis, governments can try not to appoint persons they believe would adopt a progressivist view of the Constitution once seated on the Court. This is an important issue,

especially for a conservative or a liberal government which takes seriously a commitment to the constitutional rule of law. In practical terms, it means that a government such as the present Coalition administration should be extremely cautious in its High Court appointments, and should ensure that any available writings produced by possible appointees on the subjects of constitutional law and interpretation are closely analysed.

However, there are obvious problems in relying upon the constitutional rectitude of Commonwealth governments as a cure for progressivism on the High Court. In the first place, a Labor government with an extensive agenda of constitutional change might well be highly attracted to the appointment of like-minded progressivist Justices, on the basis that they would be able to achieve far more by way of covert change to the Constitution through the application of illegitimate interpretative techniques than would ever be possible by legitimate resort to the referendum process under section 128.

Another difficulty is presented by the prevalence of progressivism among Australian lawyers. To a very real extent, it would be difficult for any Commonwealth government to identify a sufficient range of candidates suitable for appointment to the High Court who were not to some extent infected with this fashionable constitutional heresy. This problem is exacerbated by the fact that it may well be far from easy to diagnose progressivism in a barrister prior to that barrister's appointment to the Court. As Sir William Deane could testify, even reputed legal conservatives, once appointed to the bench, may well rather enjoy the idea of becoming constitutional philosopher kings. Of course, the fundamental difficulty here - which underlies much of the attractiveness of progressivism to Australian lawyers - is the lack of any obvious alternative in the form of a comprehensive and plausible conservative theory of constitutional interpretation upon which constitutional traditionalists might take a stand.

Were one disinclined to trust to the good sense of successive Commonwealth governments in this regard, it might be thought that some form of legislative ratification - already examined in the context of the Court's anti-federal bias - might offer some potential to restrain the appointment of progressivist judges. In fact, such a mechanism would be useless or worse. Any examination of potential candidates before a Senate committee or similar body inevitably would produce a highly public controversy between progressivists and traditionalists, with the likely result being the type of disaster represented by the failed Bork nomination in the United States.[52] Moreover, the likely composition of the Senate into the foreseeable future would positively favour the appointment of progressivist, rather than traditionalist judges. Finally, were the Senate or a Committee thereof actually to ratify the appointment of progressivist judges, it might be argued that such ratification operated to legitimize their subsequent lawmaking activity.

No further hope is offered by the creation of a judicial appointments commission. Given the prevalence of progressivism in what passes for Australian legal intellectual circles, there is every reason to suppose that the persons likely to be nominated to such a commission - academics, representatives of legal professional organisations and judges - would themselves be infected with progressivism to precisely the same degree as are the existing Justices of the Court. Thus, such a Commission could be expected to promote the appointment of progressivist judges, while giving to the whole process a spurious imprimatur of objectivity. This would presumably be the case unless a Commonwealth government were to appoint to the judicial appointments commission only the most constitutionally conservative judges, lawyers and academics, a course which would be politically extremely difficult.

Ultimately, it would appear that the mechanisms of State consultation outlined earlier in this paper might constitute the best, if sadly deficient protection against the appointment of

progressivist judges. This is because such mechanisms would promote scrutiny by six State governments and require agreement by three of those governments, a process which would be as likely as any other to involve the detection of any strongly held progressivist view. As the States have more to fear from progressivism than any other Australian constitutional entity,[53] their reaction to such a constitutional philosophy logically would be one of considerable hostility. For this reason, one would be inclined to think that the proposal previously outlined in relation to State concurrence in High Court appointments offers the best chance of combating progressivism through the appointment process. Against this, however, it must be noted that the operation of such a measure in relation to progressivism admittedly would be indirect; would rely upon the constitutional sophistication of State Attorneys-General; and would not resolve the difficulty posed by the prevalence of progressivist thinking among the pool of available candidates, nor the problem of detecting a progressivist bent prior to appointment.

Of course, there would in theory be more direct ways of coping with progressivism than through a modification of the appointment process. Ideally, it would be possible to amend the Constitution so as to define the duty of the High Court in the interpretation of the Constitution in such a way as to absolutely preclude judicial amendment. However, even assuming that one could effectively draft so problematic a provision, difficulties remain. In the first place, it is doubtful whether such a section would be approved at referendum, and its effect would certainly be difficult to explain to the electorate. Secondly, there could never be any guarantee that the Justices of the Court would themselves obey such an interpretative provision, given that it would itself be subject to interpretation by them.

The conclusion concerning progressivism must therefore be that it cannot really be dealt with effectively through the appointment process. As progressivism represents a sea-change in the constitutional attitude of Australian lawyers, it has to be dealt with as such. The only means by which progressivism ultimately may be defeated is through the development of an alternative constitutional theory which is sufficiently principled and logical to attract the allegiance of a majority of Australian constitutional lawyers. This, of course, is easy to say. The real problem is that our legal culture has, like a bad football team, gone soft: lawyers find the mushy social theory of progressivism with its appeals to higher notions of justice irresistibly attractive. It flatters lawyers to imagine themselves as the final arbiters of social priorities, and as philosopher kings dedicated to the protection of human rights. This is the view of constitutional law that is being taught to future lawyers and judges, and it is a view which is taught without concession to any alternative position. The real question is whether there will be any lawyers in Australia who are not progressivists in thirty years time.

General Problems in Judicial Appointments

The issues dealt with here do not relate specifically to the problems of the High Court, but rather to questions concerning the process of judicial appointment generally. Nevertheless, it is appropriate in a paper of this kind to express some tentative personal views upon this wider subject.

I would be opposed on pragmatic grounds to any proposal for legislative approval of judicial appointments as practised in the United States and Switzerland. It is not that the High Court does not richly deserve exposure to the rigours of ordeal by politician. On the contrary, its flirtation with progressivism clearly demonstrates that the Court merits being set adrift on the political seas which it has been so eager to chart. However, consistently with what has been said before in this paper, the probable result of legislative ratification would be the even greater politicisation of the Court, via all the usual horrors of media-directed judicial assassination.

Similarly, I would oppose the creation of judicial appointments commissions. I detect in such proposals that same strand of legal empire-building that underlies much of progressivist theory. Thus, nothing would suit progressivist lawyers better than to wrest from the executive government the task of constructing the nation's courts. Once this principle was firmly established, it would be possible to fully implement a judicial structure which reflected the role of lawyers as a directive liberal aristocracy. Naturally, this structure would be both profoundly anti-federal and anticonstitutionalist.

On the general issue of consultation, I am broadly supportive of any measure requiring governments to consult widely over judicial appointments. However, in the specific case of the High Court, it is vitally necessary that the States have an entrenched and pre-emptive right to such consultation. Unless this were the case, any requirement of wider community consultation almost certainly would be utilised for the purpose of swamping their views. It would be all too easy for a Commonwealth Government to engineer a consultative process that was designed to reflect precisely the anti-federal and progressivist views that it might wish to hear.

As regards the question of the pool from which judicial appointments should be drawn, I am inclined to think that it should be broader than is presently the case. This view is based upon a variety of considerations, which are too far removed from the subject of this paper to warrant consideration here. However, I would make the point that barristers often are fond of identifying themselves as the dispassionate guardians of legal and constitutional rectitude, and thus as the natural appointees to the courts, and to the High Court in particular. Yet it should be remembered in relation to that Court that it is populated exclusively by barristers, and that barristers as a corporate entity must consequently be prepared to accept some responsibility for its present constitutional course. After all, Sir Anthony Mason, Sir William Deane and Justice Gaudron were all barristers.

Moreover, were one being absolutely honest, a government in search of constitutionally conservative intellectual muscle for the High Court would be hard put to find it in the Bar. It has to be accepted that, in these days of constitutional confusion, it is not enough to recite - as many barristers are prone to do - the old legal certainties. What is imperative is the synthesis of a principled conservative constitutional theory, which will build upon but not slavishly adhere to the old formulations. Virtually no one has even attempted to generate such a theory since Sir Owen Dixon, and however much its passing may be mourned, the days of Dixonian theory are past.

Conclusion

I am forced to accept that this has been a depressing paper, in which discussion of problems far outweighs identification of solutions. However, I adhere to the view that in considering the question of High Court appointments, we must concentrate on the real issues concerning that Court: anti-federalism and progressivism. In the case of anti-federalism, an at least partial solution is readily to hand in the form of a requirement that three States agree before a High Court appointment may be made. Whether such a proposal is politically or constitutionally practicable, of course, is another question. The issue of progressivism is a much harder one, and one which in all probability requires more sophisticated solutions than mere constitutional amendment.

Endnotes :

1. See e.g. Winterton, G., *The Appointment of Federal Judges in Australia* (1986), 16 University of Melbourne Law Review 185, pp.209-10.

2. Australian Constitutional Convention, Judicature Sub-Committee, *Report to Standing Committee on an Integrated System of Courts,* Appendix C.

3. See Winterton, *op.cit*., pp.196-8.

4. See Craven, G., *The States* in G. Craven (ed.), *Australian Federation: Towards the Second Century* (1992), pp.62-5.

5. Section 74 of the Constitution permitted appeals to the Privy Council in certain circumstances. These were finally terminated by the *Australia Acts* in 1986.

6. See generally, Quick, J. and R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), pp.797-804.

7. See Dicey, A.V., *The Law of the Constitution* (8th ed., 1915), p.38.

8. See e.g the comments of Trenwith at the Adelaide session of the Convention: *Convention Debates,* Adelaide, 1897, p.940.

9. See Craven, *op.cit*., p.61.

10. As was ringingly asserted in the joint judgment in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129.

11. As illustrated by the approach of the first High Court in cases like *Huddart, Parker and Co. Pty. Ltd. v. Moorehead* (1909) 8 CLR 330.

12. See e.g. *Attorney-General (Queensland) v. Attorney-General (Commonwealth)* (1915) 20 CLR 148, per Griffith CJ at 163.

13. See generally, Craven, G., *Original Intent and the Australian Constitution Coming Soon to a Court Near You* (1990), 1 Public Law Review 166; see also Quick and Garran, *op.cit*., pp.985-95.

14. See e.g. *Theophanous v. Herald and Weekly Times Limited* (1994) 182 CLR 104 at 168-74.

15. *Ibid*., and see especially the comments concerning Andrew Inglis Clark at 171-3.

16. *Mabo v. Queensland* (1992) 175 CLR 1.

17. (1995) 183 CLR 273.

18. Sawer, G., *Australian Federalism in the Courts* (1967), p.201.

19. Section 51 (xx).

20. Section 51 (xxix).

21. *Nationwide News Pty. Limited v. Wills* (1992) 177 CLR 1.

22. (1994) 182 CLR 104.

23. See Goldsworthy, J., *Implications in Language, Law and the Constitution* in G. Lindell (ed.), *Future Directions in Australian Constitutional Law* (1994), p.l50.

24. See the judgment of Dawson J in *Theophanous* at 193.

25. See especially his judgment in *Theophanous* at 171-2.

26. *McGinty v. Western Australia* (1996), Unreported, 87.

27. See the comments of McHugh J in *Theophanous* at 197-198; and of Dawson J at 193-4.

28. *Op.cit*. See e.g. at 147 the comments of Gummow J as to the `evolving' nature of representative democracy under the Australian Constitution.

29. These general problems are discussed comprehensively in Winterton, *op.cit.*

30. See Australian Constitutional Convention, Judicature Sub-Committee, *Report to Standing Committee on an Integrated System of Courts* (1984), Appendix D, `Appointment of Judges in Other Federations', pp.40-42.

31. The various proposals are fully set out in Australian Constitutional Convention, Judicature Sub-Committee, *Report to Standing Committee on an Integrated System of Courts* (1984), Appendix B, `Commonwealth Government Paper - Appointment of High Court Judges.'

32. Winterton, *op.cit.*, p.204.

33. *Ibid.*, pp.209-10; see also Barwick, G., *The State of the Australian Judicature* (1977) 15 Australian Law Journal, pp.480, 494.

34. For a more detailed discussion see Craven, G., *The States*, *op.cit*., pp.62-7.

35. Australian Constitutional Convention, *Commonwealth Government Paper - Appointment of High Court Judges*, *op.cit*., p.29.

36. *Ibid.*, p.30.

37. *Ibid.*

38. Australian Constitutional Convention, Judicature Sub-Committee, *Report to Standing Committee on an Integrated System of Courts,* Appendix C.

39. Australian Constitutional Commission, *Report* (1988), p.401; see also Australian Constitutional Commission, *Australian Judicial System: Report of the Advisory Committee to the Constitutional Commission* (1987), p.74.

40. Australian Constitutional Convention, Judicature Sub-Committee, *Report to Standing Committee on an Integrated System of Courts,* Appendix D, `Appointment of Judges in Other Federations', pp.42-3.

41. See Hogg, P., *Constitutional Law of Canada*, pp.168-186.

42. *Charlottetown Accord*, paras. 17-19.

43. See Winterton, *op.cit*., pp.188, 202.

44. *Op.cit*.

45. *Op.cit*., pp.209-10.

46. Australian Constitutional Commission, *Report* (1988), p.401.

47. *Ibid.*

48. See generally, Craven, G., *The Crisis of Constitutional Literalism in Australia* in Lee, H.P. and G. Winterton, *Australian Constitutional Perspectives* (1992), p.1.

49. *Ibid*., pp.8-10.

50. See e.g. the judgment of McHugh J at 96-7; of Gummow J at 147.

51. *McGinty v. Western Australia* (1996), Unreported, 87.

52. See generally, Bork, R., *The Political Seduction of the Law: The Tempting of America* (1990).

53. For the simple reason that a progressivist judge invariably equates centralism with progress: see e.g. Mason, A., *The Role of a Constitutional Court in a Federation* (1986), 16 Federal Law Review 1.

Chapter Three

Constitutionally Entrenching our Flag

Hon. David Jull, MP

Thank you for inviting me here today to talk to you about constitutionally entrenching the Australian National Flag.

I am glad to say that your invitation was one of the first that I was able to accept in my capacity as Minister for Administrative Services in the new Howard Government.

In accepting your invitation, I saw an opportunity to reiterate the Government's views on the subject of the national flag.

The Coalition Government is strongly committed to the national flag.

It was this commitment to the flag which, during the election, led us to promise to amend the *Flags Act* 1953 to "guarantee that all Australians would be consulted before any changes to the national flag were made".

In our pre-election policy statement on veterans we stated:

> "The Australian National Flag, as a national symbol, belongs to the Australian people, not the Prime Minister or the Government of the day.
>
> "Clearly the present legislative arrangement whereby the National Flag can be changed by an Act of Parliament, without the views of the Australian people being taken into account, is unacceptable."

On ANZAC Day, the Prime Minister stated :

> "It's a very simple proposition...we will amend the *Flags Act* so that in future there can be no change to the Australian flag without all of the Australian people being consulted."

Before turning to this and the issue of constitutionally entrenching the flag, I think it would be worth recalling the flag's historical development.

I must say that few issues excite as much passion in the community as the question of the Australian National Flag.

And I believe that one of the reasons for this is that it is so effective a design: as a potent symbol of our nation and its history, it occupies centre stage in any debate about where we have come from and where we are going.

The Australian National Flag is the oldest of our national symbols.

Despite this, the history of the flag, like the contents of our Constitution, is not as well known by Australians as it should be.

This has undoubtedly made the flag an easy target for those who believe that its symbolism is anachronistic.

But even the most cursory examination of the story of how we came to choose our flag will reveal that it is, again like our Constitution, distinctly Australian and democratic.

The Australian National Flag was by no means the first flag to be designed in Australia.

As early as about 1823, two military officers were credited with the first recorded attempt to design a `national' flag for Australia.
Significantly, this early design, known as the National Colonial Flag, featured a stylized representation of the Southern Cross, on the red cross of Saint George, and included the Union Jack.
It is also worth mentioning the Australasian Anti-Transportation League flag, unfurled in 1851, which again featured the Southern Cross and the Union Jack.
Three years later, in 1854, the Eureka flag was raised by gold miners at Bakery Hill, Ballarat.
This flag captured the spirit of protest and demonstrated the power of flags as symbols.
Finally, I should mention the flag of the Federation movement of the 1880s and 1890s which gave substance to their slogan: "One people. . .One destiny...One flag".
Long before Federation, therefore, Australians had come to see flags as a means to express and define their views, ambitions and unity.
It was not, however, until 1900, with Federation looming, that the Australian public were directly involved in a search for a national flag.
A Melbourne journal, the *Review of Reviews for Australasia,* launched a competition for this purpose in November 1900, offering a first prize of £50.
The journal, drawing on the symbolism of popular flag designs of the last hundred years, suggested that entries in the flag competition incorporate the Union Jack and the Southern Cross.
Upon Federation in 1901, the new Commonwealth Government announced it would also run a flag competition for two flags: "one for the merchant service and one for naval or official use".
The *Review of Reviews* agreed to combine its entries with those submitted to the official government competition, but it was not a requirement of the official competition rules that the Union Jack be included in a design for it to be considered by the judges.
Furthermore, the combined prize money of the two competitions, now £150, was increased to £200 by a donation from a private company.
In all, more than 32,000 entries were received from all over the world and from people of all ages and backgrounds, even an unnamed State Governor.
Among the more peculiar entries was a design depicting native animals playing cricket with a winged cricket ball, and another which included a rather portly kangaroo aiming a gun at the Southern Cross!
What, might we ask, did the judges make of such bewildering variety?
Mr J S Blackham, chief of staff of the *Melbourne Herald*, and Chief Executive Officer of the federal competition, candidly admitted that many of the entries could be described as "miracles of misplaced ingenuity".
In the end, the judges settled on five designs that were almost identical.
The winning designs, named the Australian Red and Blue Ensigns, were gazetted in 1903, the same year as Samuel Griffith's appointment as foundation Chief Justice of the High Court.
Since 1903, the Australian National Flag has remained unchanged, with one exception - the addition, in 1908, of a seventh point to the Commonwealth Star to symbolize the Commonwealth Territories.
Following the adoption of the national flag there was some confusion regarding the proper use of the Blue Ensign.
There was uncertainty whether it was available for public use or restricted to official purposes.
In addition to this, people were apt to use the Red and Blue ensigns interchangeably according to their own personal preference.

On 15 March, 1941 Prime Minister Menzies issued a press statement to encourage the Australian public to fly the Blue Ensign on land and for Australian merchant ships to continue to fly the Red Ensign.

After World War II, the Chifley Government sought to promote the use of the flag by raising its profile.

In 1947, Prime Minister Chifley issued a statement in support of Prime Minister Menzies's earlier statement, encouraging more general use of the Blue Ensign.

Accordingly, the flag also became a prominent feature of naturalization ceremonies in the post-war immigration boom.

Finally, in a move designed to clear up any remaining confusion regarding the status and design of the flag, the Menzies Government passed the *Flags Act* in 1953.

The Act, which received enthusiastic bipartisan support, formally established the Blue Ensign as the Australian National Flag and defined the correct dimensions of the symbols which constitute the flag.

The Act received Royal Assent from the Queen during her 1954 visit to Australia.

This was the first time an Act of the Australian Parliament had received assent in this way and the first time a reigning Australian sovereign visited Australia.

The Menzies Government had already begun the practice of issuing flags to all public schools and community groups in 1951.

In keeping with this policy of raising awareness in our foremost national symbol, the Menzies Cabinet directed that the flag be flown by all Commonwealth government departments.

Despite the formal recognition of the status of the national flag in statute law, parliamentarians have more recently become concerned that the flag could be changed without reference to the people of Australia.

The previous Government made it clear that they were in favour of changing the flag, but despite raising the issue on a number of occasions they proved unwilling to clarify how they would go about it.

In response, Coalition members introduced a number of *Flag Amendment Bills* since 1984.

The purpose of these bills was to include in the *Flags Act* a clause that would require a plebiscite to change the flag.

Throughout this period, despite attempts to politicize the issue, opinion polls continued to show that the weight of public opinion was in favour of retaining the flag as it is.

Consequently, during the recent election campaign we promised to legislate to amend the *Flags Act* to state that no new flag could be adopted without a plebiscite of the people.

We are now in a position to keep that promise.

An Act of Parliament requiring a plebiscite is, of course, a lesser standard than entrenching the existing design in the Constitution, and I will come to that later.

An amendment to the existing *Flags Act* is attractive for its simplicity, for it only requires the approval of Parliament in the normal way.

But it must be remembered that Parliament cannot bind its successors, and a clause in the *Flags Act* requiring a plebiscite could be removed through the usual processes of legislative amendment.

Nevertheless, an amendment to the *Flags Act* for a plebiscite puts the flag in the hands of the people, and it would be a hard case for any politician to explain why Australians should not be asked to approve any change to what is after all the most important national symbol of Australia.

Also, no politician would seek a plebiscite unless it was clear the public was in favour of change, and had shown support for an alternative design.
These factors combined with the cost of a vote would deter disingenuous attempts to change the flag.
In the context of introducing a plebiscite clause, consideration will need to be given to the extent to which details on the mechanics of a plebiscite would need to be included in the Act.
Consideration needs to be given to such issues as:

***** How would the process of instituting a plebiscite be set in motion?

***** How would it be conducted?

***** How might new flag designs arise?

***** How would designs be selected for inclusion on the ballot paper with the current design?

***** How many alternate designs might be placed on the ballot paper?

***** How would the ballots be counted?

To date, only one of Australia's national symbols has been chosen by way of a plebiscite.
In May, 1977 Australians were asked to choose`a national song' from four selections.
For this plebiscite, the Government decided that voting should be on a preferential basis, but no special legislation was put in place to govern the conduct of the national song poll.
The Chief Electoral Officer at the time decided that the poll would be conducted in accordance with the provisions of the *Electoral Act* relating to House of Representatives elections, with the votes for the songs being counted as if they were candidates.
Australians selected *Advance Australia Fair* as their national song.
In 1984, the Hawke Government proclaimed it as the National Anthem.
I do not envisage that our proposed amendment to the *Flags Act* will set out the exact method of the conduct of a plebiscite.
That is really something that should be considered when or if a plebiscite is required.
Enshrining or entrenching the flag in the Constitution sets a much higher threshold for change, for this could only be done by way of constitutional amendment.
Section 128 of the Constitution stipulates that amendments must be passed by both Houses of Parliament, or in some circumstances by one House alone.
The issue is then put to the people.
For an amendment to be successful, it requires an overall national majority of voters and the approval of a majority of voters in a majority of States.
This sort of `double majority' sets a very high standard to both including a provision relating to the flag in the Constitution and any subsequent attempt to change it.
Taking into account a State by State preference has special significance in respect of the Constitution, where a change may alter the balance of powers between the Commonwealth and the States, but it is not necessarily relevant to the choice of a national flag, which, it can be argued, should be made by the Australian electorate collectively.
Certainly, State views were not formally taken into account in the original selection of the flag in 1901.
Indeed, when the two flag competitions were combined in 1901, new judges had to be chosen because the State Premiers felt that they should not judge a Commonwealth contest.

In any event, bearing in mind the results of the 42 referenda held since Federation, we can deduce that Australians are quite conservative when it comes to amending the Constitution.
Only eight have been passed, with two more attaining national majorities but failing to achieve a majority in four States.
This must partly, at least, be taken as an indication of the Australian people's satisfaction with the Constitution as it stands.
I understand the appeal of protection of the flag under the Constitution.
We must, however, have regard for the realities of a referendum.
The voting record on referenda is also the clearest indication that Australians may not approve entrenching the flag in the Constitution.
This would not be because Australians do not value their flag.
It would be yet another sign that Australians are happy with the way in which the Constitution is framed and are reluctant to tamper with it.
In this respect, it may be that our Founding Fathers were wise to avoid detailing everything in the basic law of our nation.
Countries to which we, and indeed our Founding Fathers, have compared ourselves, have avoided this route as well.
By not including the minutiae of government in our Constitution, Samuel Griffith and the Founding Fathers ensured that our polity would be flexible enough to avoid the sort of constitutional crises which might jeopardize our entire system of government.
The stability of our system testifies to their success.
Altering the Constitution is not a measure to be taken lightly.
History is replete with stories of how unintended consequences have caused great problems later on.
An attempt to entrench the flag in the Constitution after it has stood the test of time for close to a hundred years might be portrayed by some as an act of weakness, an admission that it has lost the respect of those it was designed to represent.
Entrenchment in the Constitution is also likely to polarize views on the flag and divide Australians unnecessarily.
In our attempt to build consensus on this issue, we must make sure that we do not diminish the highly positive status that the flag currently enjoys amongst Australians from all walks of life.
These sort of issues should be taken into account when contemplating change in the Constitution.
It is not an argument against change *per se* - after all, history has the benefit of 20/20 hindsight - but it is an argument for prudence.
If we look at how other countries have gone about establishing their flags we can see a number of similarities.
The flag of the United States, for example, was proclaimed by Executive Order of the President in a similar way to which the Governor-General proclaims additional flags in Australia under the *Flags Act*.
As such, it too can be changed by a further Executive Order without reference to the people.
The Canadian national flag was formally adopted by resolutions of Parliament and proclaimed by the Queen to take effect on 15 February, 1965.
The current Union Jack was established by Royal Proclamation (not legislation) on 1 January, 1801 with the political union of Great Britain and Ireland.
It achieved its hundredth birthday on the very day the Australian Commonwealth came into being.

It is true that a number of countries have defined and protected their national flag through their Constitution.

France, Iraq and the Former Yugoslav Republic of Macedonia have followed this path.

In closing, I would reiterate that the Coalition Government is firmly committed to keeping our flag as it is, unless the Australian people themselves choose an alternative.

Our protection of the national flag through the *Flags Act* will ensure that the flag cannot be changed without reference to the Australian people to whom it really belongs.

We will also continue to promote the flag through the free issue of flags through Federal Members of Parliament and Senators to all schools, local councils, churches and other non-profit or benevolent community organizations, associations and groups that have occasion to display the flag on special public occasions or in halls or meeting rooms.

We will also continue our other information and publicity activities.

I would hope that by becoming more familiar with the history of the flag, Australians will appreciate and understand the symbolism of the flag.

The three symbols which comprise the design of the flag each represents an aspect of our identity: the Southern Cross - our geography, the Commonwealth Star - our polity, and the Union Jack - our heritage which has provided us with a common language, democratic ideals, and our political institutions.

We should have nothing but pride in a flag which has served us so well.

I would suggest to you that pride and respect in the Australian National Flag will remain the best safeguards against those who wish to rewrite our history for purely political purposes.

Chapter Four

The Republic: Problems and Perspectives

Peter Howell

Introduction

As this address arises directly from my work with the South Australian Constitutional Advisory Council, I should, for the benefit of those who are visitors to this State, begin by offering a brief explanation of our task.

In deciding to establish a Constitutional Advisory Council in September, 1995 the South Australian Government was responding to two developments. First, the then Prime Minister had made it very clear that if his Government was re-elected, he was determined to hold a national referendum in an attempt to turn Australia into a republic. Second, the then Leader of the Opposition in the Federal Parliament (Mr Howard) had espoused an undertaking given by his predecessor (Mr Downer) that, if the Coalition won the 1996 election, a `people's convention' would be called to review Australia's constitutional arrangements. Both of these commitments possessed the potential to have important consequences for the States. Hence an Advisory Council was commissioned to investigate and, after the widest possible consultation with the people of South Australia, report on the constitutional arrangements which will best sustain, not only national unity, but regional diversity into the 21st Century.

Central to this task, of course, is a consideration of the adequacy, or otherwise, of the current distribution of power between the Commonwealth, the States and Territories, as affected by the High Court's activities and by the exercise of the Commonwealth's financial and treaty-making powers. Closely related to our deliberations upon this are such questions as: should the federal Parliament retain its monopoly of the right to initiate referendums to change the Constitution of the Commonwealth, if its meaning, as currently interpreted by the High Court, is found to be unsatisfactory, or should the State Parliaments, or any one or two of them acting in concert, also be given that right? Or again, should the State Attorneys-General, according to some rota, be given the right to fill every second vacancy on the bench of the High Court? But matters of that kind are not what I have been asked to canvass today.

The posturings of our federal parliamentarians have had the result that the feature of our current constitutional arrangements which has been most in the spotlight since 1992 is the fact that Australia shares a monarch with the United Kingdom, New Zealand, Canada, Papua-New Guinea and a dozen other nations. Before addressing some of the problems of seeking to change this, I must also explain that the South Australian Government sought to make the State's Constitutional Advisory Council as broadly representative as a workable group (limited to twelve people) could be. For example, as part of this process, each of the three political parties represented in the South Australian Parliament was invited to nominate a person.

The mixed composition means that some of my fellow-Councillors are convinced and committed republicans. Others are convinced and committed constitutional monarchists. Hence the Premier made it plain that his Government was *not* asking us to report on whether Australia should

become a republic or not, because that is a question for the people of Australia as a whole to decide. Our job was to advise the Government so that, amongst other things, the State is not left unprepared, and therefore in some kind of constitutional hiatus or limbo, if change does come at the federal level.

Consequently, insofar as the republican question appears in our brief, we have seen our task as:

(a) to help raise awareness of the issues and encourage debate amongst the people of South Australia, who will be sharing in making the national decisions on these matters; and

(b) to make recommendations on the most appropriate actions this State should take if the campaign for a republic looks like being successful.

Accepting appointment by the Governor in Council has meant that, rather than representing a particular constituency, each member of the Advisory Council has a duty to share in making judgments on what is best in principle, for the nation and the State, leaving it to our parliamentarians to assess what is politically possible. It is within these parameters that I must confine my remarks today.

Is a `minimal' Republic realistic?

The most prominent advocates of republicanism in Australia have been advocating minimal change, evidently because they believe that a change which does the least violence to our existing arrangements is the only kind that will be acceptable to the necessary majorities of the Australian people. Thus, in June, 1995 Paul Keating indicated that, because his object was to terminate the links of the federal government and Parliament with the Crown, his Government's `*preferred* position'[1] was to vest the powers currently held by the Queen and the Governor-General in a new Head of State, and that these powers should be exercised in accordance with the constitutional conventions that have hitherto governed their use. Mr Keating also proposed that it should be left to each of the States to decide whether or not it wanted to follow suit. The first of these propositions raises many problems which have been contentious. The second is pregnant with mischief. Let me give some examples.

The Head of State

It is often said that the sovereign's role in Australia is almost entirely symbolic. Since Federation, we have had six monarchs, but only one of these, Queen Elizabeth II, has actually visited Australia since ascending the throne, and most of her visits have been quite brief. Virtually all her powers as Queen of Australia are exercisable only by the Governor-General (for national purposes) and the Governors (for State purposes). This underlines the growing belief that our actual constitutional Head of State, at the national level, is not the Queen but the Governor-General.

The notion is not just an abstract theory. It reflects the way the system operates. In 1926, at one of the Imperial Conferences that were the forerunners of the Commonwealth Heads of Government Meetings of our own day, the assembled Prime Ministers of what were then styled the self-governing `dominions' within the British Empire decreed that a Governor-General holds the same position in relation to the administration of public affairs in the dominion as is held by the King in the government of Great Britain.[2] As a result, when the Speaker of the House of Representatives asked the Queen to intervene and direct the Governor-General to reverse his dismissal of the Whitlam Ministry in 1975, Her Majesty's Private Secretary replied that the Queen has no part in the decisions which the Governor-General must take in accordance with the Constitution.[3] Meanwhile, the next Imperial Conference, in November, 1930 had taken the further step of declaring that, from that time forward, in appointing a Governor-General, the

King "should act on the advice of His Majesty's ministers in the Dominion concerned".[4] This was implemented in that very same month when, on the advice of Prime Minister Scullin, Sir Isaac Isaacs was appointed as the nation's first Australian-born Governor-General.

The evolution of rules and conventions such as these has led many to say that because the Crown's constitutional significance is now diminished to the point that we are a *de facto* republic already, we should therefore take the next step and become a *de jure* republic. Others insist that we would lose something of value in that process.

In the past 160 years, our monarchs have established a firm tradition of standing above and apart from party strife and pressure groups. It was this development that enabled the Crown to become a symbol of national unity, as well as continuing to be the trustee of the particular constitutional arrangements we have enjoyed at any time. The oath or affirmation of allegiance has effectively reminded all who have accepted vice-regal appointments that they are not doing so for the perks and privileges of office, but that their first and foremost duty is to serve the Crown, in its capacity as the people's representative and trustee. It is this obligation which has helped former politicians, such as Isaacs, McKell, Casey, Hasluck and Hayden to perform their vice-regal duties with a striking degree of impartiality, dignity and distinction, because all of them have been conscious of a very personal duty to their sovereign to act with the same detachment that has so long characterized the monarchy. If we jettison this part of our current constitutional arrangements, many people ask, is there any effective way of securing a similar outcome?

Mr Keating's answer was to exclude parliamentarians from nomination as President until five years had elapsed from their departure from any Parliament. Yet two of the most able and successful of all our Governors-General (McKell and Hasluck) were translated to vice-regal office within days of their relinquishing senior Cabinet posts. On the basis of their record, it has been argued, Australians would be foolish to exclude such statesmen, because those who have honed their skills - and gained a proper grasp of our constitutional arrangements - in high political office, and who are still close to the peak of their powers, are ideally suited to serve in the role of Head of State.

Appointment and Dismissal

For the moment, let us accept the much-publicized view that the Head of State in a republican Australia should be called `the President'. Now while a great deal of energy has been devoted to argument about methods of appointing a President, too little has been given to the at least equally important question of dismissing the Head of State. There is great merit in the current situation under which the Governor-General can dismiss a Prime Minister who is acting illegally, while the Prime Minister can demand the speedy dismissal of a Governor-General who is acting improperly. Each can act as an invaluable check upon the other.

It would be very difficult, and probably impossible, to remove a President who had been elected - by any method. If he or she had been elected by the people, the people would be extremely suspicious of any Prime Minister wanting to displace their President. Again, it would be possible to get a two-thirds majority of both Houses of the federal Parliament to accept the nomination of a distinguished citizen as President, but practically impossible to organize a two-thirds majority to displace that person, because it is more than fifty years since any government commanded the allegiance of that proportion of our national legislators. And what would you do if Parliament had been dissolved pending a general election?

Again, some have suggested that a President should be appointed by an electoral college comprising representatives of the national and State Parliaments, as is done in some other federal republics such as India and Germany. This has been criticized on the ground that it would

maximize the likelihood of the choice of a President being open to horse-trading and manipulation. There is also the consideration that because the President's role would be linked to the business of national government, with the States retaining their own separate Heads of State for State purposes, the State Parliaments could have no legitimate claim to be involved in the appointment of the national Head of State. Furthermore, reconvening such an electoral college, in the event that ministers genuinely perceived that it was in the national interest to dismiss a particular President, would be problematical if most State and federal legislators were away enjoying their mid-winter or mid-summer recesses.

Above and beyond all these considerations, however, we should note that if a President were to become a bender-drinker or bankrupt, or to lose the faculties of sight or reason, or all sense of the obligation to perform official duties according to the law and conventions of the Constitution, it would be cruelly humiliating to that individual, and to his or her family, to have the President's defects publicly exposed, debated and voted upon by the people or their parliamentary representatives in *any* forum.

For these and similarly relevant considerations, there is much to be said for retaining, in a republic, the present system whereby the Head of State is in effect appointed by, and can be dismissed by, the Prime Minister. It does the least violence to our existing arrangements and, of all the proposals that have been put forward, it best accords with our traditions of representative government. At the appointment stage, the Prime Minister's nomination could be presented to the retiring President, who would have the Head of State's usual rights to be consulted about whatever he was asked to assent to, and to warn the Prime Minister of the consequences if he or she believed the Prime Minister was proposing someone who would be unacceptable to a significant proportion of the population. Under such a system, would Prime Ministers be any less likely, than they are under our present system, to nominate someone who could not command widespread public support?

We could also provide two safeguards against the cavalier or self-interested dismissal of the President. First, we could impose a constitutional restraint on impulsive action by instituting a time delay equivalent to that arising from the present necessity of making contact with and properly consulting Her Majesty. For example, it could be stipulated that the President must be given forty-eight hours notice before his dismissal became operative. This would allow the Prime Minister time for second thoughts. It would also allow the President time to commission a new Prime Minister if he deemed that practical, appropriate and in the public interest, and if he could find anyone prepared to take the job in those circumstances.

Second, we should extend the current rule that, in the event of the death, absence or incapacity of the Head of State, the most senior of the State Governors should assume office as Administrator of the Commonwealth. That is, we could extend this present rule by requiring that if a President is dismissed for any reason, the most senior available State Governor should serve as Administrator for the whole of the remainder of the displaced President's term. Thus the disgruntled Prime Minister could not just choose his own party hack, but would have to put up with whoever happened to be the senior State Governor at the time.

What about the People?

Opinion polls have been consistent in indicating that about eighty per cent of Australians hold that a President should be elected by the people. I must report that it has seemed to me that no more than *twenty* per cent of the South Australians who have attended public meetings on constitutional questions this year want popular election of the Head of State. It is probable that those who are interested enough to go to a meeting have a greater and more informed grasp of

what is at stake than those who stay at home. At the same time it is clear that many of those who do call for a popularly elected President are either monarchists seeking to divide and thus undermine the republican push, or else - and this appears to be a much more widespread phenomenon than you might think - they have been misled, by the proposed name of the office, into thinking in terms of the American presidential system of government. One method of enlightening this second group of people would be to avoid the title `President' altogether, and continue to style our Head of State `the Governor-General'. It would help dispel any assumptions that the nature of the office was undergoing wholesale change.

We live in an age in which standards of political integrity have been in decline. Citizens have become, on the one hand, increasingly disdainful of the motives, appalled by the parliamentary behaviour, and scandalized by the ethics of many politicians. On the other hand, citizens have resented the rising power of those special interest groups which have periodically secured incorporation into governmental consultative mechanisms. It is therefore understandable that many people want a strong Head of State, and that they want to be in control of the choice of that person.

At the same time it does show the need for an educational campaign to help more people see the advantages of our tradition of separating the offices of Head of State and head of government. It was the loss of the sovereign's active role in law-making and government, in the course of the eighteenth and early nineteenth Centuries, that had enabled Queen Victoria to become so admired and respected. As I have noted elsewhere,[5] in the eighteenth Century the revolting colonists in North America had blamed King George III for all their grievances, real or imaginary. No one could regard his grand-daughter in such a light once it was made plain that her ministers were responsible for what the Crown did, and that they were answerable to Parliament and the people for the advice they gave her.

During the Victorian era, this principle was extended to all the Queen's realms in which parliamentary government had been inaugurated. As long ago as 1880, it had become firmly established that a constitutional Governor should never be held accountable, within the sphere of his government, for the conduct of public affairs, because that responsibility rests with the Cabinet ministers, who share in all the functions of sovereignty, devolved under the Governor's commission, on condition that they accept full responsibility for its exercise.[6] This was the development which not only gives a Governor the capacity to act as an impartial mediator, in those very rare crises when exercise of the reserve powers is called for, but also the capacity to act, so effectively, as the representative of the whole community on important public occasions.

The strongest case for popular election of a Head of State is the one presented, at this Society's last conference, by Professor Patrick O'Brien. He argued that popular election would underline the fact that the sovereignty of the Crown had been replaced by the sovereignty of the people. Yet it would also make the President a much more powerful figure than any of our Governors-General have been. Indeed, it would transform the office of Head of State, and our constitutional arrangements, in a revolutionary way, reproducing the very means by which that democratically elected French President, Louis Bonaparte was able to realize his ambitions and proclaim himself the Emperor Napoleon III.

We cannot afford to ignore the lessons of history. We must always remember that the reason why our monarchs, and their vice-regal representatives, were able to become so popular and respected was that they were shorn of their former powers. It is not good enough when those who have lauded this development are summarily dismissed by Professor O'Brien as

`Unreconstructed Westminsterites'.[7] Bluster, as I'm perhaps too fond of reminding Mr Paul Kelly, Editor-in-Chief of *The Australian* newspaper, has never yet won an argument.

As for the sovereignty of the people, this is already manifested by their command of the Constitution of the Commonwealth. That Constitution was drafted by delegates who were for the most part elected, by the people, expressly for the purpose of devising a scheme for the federation of what used to be called the Australian colonies. The Constitution was also ratified by decisive majorities of those voting in referendums held in each of the colonies that were to become the States of the new nation. Moreover, the Constitution can now only be changed with the consent of the people, voting in a referendum. Thus the really important - one might say the vital - manifestations of popular sovereignty, control of the Constitution and control over who will be our lawmakers, are in place here and now.

It is appropriate to add that the continued existence and occupancy of the throne itself is subject to the popular will. Notions of `the Divine Right of Kings' were banished from the English speaking world when Charles I lost his head, and they were soon crushed when his grandson tried to resurrect them. From the Revolution of 1688-89 onwards, when James II was forced to quit the throne and William of Orange was invited to take his place, the Kings of Britain in fact held office at the pleasure of the British people's elected representatives. This was confirmed early in the eighteenth Century, when Parliament again altered the succession, transferring it from the Stuarts to the House of Hanover. The principle was modified at the Imperial Conference of 1930, which ordained that any question "touching the Succession to the Throne ... shall hereafter require the assent ... of the Parliaments of all the Dominions" as well as the assent of the United Kingdom Parliament.[8]

It was Australian ministers who first invoked the spirit of that resolution, in 1936, when the Lyons Government's representative in London, High Commissioner S M Bruce, took what the records show was the `decisive' initiative and insisted that King Edward VIII must abdicate if he wished to contract any form of marriage with the divorcee, Mrs Simpson - on the ground that if the King made such a marriage he could not command the respect of the majority of the Australian people. It was this Australian intervention which forced the British Prime Minister, Stanley Baldwin, to stop prevaricating on the matter.[9] John Major's gaffe last year notwithstanding,[10] as long as we acknowledge Her Majesty as Queen of Australia, Australian public opinion must be heeded in the event of any future crisis regarding the succession to the throne.

The consent of the people is also integral to the few powers remaining in the hands of our constitutional Head of State. As the late Professor Kenneth Bailey, of the Melbourne University Law School put it, our constitutional system :

> " ... is the combination of the democratic principle that all political authority comes from the people, and hence that the will of the people must prevail, with the maintenance of a [Head of State] armed with powers to dismiss ministers drawn from among the people's elected representatives, and even to dissolve the elected legislature itself. In normal times, the very existence of these powers can simply be ignored. In times of crisis, however, it immediately becomes of vital importance to know what they are and how they will be exercised. ... [T]he reserve powers ... are not the antithesis but the corollary of the democratic principle that political authority is derived from the people."[11]

There is every reason why this should continue to be the case, in a republican Australia, without any need whatsoever for the new Head of State to be popularly elected.

A Warning from the 1890s

It is always instructive to look at the records of the Constitutional Conventions of the 1890s. At the Convention of 1891, Sir George Grey, who had been Governor of South Australia exactly half a century earlier - he was a psychological case then, and grew dottier in his old age - suggested making it a constitutional requirement that the Governor-General of Australia should be a person elected by the people, rather than one nominated by the Queen's ministers. The statesman whose name is commemorated in the name of this Society, Sir Samuel Griffith, replied that this would politicize the office and thus destroy its value.[12] Is it conceivable that Professor O'Brien could scorn Sir Samuel as just another unreconstructed Westminsterite? Griffith's prophecy has been echoed in our own day, by former Governor-General Sir Zelman Cowen, a jurist whose views command at least some attention.[13]

Be that as it may, it was largely at the instigation of one of the South Australian delegates to the Convention of 1891, Sir John Downer, that Grey's proposal was finally scotched. Downer argued that an elected Governor-General could claim a direct mandate from the people and thus become a rival to the Prime Minister, developing pretensions to real power and authority instead of being just a ceremonial figure and, in times of trial, an umpire - the dignified part of the Constitution. Downer's logic carried the day by thirty-five votes to three,[14] and the members of my Council believe it is as vitally relevant to current debates about the mode of appointing a Head of State in the proposed republic as it was, in reference to the choice of the Governor-General, a century ago.

It is, for example, most unlikely that someone of the calibre of Dame Roma Mitchell, who by every yardstick has been the best as well as one of the most popular Governors South Australia has ever had, would consent to undergo the ordeal of an election campaign even at the State, let alone the federal level. It also seems certain that no person could succeed in such a campaign without endorsement by one of the major political parties. The Indian experience illustrates the kind of outcome that may be expected from political endorsement. In that nation, as I have mentioned, the President is appointed by an electoral college comprising representatives of the State and national legislatures. Since the adoption of a republican constitution in 1950, most nominees for the presidency have been distinguished citizens, often scholars of world stature. Even so, none would have succeeded without party endorsement.

When Mrs Indira Gandhi's ministry resolved upon the declaration of a state of emergency in 1975, President Ahmed demurred on the ground that the proposal was unwarranted, unlawful and unjust. She thereupon reminded him that he owed his position, and therefore his first duty, to the Congress Party which had put him in office, and thus coerced him into kowtowing to her will, with tragic results. Ever since, Indian political commentators have, quite reasonably, been using epithets like `nodding automaton' and `glorified cipher' as synonyms for their nation's Head of State.[15] Could we risk a similar result without being utterly irresponsible?

Why should the Offices remain Separate?

Members of my Council have encountered a handful of people who would like Australia to scrap the system of responsible government and replace it with a presidential system. Most South Australians, on the contrary, believe we should continue to separate the offices of Head of State and head of Government if Australia becomes a republic. People have observed that in places where this is not done, as is the case in the United States, it gives one person such power that it maximizes the opportunities for scandals and corruption of the kind witnessed most dramatically during the presidency of R M Nixon. The only exception has been Switzerland, where the president is elected for a mere twelve months only and is surrounded by elaborate machinery for

the preservation of both collegiality and participatory democracy, which most Australians, and their parliamentarians, would find insufferable.

Indeed, the United States and Switzerland are the only nations in history that have managed to unite the offices of Head of State and head of Government and yet remain democracies. In every other instance, and there are hundreds of examples, tyranny has been the immediate and the long term result. Likewise, making the office of President more powerful than that of Prime Minister, as has become the case in the current French Republic, can be equally disastrous for the public good, as the blatant corruption of two recent French administrations made plain.

Is a Republic actually Achievable?

A couple of the eighty-nine written submissions presented to the Constitutional Advisory Council have suggested that there is now no mechanism by which Australians could lawfully proceed down the republican path. One of these submissions, backed by opinions from retired judges of great distinction, demands notice here. I believe it is fair to summarize the argument as follows. The preamble to the *Australian Constitution Act* 1900 begins by reciting that :

> "The people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established."

The first rule of statutory construction, as Professors Lumb and Ryan put it, is that "the preamble is not part of the Act, and can only be used as an aid in interpretation in resolving ambiguities in the text".[16] Nevertheless, in this case it has rather special value as a guide to the unprecedented objects of the legislation. In addition, section 2 of the Act refers, not to the sovereignty of the Crown but to `the sovereignty of the United Kingdom' - an odd expression, reflecting something of both the Jingoistic imperialism and the legal positivism that were rampant in that era.

Now this *Constitution Act*, which in its section 9 incorporated and thus gave legal force to the Constitution of the Commonwealth, is an enactment of the United Kingdom Parliament. Because the terminology is a little confusing, there was much to be said for the practice prevalent, when I was an undergraduate studying constitutional history in the 1950s, of styling the Act the *Australian Constitution Statute*, for this served to highlight the fact that it was a superior kind of law, with quite a different character from the Constitution of the Commonwealth, even though it contained the latter. The point of the distinction is that whereas the Constitution provides, in section 128, a procedure for its amendment within Australia, by referendum, the *Constitution Statute* was not amenable to that procedure. Because it expressly applied to Australia, the Statute, by virtue of the *Colonial Laws Validity Act* 1865, an enactment of paramount force, was only alterable by fresh imperial legislation.

Next, that great charter of dominion independence, the *Statute of Westminster* 1931, which waived nearly all the *Colonial Laws Validity Act's* restraints on the Australian federal Parliament's capacity to pass laws, contained express provision in section 8 that one thing our national Parliament could still *not* do was repeal or alter the *Australian Constitution Statute.* There the matter rested until the passage of the *Australia Act* 1986, section 1 of which terminated the power of the United Kingdom Parliament to legislate for Australia. So some have suggested that there is now no lawful means of removing the references to the Crown and the United Kingdom's sovereignty from the *Australian Constitution Statute.* That is, it would require an unlawful, namely a revolutionary, action. If that were really true, so that our *Constitution Statute* appeared to be forever frozen, it would be perceived as such an affront to our national dignity that there would soon be clamour for a unilateral declaration of independence.

Luckily for avowed republicans, there appear to be less drastic remedies at hand. Section 15 of the *Australia Act* 1986, provides a mechanism for the amendment and repeal of the *Statute of Westminster*. It states that this may be effected "by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States". So repeal of section 8 of the *Statute of Westminster* would empower the federal Parliament to change the *Constitution Statute* if all the States consented.

Curiously, in view of the enormous amount of time and effort that was put into the preparation of the *Australia Act*, this provision in its 15th section seems superfluous, because the power it presumes to grant to the federal Parliament was already contained in the Constitution itself, at section 51, placitum xxxviii. This gives our national Parliament, "at the request or with the concurrence of the Parliaments of all the States directly concerned", any power which at the time of federation could only be exercised by the United Kingdom Parliament.

Still more curiously, that placitum completely mystified Quick and Garran, who professed themselves unable to imagine what it meant.[17] One person did know, and that was Richard O'Connor, who was later to join Griffith and Barton as one of the High Court's first three Justices. At the Sydney sitting of the Federal Convention of 1897-98, he noted that it offered a means of escaping the *Colonial Laws Validity Act's* prescription that imperial statues applying to Australia had paramount force. Isaac Isaacs rubbished O'Connor's observation with such vehemence that O'Connor did not press his suggestion, and the other delegates, along with Quick and Garran, accepted the Isaacs view but did not bother to delete the placitum.[18] With hindsight, it is obvious that O'Connor was right.

In the meantime, historical events have affected the interpretation of the *Constitution Statute* and its preamble. After southern Ireland and three of the nine counties of Ulster were carved off from the United Kingdom, the reference to the Crown had to be construed as meaning the new Crown of the United Kingdom and *Northern* Ireland. Since 1953, as constitutional monarchists keep insisting, we have had an Australian Crown, and the common law recognizes Australian independence, along with the fact that the Australian Crown is divisible and separate from that in the United Kingdom. Thus the substantive provisions of the Constitution and its statute are now read in the light of Australia's being independent and separate.

In the High Court's decision in *McGinty v Western Australia* (1996),[19] Justices Toohey, McHugh and Gummow acknowledged that the sovereignty of the Australian nation has ceased to reside in the United Kingdom Parliament and has become embedded in the Australian people. All of them referred to the referendum provision in section 128. As Gummow put it, "ultimate authority ... is reposed by section 128 in a combination of a majority of all the electors and a majority of the electors in a majority of the States". These judgments reinforce the view that section 128 does provide a mechanism for amending the Constitution to establish a republic, notwithstanding the *Constitution Statute*. It may perhaps be added that the wording of the *Constitution Statute* was itself devised in Australia, and approved by the Australian people in referendums before it was sent away to be proclaimed in London. As a document which is fundamentally Australian, it is fitting that the power to alter or repeal it now rests wholly within Australia.

Because the Constitution and its Statute were initially ratified by Australia's voters, which even then included Aborigines as well as women in some of the colonies, there is a case for maintaining that it would be improper to proceed to radical change by parliamentary action alone, as is permitted by section 51 (xxxviii). Our democratic traditions demand that the people should be consulted in matters of such moment. And if, as I shall argue presently, we should not move to a republic without simultaneously putting the States' constitutional instruments in order,

so that neither any region nor the federal balance is adversely affected by the change, there are many who would say that the State Constitutions ought not be changed simply by use of section 128, because this could have the result that the Constitutions of one or two States were altered without the consent of a majority of the electors in those States. Hence it may in the end prove necessary to use some sort of combination of section 51 (xxxviii) and section 128. This needs further investigation.

The proposed Republic and the States

When political leaders in Canberra announced that they were willing to throw the nation's constitutional arrangements into the melting pot, this encouraged would-be reformers to propose all manner of radical changes. From the numerous meetings members of our Advisory Council have attended, all around the State, and from the written submissions we have received, it is clear that there are still quite a few people who seem not to want to take stock of the fact that, in the wider world, centralism is very much in decline. In recent decades, several federations, including the West Indian and Malaysian ones, have wholly or at least partially disintegrated,[20] and in those that survive, the principle of subsidiarity is very much in the ascendant - that is, the notion that whatever can be managed locally ought to be managed locally. Even in Australia, we have seen the Australian Labour Party, after seven decades of outright hostility, realizing that its leaders must learn to live and work within Australia's federal system, because one referendum after another has demonstrated that a majority of the Australian people are strongly opposed to transferring any more power to Canberra, save in the most exceptional circumstances.[21]

It must be made clear to all who participate in Mr Howard's `people's Convention' that if that forum resolves to present a proposal for an Australian republic, then it must include in the package machinery for the proper maintenance of our federal system. In particular, what is to become of State Governors if the office of Queen of Australia is abolished?

We have received a few submissions suggesting that the post of Governor should be abolished, with all its ceremonial and representative duties, including the provision of hospitality to visiting dignitaries from overseas, being performed by the Lord Mayor of Adelaide (within the metropolis) or the relevant heads of local government (outside it), and all the Governor's constitutional duties being carried out by the State's Chief Justice.

Two objections to this are that the Chief Justice is now a very busy person anyway, and that the present one, like his two immediate predecessors, has been much influenced by the conceit (which the High Court has been developing over a long period, and which it has already used to nullify parts of our Constitution) known as the doctrine of `the separation of powers'. This is a conceit that has been developed in disregard of the fact that the makers of the Constitution had no time for French and American fantasies but saw the crucial separation of powers, and the best defence against tyranny, in the Australian Commonwealth as resting in the division of power between the centre and the States.[22]

The important consequence, for present purposes, is that our recent Chief Justices have been most reluctant to serve as Governor's Deputy, as that office is styled here, for more than a day or two at a time, and even then only rarely and when absolutely unavoidable. Meanwhile, it has become so abundantly clear that the Governor's post is a full-time job that both the Premier and the Leader of the Opposition have announced that they have no wish to follow the example set by the New South Wales Premier, Mr Carr, when he attempted to make the office a part-time one in that State.

Here again the Constitutional Convention of 1897-98 is relevant. All the delegates were for federation. No one stood up for unification. At the opening session, Edmund Barton (later to

become the Commonwealth's first Prime Minister) set the tone by successfully moving a resolution declaring that the purpose of the proposed federation was "to enlarge the powers of self-government of the people of Australia". The resolution explained this by decreeing that the first condition for the creation of a federal government was:

> "That the powers, privileges, and territories of the several existing colonies shall remain intact, except in respect of such surrenders as may be agreed upon to secure uniformity of law and administration in matters of common concern."[23]

The debates record that the ideas embodied in this resolution remained a central theme throughout the preparation of the Constitution. They show that when present-day Premiers claim that the federation process created a concept of States' rights, they are not guilty of `rewriting history', as is sometimes asserted by federal ministers, but simply stating a fact. Even the most militantly left-wing of the Constitution-makers, South Australia's Dr John Cockburn, maintained that the preservation of States' rights "was the best guarantee of democracy", because "Government at a central and distant point can never be government by the people".[24]

The convention delegates studied and rejected the Canadian model. Canada has `Provinces' instead of States; and the central government appoints the head of each provincial executive, who is styled `Lieutenant-Governor' rather than Governor. Canada's Constitution gave that country's central government not only power to fill all the important judicial posts in the Provinces, but also power to disallow any statute enacted by a provincial Parliament, even if it deals with one of the subjects falling within the field assigned to the Provinces.

The makers of Australia's Commonwealth Constitution wanted none of that. The consensus was that it was "a basic principle" of Australian federation "that we should take no powers from the States which they could better exercise themselves", and that the new central government should be given "no power ... which is not absolutely necessary for carrying out its purposes".[25] To help ensure this outcome, it was agreed that each State should continue to have its own Governor. The Convention accepted Barton's argument for retaining that title, instead of Lieutenant-Governor, on the ground that, as Sir Samuel Griffith had previously put it, "Governor ... is the proper term to indicate that the States are sovereign".[26]

Barton and half a dozen other delegates stressed that the Governors must not in any way be representatives of the Governor-General or subordinate to the national government. They should remain entitled to communicate directly with the monarch. This would underline their independence from the central power in the Australian Commonwealth. Moreover, as in the case of the Governor-General, to save them from the Scylla of becoming dangerously powerful within their domain and the Charybdis of being mere party puppets, they must continue to be appointed, not given any mandate by being elected by the people.[27] In her final Proclamation Day address (December, 1995) before retirement, Dame Roma Mitchell reminded South Australians of the relevance of those speeches to the current republican debate.

If what is left of Australian federalism is to survive, abolition of the Australian Crown must not lead to State Governors being rendered subservient to anyone in Canberra. That is why the members of my Council believe it would be mischievous to leave the position of the States unsettled if Australia becomes a republic. We cannot risk further change in the federal balance being allowed to come about by default. New machinery for the appointment and dismissal of the State Governors must be put in place simultaneously with any republicanization of our federal constitution.

Furthermore, everywhere my Council has raised the question, there has been either unanimous, or else unanimous save for a single dissenter, agreement that it would not be a realistic option for

a State to seek to retain a formal association with the monarchy if the Australian Commonwealth ceases to be a constitutional monarchy. South Australians think it would be bizarre and grotesque to attempt to do that if the bulk of the nation had repudiated the Queen's sovereignty. Like the Commonwealth, the States no longer have any link with Her Majesty in her capacity as Queen of the United Kingdom. The link relates only to her position as Queen of Australia.

I have the greatest respect for Dr Greg Craven and agree with him on most things, but can not accept his suggestion that there are seven Australian monarchies, namely "a monarchy over Australia as a whole, founded by the *Commonwealth of Australia Constitution Act*, and six State monarchies, deriving from the different constitutional documents of the States".[28] That notion conflicts with the established doctrine of the unity of the Crown. From the time when Henry VII authorized the colonization of Newfoundland in the fifteenth Century until well into the twentieth Century, there was only one King and one sovereignty governing every portion of the British Empire. Even Sir Frank Gavan Duffy, the sole dissentient from the majority judgment in the *Engineers' Case*, shared his fellow Justices' opinion that, in 1920, the Crown was still "one and indivisible throughout the Empire".[29] While sovereignty might be exercised through different organs of government in different parts of the Empire, it was one common sovereignty. As a member of the Constitutional Advisory Council, Adelaide barrister Mr Michael Manetta, has pointed out in a paper which will be published as an appendix to our report, although federation may have been said to have united Australians under one Crown, "it is more accurate to say that Federation brought closer union to a people already united under one crown".

There is no sense in which the monarchy can properly be said to have been founded by Australian constitutional instruments dating from the colonial or early federal eras. It predated them all. The State and federal Constitutions simply provided new machinery to govern the exercise of the Crown's already extant powers in particular parts of the Empire. It was only when the Empire began to dissolve, after World War II, that the Crown in each of the countries owing it allegiance evolved into separate legal entities linked only in the person of the monarch.

We must also note that the Australian *Royal Style and Titles Act* 1953, proclaiming Her Majesty Queen of Australia, was passed pursuant to an imperial statute enacted earlier in that same year. While that imperial statute authorized our federal Parliament to legislate, it clearly did not empower the State Parliaments to create any new royal titles, as the Bjelke-Petersen Government discovered to its embarrassment in 1973 when it had to abandon an attempt to proclaim Her Majesty Queen of Queensland. If Australia changed from being a federal Commonwealth under the Crown of Australia to being a group of States united in a republican federal Commonwealth, it seems likely that State legislation purporting to erect a particular State into a monarchy would be in conflict with the revised Constitution of the Commonwealth, and therefore invalid.

Considerations such as these suggest that each State Government ought to consider how its constitutional instruments could be adapted to republican forms and insist that if the Commonwealth eventually does put to the people a proposal for a change to a republic, then this must incorporate all the changes necessary to republicanize the States as well, so that the nation and the States all change together, or else nothing changes. It would necessitate putting before the people a very lengthy and complex document, bristling with lawyers' language. You may well say that this would doom the experiment to failure. Yet the members of my Council believe that the consequences of failing to put the republican proposal in that comprehensive way are so dire that we shall advise the State Government to campaign vigorously for a `No' vote if Canberra fails to comply.

Endnotes :

1. Keating, P.J., *An Australian Republic: the way forward*. Speech by the Prime Minister, 7 June, 1995 (Australian Government Publishing Service, 1995), pp.6-13. The italics are Mr Keating's.

2. Hancock, W.K., *Survey of British Commonwealth Affairs*, Vol.I. (Oxford University Press, 1937), p.264.

3. Smith, D., `Some Thoughts on the Monarchy/Republic Debate', in *Upholding the Australian Constitution: Proceedings of the Samuel Griffith Society Inaugural Conference* (The Samuel Griffith Society, 1992), p.171.

4. Cowen, Z., *Isaac Isaacs* (Oxford University Press, 1967), p.198.

5. Howell, P.A., `Australia, a Republic?', *Flinders Journal of History and Politics,* Vol.16 (1993), pp.7-8.

6. Todd, A., *Parliamentary Government in the British Colonies*, second edition (Longmans, Green, and Co., 1894), p.815, reproducing without change a passage from the now extremely rare (because superseded) first edition, which went to press in January, 1880.

7. O'Brien, P., `Sovereign Citizens, not Subjects', *Upholding the Australian Constitution: Proceedings of the Sixth Conference of The Samuel Griffith Society* (The Samuel Griffith Society, 1995), p.200.

8. Hancock, *op.cit.*, p.619.

9. Edwards, P.G., `The rise and fall of the High Commissioner: S.M. Bruce in London, 1933-45', in *Australia and Britain: Studies in a Changing Relationship,* edited by A.F. Madden and W.H. Morris-Jones (Sydney University Press, 1980), pp.49-50.

10. Mr Major was widely reported last year as having said, in response to a questioner, that if the Prince of Wales were to remarry after divorce, this would be no bar to his succeeding to the Throne. Since 1930, no United Kingdom Prime Minister has had the competence to make such a pronouncement without prior consultation with all the other countries acknowledging Her Majesty as Queen, unless he explicitly offers it as a private and personal opinion.

11. Bailey, K.H., `Introduction', in H.V. Evatt, *The King and his Dominion Governors,* second edition (F.W. Cheshire, 1967), p.xxxv.

12. *Official Report of the National Australasian Convention Debates* (N.S.W. Government Printer, 1891), pp.561-6.

13. Cited in Keating, *op.cit*., p.11.

14. *Op.cit*. (1891), pp.571-3.

15. Seetha, `India', in *Heads of State: a Comparative Perspective* (Constitutional Centenary Foundation Inc., 1993), p.26.

16. Lumb, D.R. and Ryan, K.W., *The Constitution of the Commonwealth of Australia Annotated* (Butterworths, 1974), p.25.

17. Quick, J. and Garran, R., *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901), pp.650-1.

18. *Convention Debates, Sydney Session* (N.S.W. Government Printer, 1897), p.252; Quick and Garran, *op.cit*., pp.350-1.

19. 134 ALR 289.

20. In 1965, the central Government in Kuala Lumpur compelled Singapore to quit the Federation of Malaysia, on the pretext that this was the only way to avert serious racial upheavals.

21. Galligan, B., *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, 1995), pp.12, 91-109, 142-3, 150.

22. Howell, P.A., `South Australia, Federalism and the 1890s', in *South Australia, Federalism and Public Policy*, edited by A. Parkin (Federalism Research Centre, Australian National University, 1996), p.86.

23. *Convention Debates, Adelaide Session* (S.A. Government Printer, 1897), p.17.

24. *Ibid*., pp.338-45.

25. *Ibid*., pp.50-5l.

26. *Ibid*., p.994.

27. See the speeches of Downer, Barton and Kingston in *Ibid.*, pp.993-7, and those by Barton, Douglas, Cockurn, Braddon and Symon, in *Convention Debates, Melbourne Session* (Victorian Government Printer, 1898), Vol.II, pp.1706-15.

28. Craven, G., `The Constitutional Minefield of Australian Republicanism', *Policy*, Spring 1992, p.35.

29. 28 CLR 129, at 146-7, 152, 159, 174-6.

Chapter Five

Revisiting *Mabo* : Time for the Streaker's Defence?

John Forbes

In Brisbane two years ago I was privileged to present a paper to this Society on *Proving Native Title*.(1) It questioned the sort of evidence which would be used to implement the High Court's *Mabo* discovery. Dare I suggest that recent events at the Murray River sharpen the point of comments made at that time?(2)

Critics of the judicial propriety of *Mabo* generally accept that theirs is a lost cause; proposals for change now begin with a ritual genuflection to the principle of native title. However, "correctness" has eased a little of late, and in a recent issue of the *Australian Law Journal* a distinguished constitutional lawyer shot a Parthian arrow at "rights-driven social engineers operating, in their elitist way, outside Parliament House and outside the electorate".(3)

We are now contemplating amendments to the *Native Title Act* (*NTA*) -- some which the Government hopes the Senate will let it make, and some which the Government hopes the High Court will make *for* it. The Government claims that the Act is unworkable. A son of Chief Justice Frank Brennan sees "under the cloak of workability ... the wolf of dispossession and disempowerment."(4)

Flimsy Foundations?

The Government is not posing the ultimate question and so I venture to raise it again. Native title claims are only as good as the evidence led to support them, and we should look very carefully at the quality of evidence upon which the elaborate theory depends. Will it often be reliable enough to warrant handing over or restricting the use of large tracts of Crown land, leaving future generations to deal with the results of today's political or commercial expediency?

Little "hard" evidence is available to identify native parties' customs and "continuous connections". The lay (or "traditional") evidence for claimants is hearsay upon hearsay upon hearsay, manifestly open to bias or error. Before they testify, witnesses come in close contact with activists and anthropologists in their employ. Even in less politicised circumstances there are clear dangers in allowing "experts" to interview lay witnesses to gather "facts" on which the expert's opinion in court is based.(5) Contested claims of native title do at least go to a court, instead of a tribunal created by and for the cause. But the court procedure needs an amendment which is not on the present agenda. Section 82(3) of the *NTA* is an extraordinary provision which exempts native title cases from the rules of evidence. It should be deleted.

Land rights claims depend upon the evidence of anthropologists or other "social scientists". If anthropology is a science,(6) is it a sufficiently exact one to govern the disposition of vast areas of Crown land? If so, are its practitioners likely to be impartial in these cases? After all, the prime subject-matter of Australian anthropology is Aborigines. Asking an anthropologist whether native title evidence is reliable may seem like asking whether anthropology is bunk. At the Hindmarsh Royal Commission one or two brave experts gave evidence of fabrication and

were then subjected to the pressures which all such hierophants can expect to endure. They are not likely to be allowed into "the field" to check the evidence used to support a native title claim. In 1994 I offered evidence (including admissions) suggesting that anthropologists are predisposed to favour native title claimants and strongly discouraged from assisting other parties. Soon afterwards a note arrived from a national firm of solicitors which specialises in land rights cases. It read in part:

> "I can certainly endorse from personal experience what you had to say about the difficulty in finding anthropologists who are prepared to provide reports and to testify in circumstances where their evidence is likely to be construed as being contrary to Aboriginal interests".

In August, 1994 I received a letter from the President of the Australian Anthropological Society complaining that criticism of his colleagues' brand of evidence was "unsympathetic". The letter challenged none of the published evidence of bias but merely confessed and avoided by pleading "ethical duties". I replied:

> "I cannot finally decide the validity of the claims [of bias] ... but the sources of my information have a lot of relevant experience, and in some cases they are [anthropologists] making statements against interest. So far I have seen no reasoned refutation of what they have to say. I do sympathise with witnesses who fear ... that they will suffer professional prejudice, or peer group pressures, or public abuse for giving evidence which some noisy and influential people deem `incorrect'. I appreciate your point about ethical inhibitions but they arise with other expert witnesses ... [expert] evidence given every day is confidential but at law it is not immune from disclosure. Besides, in other cases a `second opinion' can be obtained from another expert ... In those professions such a witness does not risk an official or unofficial `blackball'. If every anthropologist who has had a decent chance to examine claimants and their environment is *ipso facto* to be regarded as having some bond of fealty to the examinees, how can a genuine judicial inquiry be held? ... If I am mistaken I am willing to be set right. I would be happy to discuss ... what I see (on present information) as inherent weaknesses in lay and expert evidence in this field."

Although it was the anthropologist who had initiated the contact, no reply was ever made.
The experiences of non-claimants which I summarised in 1994 were replicated in the Hindmarsh case, where the solicitor for the developers was moved to write:

> "Anthropologists and archaeologists working in the Aboriginal heritage field are beholden to the Aboriginal people for their livelihood. To write a report adverse to an Aboriginal claim is to jeopardise that livelihood. These experts freely admit the existence of this problem. They are reluctant to act for developers as that can cause the expert to be `frozen out' by the Aboriginal community -- as happened in the Bridge case. This is a major issue which must be addressed."(7)

Lawmakers who ignore this "major issue" take the risk of sponsoring an enormously expensive charade.

NNTT Seeks a Future

There is broad acceptance that the *NTA* is not working well. When we met in Brisbane two years after *Mabo*, the only known native title was on a little island near New Guinea, inhabited by Melanesians who emphasise their racial and cultural differences from Australian Aborigines.(8) So far as Australia was concerned, we did not know where the new-found title resided, or what rights it entailed, or who was entitled to it. In mid-1996 we are none the wiser.

In 1994 the National Native Title Tribunal (NNTT) opened with great *éclat*. Its President toured the country at no small expense, holding Press conferences and advertising the possibility that titles could be created by "mediation" under NNTT auspices. The Tribunal is an elaborate registry for claims which, if contested, still have to be decided by courts doing their best with the vague *Mabo* criteria. As at 1 May, 1996 some 238 claims had been registered(9) but the Tribunal, which is said to have cost more than $40 million so far,(10) has not sponsored a single title.

Hopes that the NNTT would soon produce numerous settlements by "fair, just, economical and informal" procedures -- a mantra of the promoters of new tribunals -- have been sadly disappointed. The President is consoled by the thought that the very concept of native title is a "catalyst for a whole range of negotiations".(11) But the first duties of miners, bridge builders and other developers are to their shareholders and creditors. It is not reasonable to expect them to be the principal crusaders for land management which is in the best interests of future generations of Australians.

After the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission*,(12) the President recommended that the NNTT be reduced to a mediation role.(13) Certainly these claims should go to a court and not to some bureau which owes its existence and prospects of growth to the native title movement. But for reasons which would best be given by Sir Humphrey Appleby, no important person has explained why the NNTT should be kept alive.

Mediation

There is a question whether this fashionable replacement for the old "without prejudice" conference is quite so impartial and non-coercive as its disciples claim. These comments by Mr Justice Young of the NSW Supreme Court are worth considering:

> "Mediation and other forms of Alternative Dispute Resolution have become the flavour of the year. ... Anecdotal evidence suggests that some mediators preside over a conference of the disputants and their lawyers and try to talk things out, often in the atmosphere that the alternative of litigation would be worse than anything else that could happen. ... Although mediators tend to keep saying that they are merely helping parties reach their own solutions ... parties feel that they have had the mediator's solution imposed on them.
>
> "Another message that comes from anecdotal evidence in Sydney is that a person with a bad case should always choose mediation. In court, a person with a bad case will lose with costs. In a mediation that person will always save or win something ... Another criticism is that it involves a lot of hypocrisy. The mediator has to pretend that he or she is merely helping the parties deal with their own dispute, whilst in reality the mediator is, to a greater or less extent, deciding the dispute on non-legal grounds ... The idea behind mediation is hardly new. Barristers and solicitors have been settling cases for centuries. ... An interesting question is whether the costs of a mediator at so much per hour plus the hire of rooms and so forth is really a marked improvement."(14)

The judge was referring to normal litigation. His comments about pressure to settle apply *a fortiori* when a claimant, simply by claiming, gains the equivalent of an injunction(15) which will impose a long and costly delay if the claimant is not well paid to go away.

Whatever may be thought of mediation in principle, the assumption that the NNTT is an impartial mediator is open to question, considering the circumstances of its birth and promotion. In younger and happier days the President trusted that people would stay away from the NNTT if they were not sympathetic to the cause. A few, perhaps, suffer from an excess of zeal. Henry II,

in days of yore, felt bound to tell his subjects that a few of his courtiers took his complaint about Thomas a'Becket -- "Who will rid me of this turbulent priest?" -- just a mite too literally. In like vein is a passage from one Tribunal Member's contribution to mediation and "reconciliation". It should be emphasised that these *dicta* were delivered in a non-claimant case in which there was no opposition at all to the building of a retirement village. Indeed one Aboriginal witness described it as a "fantastic idea". After making the formal order (all that was needed) the Member delivered a gratuitous harangue:

> "We, the newcomers, have a responsibility for the plight of the descendants of the original owner occupiers ... Soon after [British settlement there] began the invasion of their gene pool. We shamefully treated and taunted the offspring of these usually violent sexual encounters. Those we referred to as having `a touch of the tar brush' or `half caste black bastards' found refuge in Aboriginal societies or were stolen from their mothers and communities by the State. Despite all this suffering, however, Australia's indigenous people have survived and although often damaged remain distinguishable in heritage, culture, cohesion and loyalty ... The modern put-down in many urbanised areas is that *they* (always *they*) are not real Aborigines because *they* are not full blood tribal people .... More often than not these statements are made by people who have never met or spoken with Aboriginal people. ... Too often Aborigines have been denied the chance to live on their land and to hunt, fish or gather on that land and waters; are we now to tell them they have abandoned a traditional lifestyle and therefore they have lost their native title in those few places in Australia where native title has not otherwise been extinguished by past Crown dealings? I hope we can accept that modern Aborigines still identify with their homelands in ways that *transcend common law notions of property or possession*." (Emphases in original).(16)

Do Pastoral Leases extinguish Native Title?

This is the most vexed of all the questions about native title at present. Vast areas of Western Australia, Queensland, South Australia and the Northern Territory are subject to pastoral leases. The question is urgent not only for pastoralists but also for developers interested in such areas -- the *Waanyi* and the *Wik* claims in north-western Queensland are very much in point. It is complicated by the fact that there are several (perhaps many) varieties of pastoral lease. In Western Australia, South Australia and the Territory they often contain reservations, devised long before native title was heard of, which allow Aboriginal activities to continue.

A representative of the Kimberley Land Council rejoices that the uncertainty surrounding pastoral leases "gives a certain strength to our negotiations".(17) A relative of the author of the leading judgment in *Mabo* observes that:

> "Uncertainties about the effect of the High Court's decision in *Mabo* provided the political stimulus for federal politicians to act ... even when the results [of litigation] are uncertain [they] can increase the political leverage of disadvantaged groups."(18)

This uncertainty was not supposed to exist after the *NTA* was passed. On the second reading of the Bill, Prime Minister Keating stated:

> "I draw attention ... to the recording in the Preamble of [sic] the Bill of the Government's view that under the common law past valid freehold and leasehold grants extinguish native title".(19)

And the long and argumentative Preamble to the *NTA* declares:

> "The High Court has ... held that native title is extinguished by valid governmental acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates."

But when the Bill became law its operative parts did not clearly support the Prime Minister. In November, 1995 some 86 of the 156 native title claims then registered related to pastoral leases.(20) It seems likely that these figures refer only to current leases, and that other claims cover areas where pastoral leases have expired. (*Mabo* indicates that the expiry of a Crown lease does not revive native title.)

In the *Wik* case a Federal Court judge held that native title *is* extinguished by a type of pastoral lease (without relevant reservations) which has been used in Queensland since the 1890s.(21) The *Wik* people appealed. By special arrangement the normal appeal to the Federal Court was bypassed and in a few days' time(22) Brennan CJ and his brethren return to the Parnassus of judge-made law to contemplate native title. Judgment will be reserved; if this conference would only adjourn to next summer this paper could be a little less tentative.

There are now two judges on the High Court who were not there when *Mabo* appeared, one with a well-known predilection for the grand gesture. Some members of the Court are probably unshaken in their belief that the 1992 decision was a fine bid for a place in history. But there may be others who are tempted to file the Streaker's Defence: "It seemed like a good idea at the time". Whatever the dominant instinct, it will take more judicial legislation to sort out the mess. *Mabo*, which was gratuitously extended from tiny islands to the whole of Australia, contains all manner of equivocations(23) which leave room for contraction or expansion, as the legislative judges see fit.

It is unlikely that the Court will stunt the growth of its child by simply saying: "Yes, all pre-1975(24) pastoral leases extinguish native title." It is more likely to say: "Pastoral leases *without reservations* extinguish native title but other leases are another story, which we may tell in the coming bye and bye."

Political or commercial compromises aside, we would then have to wait for the courts to discover in each case the existence and nature of native title, and the extent to which it can co-exist with the lease in question. Millions more could be spent on acrimonious publicity, mediation and litigation. A third possibility would be to say, "No, pastoral leases are really just a special sort of licence which never extinguishes native title". This, I suspect, is a bombshell which the Court would not now dare to release.

A prediction of an inconclusive result in the *Wik* case assumes that the High Court will follow judicial tradition by refraining from "advisory opinions". That is a large assumption these days but only last February, in the *Waanyi* case, the Court took refuge in that rule.(25) It is a rule based on the separation of powers, a doctrine which has not greatly troubled the Court in recent years. (If 95 per cent of *Mabo* is not an advisory opinion then I do not know what *Mabo* really is.)

From the Government's viewpoint, the next best thing to a complete clearance for pastoral leases would be a categorical statement of the position of every common type of pastoral lease in Australia *vis a vis* native title. The Court may see this as a viable alternative to pleading the Streaker's Defence despite its recently-affirmed rule against advisory opinions. Kirby J, who joined the Court just before the federal election, was keen to do this in the *Waanyi* case, upbraiding his seniors for confining themselves to a narrow point of procedure:

> "The judicial function should not be frozen in time. [C]ourts should endeavour to be constructive and useful to parties in a dispute."(26)

However, one of Kirby's brethren (McHugh J) did recognise that the burning question could not be avoided much longer:

> "[Everyone] will be left in a position of doubt until this Court finally resolves the consequences of pastoral leases."

The result of the *Wik* appeal depends on the resolution of two competing interests:

(a) retaining the warm glow of the original decision; and

(b) escaping the unforeseen consequences of the self-indulgently wide *dicta* in *Mabo*.

At the preliminary hearing which "fast tracked" the *Wik* appeal, shafts of realism did peep through. Justice McHugh looked beyond Lake Burley Griffin:

> "Surely these issues affect the economies of Queensland and Australia and are probably starting to affect the social fabric of the country, at least those parts where native title is alleged. Surely somebody's got to make a start on addressing these questions."(27)

Chief Justice Brennan ventured: "It is not desirable [that] it should be delayed at all".(28) Compromise is likely, but will it produce more questions than answers?

The Government accepts that it is politically impossible to solve the pastoral leases problem by legislation. It points to an obstructive Senate and to the high excitement that would be aroused by changes to the *Racial Discrimination Act* (*RDA*) which underpins *Mabo*. In effect the Government says: "Let the High Court fix the mess of its own making".

At the time of writing some backbenchers were seeking a firmer line, arguing that the Government's resigned attitude endorses the legislative pretensions of the Court. The Government's reply is that extinguishment by legislation would involve untold compensation under the "just terms" clause of the Constitution,(29) and an interminable round of litigation as to whose title was extinguished, what it amounted to, and what it is worth. (I leave it to higher intelligences to explain how a non-assignable(30) title which may fall far short of ownership can sensibly be valued.)

The Government's hope that all pre-1975 pastoral leases extinguished native title depends heavily on the Brennan view that:

> "... the limited reservations in the special conditions [in leases on Murray Island] are not sufficient to avoid the consequence that the traditional rights and interests of the Meriam people were extinguished. By granting the lease, the Crown purported to confer possessory rights on the lessee and to acquire for itself the reversion expectant on the termination of the lease. The sum of those rights would have left no room for the continued existence of rights and interests derived from Meriam laws and customs."(31)

But the logical consequences of this statement could be avoided, if other judges so desired, by arguing:

(i) That the leases in *Mabo* were not *pastoral* leases;

(ii) That Brennan J left open the possibility that reservations in other cases are not so "limited" that traditional rights are extinguished; and

(iii) That the Deane-Gaudron judgment in *Mabo* takes a different line:

> "This lease recognized ... rights of the Murray Islanders ... It would seem likely that ... it neither extinguished nor had any continuing adverse effect upon any rights ... under common law native title. It is, however, appropriate to leave the ... possible effect of that lease until another day."(32)

But on the other hand one may ask why Brennan J limited the power of extinguishment to Crown *leases*:

> "The rights ... conferred by native title were unaffected by the Crown's acquisition of ... sovereignty [but it] exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title ... Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests ....".(33)

Why stop at leases? Why does not *any* proprietorial behaviour by the Crown amount to extinguishment of native title? *Mabo* depends on a new-found dichotomy between (a) the Crown's assertion of sovereignty ("radical title") over land, and (b) its assumption of ownership. But does not *any* Crown grant, lease, licence or permit imply that the Crown is owner of the property concerned? If so, any and every Crown concession would convert the Crown's "radical title" to ownership, and the Australian legal system might no longer be holding the High Court's fractious baby. But the Court's experiment has probably gone too far.

While the status of pastoral leases remains uncertain, the right to convert them to freeholds -- a right conferred by the Land Acts of most States -- is also under a cloud. If permission to "freehold" a lease affected native title, compensation calculated in some incalculable way would be payable by the government concerned.

The "Right to Negotiate"

When the Keating government drafted the *NTA* Aboriginal politicians demanded a veto and went away more or less content with a special "right to negotiate" (*NTA* sections 26-44). It is more potent than any right enjoyed by other owners facing resumption of land held under a title much clearer than native title. Bolstered by the *Waanyi(34)* decision, the right to negotiate gives a mere claimant(35) the equivalent of an *ex parte* injunction to restrain development for a year or more -- unless the developer buys his way out. Now people who are given interim injunctions usually have to promise the court that they will compensate the other party for the delay if they do not prove their claim ("the usual undertaking"). But not here: the right to negotiate perfects the bargaining counter which *Mabo* created. It does not require a clever lawyer to see that it may be worth paying even a very dubious claimant to go away if delay will be expensive. The reason why few ransoms have been paid so far is that neither *Mabo* nor the *NTA* enables a developer to be sure that if he pays off the present claimant no other "true owner" will bob up later on.

The "right to negotiate" is one of the *NTA*'s more remarkable additions to *Mabo*. There is mounting evidence, noted by Justice McHugh in *Waanyi*, that the right to negotiate and the uncertainty about pastoral leases threaten Australia's economy. The Government proposes to shorten the time for negotiation from 6 months to 4 and to make it more difficult to gain the bargaining counter by simply filing a claim. There is no legal duty to provide "reverse discrimination" in the form of rights not conferred on other owners facing acquisition. No doubt reasonable notice of developments on Crown land should be given as a matter of fairness, and to reduce the risk that someone will later claim that some sort of native title has been disturbed. But this does not require all the paraphernalia of the "right to negotiate". There are normal court injunctions to protect substantial claims. But defenders of the right to negotiate are well aware

that courts do not give injunctions as a matter of course; they look harder than the NNTT at the question of a *prima facie* case, they allow other parties to oppose the application, and they deter gung-ho applicants by demanding the "usual undertaking".

The Government would make it more difficult to register a claim by requiring every application to be accompanied by a "tenure history" -- an official summary of dealings with the subject land which would disclose "extinguishing" transactions and dispose of claims which have no reasonable chance of success.

Extinguishment Issues First

The Act should make it clear that when an issue of extinguishment arises the Court must decide that point first.(36) The ruling on this point may decide the whole case with considerable savings of time and money. The evidence on an extinguishment issue will be documentary and all parties will have equal access to it. If it shows that native title (if any) has been extinguished there will be no need to plunge into the miasma of "traditional" and anthropological evidence, to which access will seldom be equal.

The Government also intends to raise the "entry test" by giving approved "representative bodies" -- including, no doubt, the already potent Land Councils -- a power to pick the claims that deserve a court hearing, and authority to decide between rival claimants to the same land. The writer foreshadowed some such move in 1994:

> "Mining companies have been warned to confine negotiations to the `big unions' of Aboriginal affairs. Bureaucratic nature being what it is, it will not be surprising if an oligopoly of native title brokers commends itself to the central government,although some native groups in the Northern Territory have challenged the hegemony of the Central and Northern Land Councils."(37)

But the proposal ignores evidence of nepotism in the distribution of funds, favours and legal aid. The price of conferring these powers on "leaders" who are already *de facto* native title brokers may be too high. And how long will the brokers take to sift the wheat from the chaff or to resolve internecine disputes? Longer than the present right to negotiate perhaps?

Another plan is to abolish the right to negotiate when a licence to search for minerals is applied for, and to confine it to applications for mining leases. (It now arises at each stage.) But by the time a lease is sought it will be apparent that profit is in the offing, and the ransom will be much higher than at the experimental stage.

Native title brokers will say that profit-sharing and special royalty(38) arrangements are already part and parcel of "negotiations". But why should they be? No other landowner can demand a share in the profits of a mining company with a Crown lease over his property, and still less can he expect the government to share its royalties with him. Generally minerals are the property of the Crown, not of the private landowner. The latter is entitled to compensation for damage, disturbance and so on, but that is all. Why should not the same principles apply to native title holders in so far as their rights can be valued?

The right to negotiate is the only "settlement lever" held by the native title claimants. Executives of mining companies have been warned by an officer of the Northern Land Council not to be too critical of "traditional" claims:

> "At some point in time it's going to look pretty bloody stupid if you ... have a thousand Aboriginal people sitting on your front door of your development with placards blockading what's happening. It's not a threat. It's just a statement of fact that it will happen. It's part of reality and part of business. ... If you're the company executive that has to go back and

> explain to the chairman or the shareholders, why there are a thousand Aboriginal people camped outside your door and why you are a world-wide incident, then your life in the company isn't going to be that long."(39)

The same gentleman dismisses any suggestion that Land Councils are "manipulative power brokers with their own agenda".

In a few years, willy-nilly, the "2000 Olympics" will be upon us. In December, 1993 the writer concluded a short article in these words:

> "On the day this article was completed the 2000 Olympic Games were awarded to Australia. In the [native title] area they may become a more potent bargaining counter than *Mabo*."(40)

Dark hints that the Games could be used as a bargaining counter began in 1993(41) and intensified this year.(42) In a disingenuous disclaimer similar to the one above, Mr Charles Perkins said: "I am not threatening the government, I'm just saying that we've got five years to get it right".(43)

This type of negotiation is often accompanied by references to nebulous "international opinion". It is now commonplace to exaggerate the size and unity of special interest groups by alluding to some keenly supportive "community" in the background. Here we are asked to assume that there is an "international community", all-wise, all-knowing, with nothing better to do than to barrack for lobbies in Australia, and to be implicitly obeyed by Australians whenever the lobbies allege that "international opinion" demands our obedience.

Will Government be able to Amend?

Even modest changes to the *NTA* will be politically arduous. "Racism", a hissing term of abuse, will often be heard, regardless of its proper semantic limits. The land rights cause has attained a *quasi*-religious status in several ways. *First*, "indigenous" fashions have been imported from abroad without regard to different historical and legal circumstances. *Second*, claims of native title are advanced without recognition of other forms of assistance, including statutory land rights in the Northern Territory and in several States. Claims approved under the NSW Act in the last twelve months cover 4626 hectares of former Crown land worth about $44 million.(44) More than 40 per cent of Northern Territory is subject to statutory land rights, and 23 per cent of South Australia is earmarked for Aboriginal reserves and statutory land claims.(45) The ATSIC budget exceeds $1 billion per year; there is a Land Acquisition Fund(46) and other benefits which need not be detailed here.

Third, there is a good deal of romantic myth-making which ignores the degree of integration with, and dependence on Western culture and technology, even in remote areas. Defending herself against other activists, the magistrate Pat O'Shane noted that "close to 60 per cent of Aboriginal Australians live in urban communities".(47) If provincial towns were taken into account that figure might well be higher. There are implicit admissions of integration in demands for water, sewerage and other services in areas which no urban infrastructure can possibly reach, and where non-Aboriginal people provide them for themselves. "Leaders" who live and travel well, and who naturally promote their kin in modern middle-class style, perpetuate "the romantic myth ... that some Aborigines can continue to maintain the hunter-gatherer lifestyle ... frozen in time for the amusement of anthropologists and tourists."(48)

When the *Wik* judgments appear there will be many delicate judicial variations on the "inconsistency" theme. Perhaps the truth of the matter is that late twentieth Century Australia, of which Aborigines are an important part, is simply inconsistent with native title. Can the clock

really be turned back to a reconstructed if not mythical past, while retaining and using in the Aboriginal cause culture and technology brought to this country since 1800?

Section 21 of the *NTA*

There are other dubious parts of the *NTA* which ought to be on the reform agenda.

Section 21 provides that in exchange for surrendering native title or consenting to a development, native title holders may receive from the Commonwealth or a State "the grant of a freehold ... or any other interests in ... land ... that [they] may choose to accept." There is no stipulation that the value of the substitute property shall not exceed the value of the rights surrendered. There are no criteria for valuing the native title concerned, and there is no provision for public scrutiny of the bargain.

It is part of *Mabo* doctrine that native title is non-assignable, except by surrender to the Crown, or within the relevant clan if its customs so permit.(49) It follows that native title has quite a limited market value, even if it comes near to ownership in the ordinary sense. *Mabo* emphasises that the content of native title depends on customs which may vary greatly from place to place. Native title may be a mere right of passage at a certain time of the year.

The mystical nature of Aborigines' relationship with land is stressed in campaigns for land rights and in attacks upon their critics. But when a foothold is gained, commercial considerations understandably come to the fore, as in a homily recently delivered to mining company executives by an officer of the Northern Land Council:

> "Those companies that will talk to Aborigines as equals will understand that attachment to land and sacred sites are legitimate concerns ... [But it's] a myth that Aboriginal people are anti-mining ... Most Aboriginal people want development as it is extremely profitable".(50)

Frank Brennan, too, conjoins also switches from mystical to monetary considerations:

> "Ever since the Fraser Government passed the Northern Territory land rights legislation Aborigines have claimed that a right of veto over development ... has been essential for cultural survival and self-determination. The right has also armed them with economic bargaining power against miners."(51)

Land rights have brought considerable wealth to Aboriginal corporations and executives in the Northern Territory, and it is disingenuous to claim that all or most objections to development have an other-worldly basis. Therefore it is conceivable that an expedient or "politically correct" government, possibly encouraged by a developer willing to "contribute", could use section 21 for a quiet handover of property far more valuable than the native title (established or merely alleged) which is surrendered. It is naive to expect that governments and developers will ensure that there are no imprudent "swaps" which later generations will regret. Native title itself is protected by elaborate processes of negotiation and arbitration. By the same token, section 21 should not be capable of "upgrading" native title at public expense to much more valuable forms of property. If not repealed, the section should be circumscribed by publicity and independent scrutiny.

Accountability and Equitable Distribution

Two years ago the writer observed:

> "So far remarkably little has been heard about ensuring that all title holders receive, equitably and efficiently, a proper share of the government grants, compensation and other fruits of the native title movement. Some of the zeal displayed elsewhere could well be applied to this area. There is also a question whether public sector emoluments and allowances absorbed in

a labyrinth of `representative' organisations will leave enough for distribution among those for whom the structure is said to exist."(52)

- There is still too little attention paid to equitable *distribution* of land rights, native title and financial assistance. In Aboriginal as in non-Aboriginal affairs, the cosy word "community" can mask strongly-held differences within the allegedly united group.(53) The authority of some grandiloquently titled "leaders" is questionable. Participation in ATSIC elections is less than impressive.(54) There may be sharp differences of opinion between traditionalists who place native title above commerce and "leaders" with a more entrepreneurial frame of mind.

In the near future we may see a new species of native title litigation with a new class of respondents -- not landowners or developers, but Aboriginal companies and "leaders" who allegedly have failed to distribute the fruits of native title and land rights fairly and efficiently. We need not now explore numerous allegations (and some convictions) relating to large amounts of public money channelled through ATSIC to its many subsidiaries. (A select bibliography is appended.(55)) These stories have risen from one-day stands in obscure corners of the newspapers to detailed discussions closer to page one. They present patterns of tried if not trusted practices such as sales of personal property to milch companies at inflated prices, large cheques drawn to "cash" without supporting details, records destroyed or never made, fictitious employees, excessive travelling expenses and the modern gambit of charging lavish fees for "consultancies" based on no discernible work or qualifications.

A barrister well known to me was briefed by a "representative organisation", in an elaborate show of concern, to advise on recovery of money advanced without proper authority, and spent unaccountably by ATSIC clients in Queensland. It was apparent from the brief that certain people sat on the committee which voted the funds, and also on the committee which received them. Records were fragmentary. Money had been spent on "employees" who probably did not exist, or who had done little or no real work. Despite the strategic gaps in the records, my friend was able to advise that there was enough evidence to recover approximately half of the $1.5 million in question. Clearly this was not the advice that he was expected to give. It is now well over a year since advice to sue was given. The rest is silence.

But abusive censorship still applies. The former federal Minister Barry Cohen notes a "near-hysterical response to suggestions that all is not well in Aboriginal legal services", and he is not surprised that "few are prepared to submit themselves to such psychological thuggery".(56) In a flagrant case, Hal Wootten, QC -- an NNTT mediator no less! -- described routine cries of "racism" as "shameful ... If you are going to have somebody exploiting an organisation it doesn't matter whether they are black or white. It has to be dealt with."(57) Fraud aside, complaints of nepotism, waste and inefficiency abound. People with no relevant qualifications administer some legal aid bureaux and other organisations with large budgets drawn from public revenue.

Slowly but very productively flood waters percolate down through the Channel Country of the Outback. More speedily, if not so productively, over one billion dollars filtered through ATSIC to more than 1600 dependent bodies in 1994-95.(58) In this Byzantine profusion of agencies purporting to cater for less than two per cent of our population, pretentious titles and sonorous job descriptions abound. There is easy incorporation under special legislation, and when a body becomes insolvent, as many do, the normal rules of liquidation and investigation do not apply.(59)

But these are not primarily matters for company law, criminal law or the inquiries which seldom go anywhere. They are questions of care, skill and honesty on the part of trustees towards their

intended beneficiaries. The larger the Aboriginal "trust fund" becomes, the more numerous the complaints of maladministration are likely to be. Should these internecine disputes be left to wind their way through the equity courts at public expense without any particular legislative guidelines? I think not; the *NTA* should have more to say about the accountability of "leaders", native title trustees and "representative bodies". Less should depend on the unregulated discretion of title brokers and regional oligarchs.

"Supermabo"

The review of the *NTA* should extend to kindred legislation. Since 1994 we have heard a great deal about the Hindmarsh Bridge affair and the Press seems to have left the public with a vague idea that it is a "*Mabo* claim". It is not; *Hindmarsh Bridge* is a child of the *Aboriginal and Torres Strait Island Heritage Protection Act* 1984 ("the *Heritage Act*") as interpreted by ex-Minister Tickner.

The declared purpose of the *Heritage Act* is to protect "areas or objects of particular significance" to Aborigines from "desecration" (section 4). No one has yet asked the High Court whether laws of this kind amount to the Commonwealth "establishing" a religion.(60) The Minister may issue "emergency declarations" (effectively long-lasting *ex parte* injunctions) for up to 60 days in response to an oral or written claim that a significant area is threatened (section 9). He may then proceed to place a long-term ban on development of or entry to the land, after "due consideration" of a report by someone selected by him, and any submissions made in response to a public advertisement. The reporter may see fit to consider the "pecuniary interests of non-Aboriginal people" (section 10). The power which this Act puts in the hands of activists and any Minister inclined to indulge them is quite remarkable. Land can be tied up and developments halted at great expense, without compensation, by a mere *fiat* of the Minister. No court or tribunal - not even a tribunal tailor-made for claimants - need be consulted before a ban is imposed. There is no appeal on the merits.

As a matter of constitutional form the Act provides for compensation to be paid when property is "acquired" (section 28). However, as the *Tasmanian Dam* case reveals,(61) "acquisition" is a slippery concept, and until the High Court adopts a more realistic definition of that term, land use can be severely restricted without activating the "just terms" clause.

Natural justice would normally require that people liable to suffer from a "heritage" listing be given notice of the applicants' claims and a chance to contest them before any permanent order is made. However, in the Hindmarsh case it was held that this elementary rule of justice does not apply to the Aboriginal heritage regime.(62) It is not surprising that counsel for the Chapmans, the developers in the Hindmarsh case, found it very difficult to frame counter-submissions to Minister Tickner. Somehow they had to deal with unseen allegations by unidentified people!

A different view was taken by a full Federal Court in *Douglas v Tickner* on 28 May, 1996 in a decision which simply restores an elementary rule of natural justice. But it remains to be seen how the courts will handle disclosure issues when (as in the *Hindmarsh* case) claimants say that their assertions are too "sensitive" to be examined by profane eyes. In Northern Territory cases there has been much tremulous to-ing and fro-ing on this point, and some parties have been allowed to get away with a degree of non-disclosure which would not be tolerated in any non-Aboriginal party seeking orders affecting large amounts of property. Indeed, shortly after the *Douglas* case a single judge of the Federal Court held that the substitute "reporter" in the Hindmarsh Bridge affair could hand material back to the claimants without disclosing it to the developers, because it had been given to the reporter in "innocence and trust."(63)

The Chapmans succeeded on a point of form rather than substance. The Minister's advertisements were inadequate, and his failure to give personal consideration to claims of "secret women's business" breached his duty to give "due consideration" to the case.(64) Therefore his ban was invalid, but that is not necessarily the end of it. It is an inherent weakness of judicial review that when a court sets a Minister's mistakes aside the Minister may try again -- as Mr Tickner was busy doing when he was voted out of office.

These facts remain:

(1) The Minister may impose a "heritage" order whatever the consequences to non-Aboriginal parties may be.

(2) This can generally be done without compensation.

(3) The Minister may impose his will without any hearing on the merits in a court or even in a tribunal which, in mediation *patois*, is "user-friendly" to applicants. There is obviously no assurance that political expediency or ideological fashion will be excluded from the decision-making process.(65) The only available remedy is judicial review, which is by no means an appeal on the merits. If Tickner had dotted his technical 'I"s and crossed his formal 'T"s in *Hindmarsh* he could have done pretty much as he liked.

(4) Native title claims can only be made over Crown land but there is no such curb upon "heritage" claims, as the owner of a suburban backyard in Alice Springs discovered in early 1995.(66)

"Supermabo" indeed. Curiosities such as these should be added to Senator Minchin's shopping list of amendments.

Endnotes

1. *Upholding the Australian Constitution : Proceedings of The Samuel Griffith Society*, Volume 4 (1994), p. 31.

2 *Report of the Hindmarsh Island Bridge Royal Commission,* State Print, Adelaide, December, 1995; Ron Brunton, *The False Culture Syndrome*, IPA Backgrounder, Volume 8, No.2, March, 1996.

3. P. H. Lane, *The Changing Role of the High Court* (1996) 70 ALJ 246 at 246.

4 *The Australian*, 27 May, 1996 : *This Time There is Nothing to Offer Aborigines*, Frank Brennan SJ.

5. *Forrester v Harris Farm Pty Ltd*, unreported, 2 February, 1996, ACT Supreme Court (Miles CJ).

6. It appears that we must now defer not only to anthropology but also to feminist anthropology: cf Hindmarsh Royal Commission Report, *op.cit*., p.161.

7 S. Paylyga, *Australian Lawyer* (1995) Vol. 30, No.8, p.24.

8 Torres Strait Regional Authority chairman Getano Lui : "We are two races. I would not expect the National Reconciliation Council or ATSIC to speak for us ... we have

been struggling for recognition as a separate indigenous race for a long time". *Courier Mail*, 30 May, 1996 : *PM Has Snubbed Us Say Torres Strait Islanders*.

9 Commonwealth of Australia, *Towards a More Workable Native Title Act: An Outline of Proposed Amendments*, Canberra, May, 1996, p.5.

10 ABC *Midday* programme, 2 April, 1996.

11. *Courier Mail*, 23 April, 1996.

12 (1995) 69 ALJR 191.

13 He has also suggested that the Tribunal change its name to "National Native Title Mediation Service" and that judges no longer be involved in its work: *Weekend Australian*, 18Ä19 March, 1995 : *Judge Seeks Mabo Tribunal Overhaul*.

14. (1994) 68 ALJ 55 : *Current Topics - Mediation*.

15 That is, the "right to negotiate".

16 *Re Greater Lithgow City Council*, NNTT, 4 April, 1995, S. Flood, Member.

17. Peter Yu, *Nationwide*, ABC television, 7 March, 1996.

18 Frank Brennan SJ, *Land Rights Make Room for Self Rule* in *One Land One Nation*, University of Queensland Press, quoted in *The Australian*, 31 July, 1995.

19. CPD (HR), 16 November, 1993, p.2880.

20 Figures quoted by Kirby J during the hearing of the *Waanyi* appeal: *The Australian*, 22 March, 1996 : *Court Sidesteps Waanyi Decision*.

21. *Wik Peoples v Queensland*, 29 January, 1996, Federal Court, Brisbane (Drummond J).

22. Hearing of the appeal to the High Court was set down to commence on 11 June, 1996.

23. J.R. Forbes, *Mabo and the Miners* in *Mabo: A Judicial Revolution*, Stephenson and Ratnapala (eds), University of Queensland Press, 1993, pp.213-215.

24. That is, leases granted before the *Racial Discrimination Act* came into effect.

25 *Re North Ganalanja Aboriginal Corporation*; *ex parte Queensland* (1996) 70 ALJR 174, applying *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

26. *Courier Mail*, 22 March, 1996 : *Judge Criticises Court's Inaction*.

27 *The Australian*, 16 April, 1996 : *Native Title Case on Pastoral Leases Heads for High Court*.

28 *Ibid.*

29 Unless the High Court subsequently decided that *all* pastoral leases extinguish native title.

30. It is a basic tenet of *Mabo* that native title cannot be assigned, save perhaps within the group which is entitled to it, if their customs envisage assignment.

31 *Mabo* (1992), 175 CLR 1 at 72Ä73.

32. *Ibid*. at 117.

33. *Ibid*. at 69.

34. *Re North Ganalanja Aboriginal Corporation*; *ex parte Queensland* (1996) 70 ALJR 174 Ä order that the NNTT register applications not obviously frivolous, and not allow other parties to present a case for non-registration Ä a procedural ruling reached after the appearance of 8 QCs and 11 other barristers.

35. In the media, perhaps under the influence of ATSIC or Land Council press releases, there is a persistent and tendentious application of the term "traditional owners" to mere claimants.

36 There are ample precedents for listing decisive points of law first, but a single judge case (noted *Weekend Australian*, 23-24 December, 1995 : *Court to Seek Federal Ruling on Native Title*) suggests that the Federal Court may not follow this practice in native title cases without legislative prompting.

37 *Mabo and the Miners - Ad Infinitum?* in M. A. Stephenson (ed), *Mabo: The Native Title Legislation*, University of Queensland Press, 1995, p.53. (The article was completed in the year before publication.)

38 This is a misnomer for profit sharing or for some special payment from government. The true meaning of "royalty" is a payment by a miner to the Crown as the price of resources owned by the Crown.

39. Darryl Pearce, quoted in *Australian Journal of Mining*, April, 1996 : *Developers Must Negotiate With Aboriginals*.

40. AMPLA Bulletin, March, 1994, *If the Commonwealth Had Its Way*.

41 *Weekend Australian*, 25-26 September, 1993 : *Aborigines Want Their Own Team*; *Courier Mail*, 27 September, 1993 : *Blacks Threaten Olympic Games*; *The Australian*, 27 September, 1993: *Black Leaders Attack Racist Mabo Proposal* ("... could lead to revolution and protest in the lead up to and during Sydney 2000 Olympic Games"); *Courier Mail*, 29 September, 1993 : *Aborigines Urge Boycott of Olympics*.

42 *Weekend Australian*, 6-7 January, 1996 : *Black Australia's Game Plan*; *The Independent*, April 1996 : *Caught in the Spotlight* ("the cameras of the world's TV stations and the press will be focused on Australia"); *Courier Mail*, 15 April, 1996 : *Aborigines Unite Against PM*; *Courier Mail*, 16 April, 1996 : *Minister Flippant and*

Dull Says ATSIC ("Ms O'Donoghue said she could not rule out civil unrest, particularly at the 2000 Olympics"); *The Australian*, 18 April, 1996 : *No Future in Return to Racial Paternalism* (quoting Marcia Langton); *Courier Mail*, 20 April, 1996 : *Australia's Reputation Hanging on Mabo Action* ("potential for Aborigines to embarrass the Australian Government internationally during the Sydney Olympic games `considerable'"); *The Australian*, 15 May, 1996 : *Perkins Warns of Sydney 2000 Turmoil*.

43 *The Australian*, 15 May, 1996 : *Perkins Warns of Sydney 2000 Turmoil*.

44 *The Australian*, 27 May, 1996 : *Black Council to Challenge Land Claim Rejections*.

45. ABC Radio ("AM") 22 May, 1996, Premier Brown.

46. *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act* 1995. There are to be annual grants to the Land Fund from Consolidated Revenue according to an "indexation factor multiplied by $121 million". (sections 193, 193D). The present Government's attitude to the "social justice package" which was to supplement the fund is not yet clear.

47. *The Australian*, 26 April, 1996 (letter, Pat O'Shane, Woollahra, NSW).

48 *The Australian*, 11-12 May, 1996 : *The Gulf Between Black and White* (Barry Cohen, a former minister in a federal Labor administration). Cohen notes that Maori author Alan Duff has trenchantly criticised a similar dualism in New Zealand "indigenous" politics.

49. *Mabo* (1992) 175 CLR 1 at 70.

50 *Australian Journal of Mining*, April, 1996 : "Developers Must Negotiate With Aboriginals".

51 *The Australian*, 27 May, 1996 : *This Time There is Nothing to Offer Aborigines* (Frank Brennan).

52. *Mabo and the Miners Ä Ad Infinitum?* in *Mabo Ä The Native Title Legislation*, M. Stephenson (ed), University of Queensland Press, 1995, p.53.

53. See for example the litigation over distribution of legal aid funds in *Majar v Northern Land Council* (1991) 37 FCR 117.

54. Only about one third of the 120,000 people eligible to vote have bothered to vote in the two ATSIC elections so far held, and some regional councillors have been elected with a mere handful of votes: *The Australian*, 15 April, 1996 : *Our Own Vehicle of Apartheid*.

55. *The Australian Financial Review*, 15 June, 1993 : *Mabo Reference Guide*; *Sunday Mail* (Brisbane), 27 June, 1993 : *Sugar Ray Heads the Battle for Land Rights*; *The Australian*, 30 August, 1993 : *ATSIC Urges Tighter Control of Funds*;

Courier Mail, 14 September, 1993 : *CJC Tells of Courtroom Arson*; *Sunday Mail* (Brisbane), 19 September, 1993 : *Audits Not Complete, Probe Told*; *Weekend Australian*, 27-28 November, 1993 : *The Bucks Stop Here*; *Courier Mail*, 2 December, 1993 : *Millions Wasted: Auditor*; *Courier Mail,* 4 December, 1993 : *Black Leaders Should Tighten Finances: Goss*; *Courier Mail*, 15 December, 1993 : *Police to Probe ATSIC Vote Rigging Claims*; *The Australian*, 15 December, 1993 : *Auditor Slams Land Council*; *The Australian*, 23 December, 1993 : *The Prince of Tithes: `A Grim Fairy Tale'*; *The Australian*, 29 December, 1993 : *Black Agency Collapse Spurs Inquiry*; *Sun-Herald* (Sydney), 20 February, 1994 : *Prosecutions May Follow Investigation*; *Courier Mail*, 26 February, 1994 : *Minister Says Black Councils Will Be Sacked*; *Courier Mail*, 8 March, 1994 : *Blacks Half Way Houses to Be Sold*; *The Australian*, 22 April, 1994 : *Staff `Squander Black Funds on Luxury Goods'*; *Sunday Mail* (Brisbane), 8 May, 1994 : *Where Black Hostel Cash Went*; *The Australian*, 20 May, 1994 : *Black Charity Faces Probe into $3.2 Million Funding*; *Sunday Mail* (Brisbane), 19 June, 1994 : *Homes Company Crashed After Boss's Property Deals*; *Sunday Mail* (Brisbane), 19 June, 1994 : *The Guilt Edged Licence to Fraud*; *Courier Mail*, 30 June, 1994 : *Call for Inquiry into Misuse of $600,000*; *Weekend Australian*, 9-10 July, 1994 : *Black Councils in Financial Disarray*; *The Australian*, 20 July, 1994 : *Blacks Accuse ATSIC Leaders*; *West Australian*, 9 August, 1994 : *Waste Appals Aboriginal Group*; *The Age*, 13 August, 1994 : *Black Finances Review Sparks Investigation*; *Courier Mail*, 1 November, 1994 : *$1.5 Million `Missing' from Black Funds*; *Courier Mail*, 11 February, 1995 : *Conscience Money Fails*; *The Australian*, 4 April, 1995 : *Tickner Urged to Act on ATSIC Staffer*; *The Australian*, 7 April, 1995 : *State ATSIC Chief Rejects Calls to Quit*; *Courier Mail*, 15 April, 1995 : *Police Inquiry Into Blacks' Committee*; *Weekend Australian*, 15-16 April, 1995 : *Bamblett's Resignation from ATSIC a Landmark*; *Sunday Mail* (Brisbane), 16 April, 1995 : *Council Cooked the Books: Auditor*; *Weekend Australian*, 6-7 May, 1995 : *Black Council Squandered ATSIC Funds: Audit*; *Weekend Australian*, 27-28 May, 1995 : *Secret Report Lists Aboriginal Fund Abuses*; *Weekend Australian*, 17-18 June, 1995 : *Tickner to Seek Tighter Accounting of ATSIC*; *The Australian*, 28 July, 1995 : *ATSIC Probes Regional Council*; *The Australian*, 2 August, 1995 : *ATSIC Staff Face Charges Over Contract*; *Courier Mail*, 30 August, 1995 : *Costly ATSIC House Lashed*; *Courier Mail*, 25 September, 1995 : *New Law on Black Cash*; *The Australian*, 27 October, 1995 : *Aboriginal Legal Group Sacks CEO*; *Weekend Australian*, 20Ä21 January, 1996 : *ATSIC in Firing Line for $1.7 Million Land Gift*; *Courier Mail*, 18 March, 1996 : *Auditor's Doubt on Black Homes Group*; *Sydney Morning Herald*, 28 January, 1996 : *ATSIC Attacked on Use of Funds*; *Courier Mail*, 1 April, 1996 : *Probe on `Misuse' of ATSIC Funding*: *The Australian*, 2 April, 1996 : *Herron Targets Black Law Services*; *Courier Mail*, 3 April, 1996 : *Opening Pandora's Box*; *Weekend Australian*, 6-7 April, 1996 : *A Crisis of Accountability*; *Courier Mail*, 8 April, 1996 : *Ex-Judge Calls for ATSIC Clean Up*; *The Australian*, 11 April, 1996 : *Aboriginal Legal Head Faces Inquiry*; *Weekend Australian*, 13Ä14 April, 1996 : *ATSIC Fails to Supply $10 Million Funding Details*; *Courier Mail*, 18 April, 1996 : *Land Deal for ATSIC Leaders*; *Courier Mail*, 25 April, 1996 : *Minister Demands Report*; *Sydney Morning Herald*, 27 April, 1996 : *ATSIC Faces New Inquiry*; *Weekend Australian*, 27Ä28 April, 1996 : *Conviction a Reason for ATSIC Queries*;

Courier Mail, 10 May, 1996 : *Police Probe ATSIC Boss Over Bribe Claim*; *The Australian*, 17 May, 1996 : *Activist Gets Three Years for Depriving His People*; *The Australian*, 23 May, 1996 : *Lawyers to Lodge Coe Complaints*; *Courier Mail*, 25 May, 1996 : *Aboriginal Leader in Row Over $10 Million `Gift'*; *The Australian*, 28 May, 1996 : *Senior Bureaucrat Investigated*.

56 Barry Cohen, *Weekend Australian*, 11Ä12 May, 1996 : *The Gulf Between Black and White*.

57. *Courier Mail*, 8 April, 1996 : *Ex-Judge Calls for ATSIC Clean-Up*.

58. *Courier Mail*, 17 April, 1996 : *ATSIC Under Siege*.

59. *Re Woorabinda Aboriginal Council*, Queensland Law Reporter, 6 April, 1996.

60. "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance ....". (The Constitution, section 116)

61. J.R. Forbes, *Taking Without Paying: Interpreting Property Rights in Australia's Constitution* (1995), 2 Agenda, p.313.

62 *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 133 ALR 74.

63 *The Australian*, 14 June, 1996 : *Hindmarsh Bridge Developers Fail in Bid for Secrets*.

64. *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 55 FCR 316; affd *Norvill v Chapman* (1995) 133 ALR 74. For a similar exhibition of ministerial incompetence or arrogance see *Douglas v Tickner* (1994) 49 FCR 507.

65. For an argument for reform of this Act, see S Paylyga, *Australian Lawyer* (1995), Vol 30, No 8, p.22.

66. *Weekend Australian*, 10Ä11 September, 1994 : *Backyard Sacred Site Finding Sparks Freeholder's Protest*; *The Australian*, 10 April, 1995 : *One Man's Backyard is Another's Sacred Site*.

Chapter Six

The *Native Title Act* at Work

Chris Humphry

The *Native Title Act* A Response to *Mabo*

The *Native Title Act* was the Federal Parliament's response to the decision of the High Court in *Mabo v Queensland (No. 2)*.(1) The preamble to the Act records that since colonisation Aboriginal people and Torres Strait Islanders have been progressively dispossessed of their lands, largely without compensation and that the *Native Title Act* is intended to rectify past injustices.

Accordingly, the expressed objects of the *Native Title Act* are to:

(1) provide for the recognition and protection of native title;

(2) establish a process and standards for future dealings affecting native title;

(3) establish a mechanism for determining claims to native title; and

(4) provide for the validation of previous actions, such as title grants, which may be invalid because of their effect upon native title (section 3).

The *Native Title Act* establishes various processes. Two are central to the operation of the Act:

***** applications for the determination of native title or for compensation for impairment or extinguishment of native title (part 3, division 1);

***** applications relating to the grant of mining and exploration titles, and the compulsory acquisition of land for non-government purposes which affect native title (referred to as "right to negotiate applications") (part 3, division 2).

Workability

The *Native Title Act* attempts to find a balance between native title interests in land and the interests of the community as a whole in the use and development of land and resources. However, the Act is claimed to be unworkable by State and Territory governments, Aboriginal groups and industry alike.

The Western Australian Government, in particular, argued from the outset that the Act would impact mostly in Western Australia, because of the large areas of land open to claim and the high level of mining and resources activity in that State. Indeed, one of the bases of the Western Australian constitutional challenge to the *Native Title Act* (2)was that the impact upon land and resources management would impair the capacity of Western Australia to function as an entity within the federation, contrary to the principle described in *Melbourne Corporation v Commonwealth*.(3)

Three aspects are central to government concerns.

First, the inflexibility of the way in which the *Native Title Act* regulates all actions, particularly government land dealings, which may affect native title (these are called "future acts"). Native title holders are given the same rights and protection as if they held freehold title to the land. Generally an action can only be undertaken on land in respect of which any form of native title rights exist, whether they are exclusive rights to land or some lesser form of co-existent rights, if the action could also be undertaken on freehold land.

Furthermore, in the case of proposals to grant mining titles or to compulsorily acquire land for non-government purposes, native title holders are given a special right to negotiate in relation to the proposals and, if agreement cannot be reached, to have the National Native Title Tribunal or a State arbitral body decide whether the proposals should proceed.

Secondly, in order to provide interim protection pending determination of a native title claim, once a claim is lodged and registered with the Tribunal the claimants are given the same rights as if they had proved their claim, irrespective of the ultimate outcome of the claim. The registration of a claim operates as a form of statutory injunction.

In view of the pivotal link between registration of claims and future act rights, the *Native Title Act* provides an acceptance process which was intended to screen unjustified claims. However, the process is largely ineffective for this purpose.

Thirdly, while most public attention has focussed on land management issues, it is becoming increasingly apparent that the resolution of native title claims will involve significant practical difficulties. These include questions of proof and extinguishment of native title. However, the potential impact of claims upon the public and private rights of the wider community within claim areas has emerged as a major issue, and is drawing large numbers of public and private parties into the claims process.

Before examining the workings of the *Native Title Act*, particularly in the Western Australian context, it is helpful to review the common law principles upon which the Act operates.

The Common Law

Native Title

In *Mabo No. 2* the High Court decided that the common law of Australia recognises and protects a form of native title which reflects the entitlements of Aboriginal people and Torres Strait Islanders to their traditional lands in accordance with their traditional laws and customs.

Native title is recognised by, but is not derived from, the common law. The content and nature of native title are determined according to the traditional laws and customs of Aboriginal people, which must themselves be the subject of proof.(4) The incidence and content of native title will vary from place to place and group to group.

In order to prove the existence of native title it must be shown that:

(1) the applicants and their ancestors have been an organised and identifiable community since the time of British sovereignty;(5)

(2) membership of the community depends upon biological descent and mutual recognition of a person's membership by that person and by those in authority;(6)

(3) there is a continuing connection with the claimed land in accordance with the traditional laws and customs of the community which can be traced to the time of British sovereignty;(7)

(4) the community continues to substantially observe traditionally based laws and customs from which entitlements to land are derived;(8)

(5) the connection with land involves a level of use and occupancy.(9)

Extinguishment of Native Title

In *Mabo No. 2* the High Court also held that native title could be extinguished, particularly by legislative and executive actions inconsistent with the continued right to enjoy native title.

The action must demonstrate a clear and plain intention to extinguish native title, although it is not necessary to expressly identify the extinguishing effect of the action provided the intention is clear. In fact, extinguishment will invariably occur by necessary implication.

The High Court identified two ways in which native title may be extinguished by executive action. These are:

(1) A Crown grant vesting in the grantee an interest in the land which is inconsistent with the continued right to enjoy native title in respect of the same land;(10) and

(2) A valid appropriation or reservation and use of land by the Crown for a public purpose; reservation without actual use for the public purpose may not be sufficient action to extinguish native title.(11)

The grant of interests which include a right of exclusive possession, such as freehold or leasehold titles (other than titles granted to or for the benefit of Aboriginal communities),(12) and the construction of public works or use of land for public purposes which are inconsistent with native title will generally extinguish native title. The grant of lesser interests (such as a mineral exploration licence) and the reservation of land for purposes not inconsistent with continued native title may not extinguish native title.

Pastoral Leases

A contentious issue is whether the grant of a pastoral lease extinguishes native title. The question was not considered directly in *Mabo No. 2*, and as pastoral leases occupy approximately 42 per cent of Australia the issue has become a major controversy and cause of uncertainty. Successive federal Governments have refused to legislate to resolve the uncertainty, preferring to leave the matter to the courts.

Pastoral leases in Australia have been granted subject to varying terms and conditions amongst the different States and Territories. In Western Australia, South Australia and the Northern Territory pastoral leases have generally been granted subject to a reservation in favour of access by Aboriginal people for sustenance purposes. In Western Australia this reservation was omitted in relation to pastoral leases granted between 30 December, 1932 and 21 January, 1935.

In Queensland and New South Wales pastoral leases have generally been issued without a reservation in favour of Aboriginal access. There are virtually no pastoral leases in Victoria and Tasmania.

In *Mabo No. 2* the High Court considered the effect of a lease granted for 20 years over the whole of the Murray Islands for the purpose of establishing a sardine factory. The lease was subject to a condition that the lessee would not interfere with the Meriam people's use of their gardens and plantations on the land, nor with their fishing on adjacent reefs. Justice Brennan(13) (with whom Mason CJ and McHugh J agreed) and Justice Dawson(14) concluded that, assuming the lease was valid, it had extinguished native title in respect to the subject land. The reservation in favour of the Meriam people did not affect the extinguishing nature of the lease. On the other hand, Deane and Gaudron JJ considered that the reservation in favour of the Meriam people prevented any otherwise extinguishing effect upon native title.(15)

Native title claimants argue that a pastoral lease should not be characterised as a true lease. Pastoral leases often extend over vast areas of land and contain a variety of reservations not

normally found in a lease. Furthermore, there is a history of Aboriginal people continuing to occupy or access pastoral lands long after pastoral leases were granted. Accordingly it is argued that the grant of a pastoral lease should not be regarded as evidencing an intention to extinguish native title.

This issue was first considered by Justice French, sitting as President of the National Native Title Tribunal in *Waanyi No. 2*,(16) who decided that a Queensland pastoral lease issued without a reservation in favour of Aboriginal access extinguished native title. This decision was confirmed on appeal by a 2:1 majority of the full Federal Court in *North Ganalanja Aboriginal Corporation v Queensland.(17)* Justice Drummond of the Federal Court reached the same conclusion on 29 January, 1996 in *Wik Peoples v Queensland*.(18)

The High Court overturned the *North Ganalanja* decision on 8 February, 1996.(19) Although the decision concerned a procedural matter, it was based on the finding that it was fairly arguable that a pastoral lease without a reservation in favour of Aboriginal access did not extinguish native title. However, the Court declined to decide the pastoral lease question in those proceedings. An appeal against the *Wik* decision is listed for hearing by the High Court on 11 June, 1996 when it is expected that the question will be dealt with.

In both the *North Ganalanja* and *Wik* decisions, the Federal Court considered pastoral leases which did not contain a reservation in favour of access by Aboriginal people. Even if the High Court upholds Justice Drummond's view of the extinguishing effect of pastoral leases in *Wik*, different considerations may apply in Western Australia, South Australia and the Northern Territory because of the pastoral lease access reservations operating in those jurisdictions.

Native Title Claims Under the *Native Title Act*

Acceptance of Claims

The *Native Title Act* provides that persons claiming to hold native title may lodge an application for determination of native title with the Native Title Registrar (sections 13, 61 and 62). If the application complies with the procedural requirements of section 62, the Registrar must accept the application unless the Registrar is of the opinion that the application is frivolous or vexatious or *prima facie* cannot be made out. In that event the application is referred to a presidential member of the Tribunal. If the presidential member agrees with the Registrar, the claimant is to be given an opportunity to make submissions. The presidential member must then, depending on the opinion formed, direct the Registrar to either accept or reject the claim (section 63).

Parties

Following acceptance, notice of the application must be given to any Commonwealth, State or Territorial Minister concerned with an area covered by the application, to any person holding a registered proprietary interest in the area and to the public (section 66). Any person notified may apply to become a party "in relation to the application", as can any other person whose "interests may be affected by a determination" (section 68).

Tribunal Determination of Unopposed or Agreed Claims

The Tribunal is required to hold an inquiry into any "unopposed application", which includes unopposed or agreed native title determination applications (section 139). The Registrar must lodge the determination with the Federal Court (section 166), which upon registration has the same effect as if it were an order of the Federal Court (section 167(1)).

If an application is unopposed, the Tribunal may make a determination consistent with the terms sought by the applicant, provided that the Tribunal is satisfied that the applicant "has made out a *prima facie* case" (section 70(1)(a)) and the Tribunal considers "the determination to be just and equitable in all the circumstances" (section 70(1)(b)). If the parties to an application reach

agreement, the Tribunal must make a determination if it is satisfied that the terms of the agreement are "within the powers of the Tribunal and would be appropriate in the circumstances" (section 71).

As a result of the decision of the High Court in *Brandy v Human Rights and Equal Opportunity Commission*,(20) the constitutional power of the Tribunal to make determinations either rejecting or approving native title claims is in doubt. Under the amendments to the *Native Title Act* recently proposed by the federal Government, claims will be lodged with and ultimately determined by the Federal Court, but in the interim the Court will refer claims to the Tribunal for mediation.

Mediation and Referral to Federal Court

If the parties cannot agree, the President of the Tribunal must direct the holding of a conference among the parties to attempt to resolve the matter (section 72). If the parties then fail to agree, "the Registrar must lodge the application to the Federal Court for decision" (section 74).

Compensation

The *Native Title Act* also makes provision for native title holders to claim compensation for any loss, discrimination, impairment or other effect of any action upon their native title rights and interests (part 2, division 5). The procedure for making a compensation claim is the same as for a native title claim.

***Native Title Act* and Future Acts**

Future Acts

The *Native Title Act* provides a comprehensive regime for regulating future dealings which affect native title in relation to land and water. The regime operates only in respect of acts which "affect" native title. Central to the scheme are the concepts of an "act" and a "future act".

In essence, a future act is:

* the passing of legislation on or after 1 July, 1993; or

* the doing of any other act on or after 1 January, 1994;

which affects or is affected by native title (section 233).

An act "affects" native title if it extinguishes native title rights and interests or if it is otherwise wholly inconsistent with their continued existence, enjoyment or exercise (section 226 (definition of "act") and section 227 (acts which "affect" native title)). If an act or action does not "affect" native title, it is not a "future act" and the *Native Title Act* has no operation, unless the land is subject to a registered native title claim.

Permissible and Impermissible Future Acts

A future act is either a "permissible future act" or an "impermissible future act". In relation to onshore areas (the area within the territorial limits of the States) an action is a "permissible future act" if it treats native title holders the same way as it treats ordinary (freehold) title holders (section 235). This is sometimes referred to as the "freehold equivalent test". Government actions such as the grant of a title may generally be taken in relation to native title land if they could also be taken in relation to freehold land. If not, the grant or act is an "impermissible future act" which will generally be invalid to the extent it affects native title (section 22), although there are exceptions (section 24 (non-claimant applications) and section 25 (options to renew)).

Procedural requirements

Even if the grant could be made in relation to freehold land (ie the grant is a permissible future act), it will only be valid if the procedures provided under the *Native Title Act* are complied with (section 23(2)). In relation to onshore areas these procedures fall into two categories:

(1) mining (including petroleum) titles and compulsory acquisitions for non-government purposes (for example, if Crown land which is subject to native title is compulsorily acquired in order to grant a title for a development) (part 2, division 3, sections 26-44); and

(2) other forms of title or interests in land (section 23(6)).

Mining Titles and Compulsory Acquisitions -

Right to Negotiate Procedure

In the mining and acquisition category, the *Native Title Act* provides for the "Government party" to give notice of the proposal to registered native title holders and claimants, to representative Aboriginal bodies (such as Aboriginal legal services and land councils), the proposed grantee and to the 'arbitral body" (section 29). The arbitral body is the National Native Title Tribunal unless the State or Territory has established a recognised body (sections 27, 251). If a native title claim is lodged with the Tribunal in response to the notice, the proposal becomes subject to negotiation, mediation and ultimately a determination by the Tribunal (sections 31-38).

For the purpose of making a determination the Tribunal must hold an inquiry (section 139). The Tribunal must consider the effect of the proposed action on the native title parties and their interests, environmental issues, the economic significance of the proposal and the public interest (section 39).

The Tribunal may approve a proposed grant (with or without conditions) or refuse to approve the proposal even though native title has not been proved to exist. If this "right to negotiate procedure" is not followed, the grant will be wholly or partly invalid if it affects native title (sections 22 and 28).

Expedited Procedure

An expedited procedure is available in the case of low impact titles. Where the State considers that the proposed act in relation to which notice is given under section 29 does not interfere with the community life of, or with sites of particular significance to, the native title holders, or involve major disturbance to the land, the State can include in the notice issued under section 29 a statement that the act attracts the expedited procedure (sections 32, 237).

If no objection to that statement is made by a registered native title claimant within two months of the date of the notice, the State may validly do the act without undertaking the right to negotiate procedures. If an objection is received, the Tribunal must determine whether the expedited procedure applies. If it is determined that the expedited procedure does apply, the State may do the act without reference to the right to negotiate procedures. If the Tribunal determines that the act does not attract the expedited procedures, the proposal becomes subject to right to negotiate procedures (section 32).

Non-mining Proposals

In the case of other onshore actions which may affect native title, section 23(6) of the *Native Title Act* requires that the same procedural rights be given to native title holders as would be given to the holder of a freehold title. Accordingly, if a public utility wishes to construct a facility on land under native title claim, it may only do so if it could also construct the facility on freehold land and if it follows the same notification and objection procedures with the native title holders or claimants as are required in relation to freehold land.

Future Acts where Native Title has not been Proved

The essential premise to the operation of the *Native Title Act* is that the proposed action is a "future act". That is, the action will affect native title. If native title does not exist in a particular

area, the *Native Title Act* has no operation in relation to any actions (whether government or private) in respect to that area.

The practical difficulty is that, as the whereabouts and content of native title are unknown, to ensure the validity of a proposed action (which would be a "future act" if native title in fact exists and is affected by the action) a government must either comply with the procedural requirements of the *Native Title Act* or undertake a non-claimant application which is unopposed (section 24(1)).

In *North Ganalanja Aboriginal Corporation v Queensland(21)* the High Court held that if land is subject to a native title claim which has been accepted by the Tribunal, the procedural requirements of the *Native Title Act* must be complied with irrespective of whether the native title claim ultimately succeeds. The Court decided that these procedural rights are intended to maintain the *status quo* pending the outcome of the native title claim.

A notable feature of the future act procedure is that it operates the same way irrespective of whether the native title claim involves exclusive rights or co-existent rights with another interest such as a pastoral lease.

Compensation

In making a determination the Tribunal may require the Government or grantee party to pay compensation. If a native title determination has not been made, the compensation must be paid into trust pending that determination (sections 41(3), 52).

Native Title Claims Experience

Land Tenure

The likely existence of native title can be related to current and historical land tenure. If it is assumed that freehold and Crown leasehold titles have extinguished native title, there are few areas in Victoria, which is mostly freehold, where native title is likely to exist. Large parts of New South Wales and Queensland are also freehold.

The fact that pastoral leases occupy 42 per cent of Australia emphasises the significance of the pastoral lease question. However, the determination of this question could separate Western Australia, South Australia and the Northern Territory, where pastoral leases generally provide for Aboriginal access, from Queensland and New South Wales, where generally there is no access provision.

The majority of vacant Crown land is in Western Australia, while the most extensive areas of reserves occur in Western Australia and South Australia.

Native Title Claims

The location of native title claims throughout Australia can be best understood from the maps maintained by the Land Claims Mapping Unit of the Western Australian Department of Land Administration.

The great majority of land under claim is in Western Australia and South Australia. More than half of all native title claims have been made in Western Australia. Depending upon the outcome of the pastoral lease question, between 59 per cent and 93 per cent of the State may be open to claim. The land presently claimed covers approximately 45 per cent of the State and is predominantly vacant Crown land, reserve land (particularly Aboriginal reserves) and pastoral land. There is a concentration of claims in the Eastern Goldfields (where there are many overlapping claims) and around Broome. The Pilbara is also attracting claims, as are Perth and its environs.

Large areas of pastoral and reserve land have been claimed in South Australia. There are few claims in the Northern Territory, where more than 50 per cent of land is held under titles issued

under the *Aboriginal Land Rights (Northern Territory) Act.* Most of the claims in Queensland and New South Wales cover relatively small areas of land, although since the *North Ganalanja* decision two large claims have been made to Queensland pastoral areas. Victoria has few claims, although they include extensive areas of freehold land.

Acceptance of Native Title Claims

The native title claims acceptance procedure was intended to be a screening mechanism against unjustified claims, presumably because of the significant rights conferred upon registered native title claimants by the future act procedures. Justice French in the *Waanyi* Tribunal decision(22) said that while the process favours the acceptance of applications, it is intended to preclude ambit claims which would waste the time and resources of the Tribunal and "undermine the spirit of the legislation and discredit the processes of the Tribunal". A number of factors have combined, however, to make the acceptance process largely ineffective:

(1) although the identification of extinguishing land tenure is an obvious way of screening claims, there is no requirement for claimants or the Registrar to undertake land tenure searches as part of the acceptance process;

(2) while the Registrar's stated practice is to obtain current land tenure searches, the increasing number of claims, many involving areas of tenure complexity, has increased the cost and complexity of tenure searches;

(3) the decisions of Justice Olney, sitting as a tribunal member in *Associated Goldfields NL and Alkane Exploration Ltd*,(23) and the Federal Court in *Northern Territory v Lane,(24)* that the right to negotiate operated upon registration of a claim, and that registration should occur upon lodgment - not upon acceptance, as was the then practice of the Registrar and the apparent intention of the legislation;(25) and

(4) the decision of the High Court in *North Ganalanja Aboriginal Corporation v Queensland(26)* that, as the acceptance procedure is *ex parte,* the Registrar should not receive material or submissions from third parties, and "fairly arguable" claims should be accepted.

The present practice of the Registrar is to accept claims within 14 days of lodgment, provided freehold land is excluded from the claim and any claim to leasehold land is limited to rights which are consistent with the rights of the lessees. Of the 188 claims to complete the acceptance procedure to 30 May, 1996, only 6 were rejected.

The status of native title claims throughout Australia under the *Native Title Act* is as follows.

Native Title Claims - 30 May, 1996

Lodged	263*
Accepted	188
Acceptance pending	58
Rejected	6
Referred to Federal Court	4
Withdrawn	7
Determined	0

* 159 in W.A.

Multiple claims

There are various examples of multiple native title claims lodged in relation to the same land, especially in the Eastern Goldfields of Western Australia. The most extreme case is in the Laverton area, where 9 claims have a degree of overlap.

In some cases, multiple claims may reflect disputes concerning traditional ownership, but they are more likely to reflect the complexities of Aboriginal culture and land tenure and the dislocation of Aboriginal people caused by non-Aboriginal settlement.

Aboriginal land tenure is communal in nature. Local exogamous descent groups or clans are usually regarded as the primary land holding entity. They have particular rights and obligations in respect of specific tracts of country. Groups of clans make up language groups or tribes which share access, hunting and ceremonies across a broad range of country associated with the language group. With the impact of non-Aboriginal settlement, clans and clan estates have become increasingly difficult to identify.

Most claims in Western Australia are oriented towards language group or tribal areas. These claims are usually made by small numbers of people and are representative in character. The overlapping claims are often made by members of the same language group asserting essentially the same or similar representative claims. The issues amongst the claimants are likely to relate to rights and obligations within the group, rather than reflect any dispute about traditional association, in a general sense, with the land.

Indeed in May, 1996 the Goldfields Land Council called for the many overlapping claims in the Eastern Goldfields to be combined on the basis that the claimants are all members of the same traditional group.

It is difficult to resolve these issues under the claims acceptance procedure, as it may not be able to be said that any of the claims cannot *prima facie* be made out. They may all succeed, either on a co-existence basis or because they are individual assertions of the same communal or representative claim.

Parties to claims

The Tribunal is required to give direct notification of native title claims to persons holding registered proprietary interests in the claim area (section 66(2)(a)(v)). Again, in areas of tenure complexity this is a difficult and time consuming requirement.

Any person whose interests may be affected may become a party to the claim (section 68(2)). Parties are entitled to participate in the mediation process. The native title rights claimed are usually broadly described and have the potential of enveloping all land, mining and petroleum and any lesser interests within the claim area. Only freehold title land may be clearly excluded. As a consequence, there are large numbers of parties to many of the claims.

The Maduwongga native title claim in the Eastern Goldfield provides perhaps the most extreme example of these complexities.

Maduwongga - WC94/3

Lodged 19.04.94
Accepted 12.10.95
Public notification 02.11.95
No. of interest holders notified 1711
Closing date for parties 26.04.96
No. of parties 709

Mediation

The Tribunal is required to attempt to mediate each claim amongst the parties (section 72). If the application is unopposed or agreement is reached, the Tribunal may make a determination that

native title exists to the claimed land (sections 70, 71). However, this power is subject to the doubts raised by *Brandy v Human Rights and Equal Opportunity Commission*.(27)

- In any event, mediated outcomes have been impeded by uncertainty about the pastoral lease question, land tenure complexities, issues concerning the effect of claims on interests held by other persons and the large numbers of parties to claims.

Litigation - Miriuwung Gajerrong claim - Ord River

When a native title claim is referred to the Federal Court, the parties become respondents to the litigation (section 84). In Western Australia only the Miriuwung Gajerrong claim (WC94/8) on the Ord River has been referred to the Federal Court. There are in excess of 200 respondents to the claim, 180 of whom are miners, pastoralists, farmers, business people, tour operators, fishing licensees, and community and recreational clubs and organisations. The concerns of the respondents relate to potential conflicts between native title rights and rights held under a variety of interests, licences and authorities, and the effect of the claim upon public use of reserves, Crown land and the waters of Lake Argyle and the Ord River. The remainder of the parties are government agencies holding interests within the claim area.

The Miriuwung Gajerrong claim illustrates the complexities of determining the extinguishing effect of land tenure. The claim area and the adjoining Miriuwung Gajerrong No. 2 claim (WC94/6) are the subject of five current pastoral leases. However, pastoral leases in Western Australia are issued for limited terms, and 161 pastoral leases of varying areas and terms have existed within the claim area. Most contained Aboriginal access reservations although some have not. The extinguishing effect of all these pastoral leases must be examined.

In addition, the claim is centred on the land resumed by the State in the 1960s for the Ord River Irrigation Scheme. The extinguishing effect of the development of this project, including the creation of a multitude of public reserves related to the project, must be examined.

The trial is scheduled to commence at the end of the year and is likely to take several months to complete. The State made application to the Federal Court to have the extinguishing effect of pastoral leases decided as a preliminary question. In December, 1995 Justice Lee refused the application, holding that questions of extinguishment can only be decided against the factual background of determined native title rights. The full Federal Court refused an appeal against this decision.

Uncertainty about the Miriuwung Gajerrong claim has caused concern and division within the Ord River community. So long as native title claims have the potential to affect existing interests and the use of public areas within claim areas, adequate resources should be directed to public information programmes and to providing legal assistance for respondents as well as for claimants.

The situation could be ameliorated if claimants were required to give detailed definition to their claims. This should include a precise description of the land claimed, including a description of the categories of excluded land. Claimants should be required either to confirm that the claim will not affect any existing interests, or, if it is claimed that any interest will be affected, to state the basis of that claim so that the claim may be tested at an early stage.

The claims experience in Western Australia has demonstrated that reconciling native title interests with the rights and interests of the wider community is likely to raise extremely complex issues. These must be worked through with patient and detailed consultation over time, even in relatively straightforward claims. Litigation may be the appropriate method of deciding, in a general sense, whether native title exists in a particular area, but it is not the best means of reconciling the claim with wide-spread competing interests.

An alternative approach was suggested by Mason C J in *Coe v Commonwealth*.(28) His honour commented that in areas of tenure complexity, the "[j]udicious selection of test cases would be a more appropriate procedure" than immediately pursuing a broad area claim which affects many interest holders.

Future Act Procedures in Operation

Mostly in Western Australia

The future act procedural requirements of the *Native Title Act* apply to any action which may affect native title rights. However, most attention has focussed on the right to negotiate procedures under part 2, division 3 of the Act. To date these procedures have occurred almost exclusively in Western Australia.

This is for two reasons. First is the importance of the Western Australian mining industry and the consequent high level of mining title administration, especially on pastoral and Crown land. Following *Western Australia v Commonwealth*,(29) the Western Australian Government recognised that to ensure the validity of titles granted, mining grants and rural land development must be carried out in accordance with the *Native Title Act* procedures, except in the most obvious areas of extinguishment. This exception is generally limited to land which has been the subject of freehold title.

Secondly, all other States and Territories have to date largely found it unnecessary to participate in the right to negotiate procedure. It seems they have either taken the view that native title does not exist on the land proposed to be granted, or issued titles on condition that they are subject to any native title rights which may exist, or they have delayed the grants.

Mining in Western Australia

Western Australia is recognised as one of the world's leading mining provinces. It is a major producer of minerals and petroleum both on a national and international basis. As a consequence, the volume of mining title administration in the State is greater than all the other States and Territories combined. Information provided by the Western Australian Department of Minerals and Energy shows that during the 1992-93 financial year in Western Australia:

- mining tenement applications were made - 64 per cent of all mining applications in Australia;
- mining tenements were granted - 67 per cent of all mining titles granted in Australia; and
- mining tenements were in force (covering 274,000 square kilometres or 12 per cent of the State) - 51 per cent of all mining titles in force in Australia and 29 per cent of the area of Australia subject to mining titles.

In terms of impact on land, 95 per cent of the area held under mining tenements in Western Australia is the subject of exploration or prospecting licences. Although mining leases comprise 39 per cent of mining titles in number, they make up only 5 per cent in area. However, relatively few mining leases result in operating mines. It is estimated that the total area of land disturbed by mining operations and used for ancillary infrastructure (such as roads and railways) is only 510 square kilometres or 0.02 per cent of the land in the State.

The potential impact of the *Native Title Act* upon the administration of the mining titles in Western Australia is demonstrated by the distribution of mining tenements amongst different categories of land tenure (estimated by the Department of Minerals and Energy for 1994-95):

Western Australia - Mining Tenements and Land Tenure

Tenure	Number	Tenements Area ('000 sq.kms)	Percentage of land held under mining tenement

			Vacant	Crown
Land	4,900	93.7	24.6%	
Reserves	900	17.6		4.6%
Pastoral leases	12,850	260.6		68.4%
Private land	500	9.1		2.4%

Expedited Procedure in Western Australia

In April, 1995 the Western Australian Government commenced issuing notices under section 29 of the *Native Title Act* in relation to the grant of exploration and prospecting licences under the *Mining Act* 1978 (WA). As these licences are regarded as low impact titles, the notifications contained a statement that the grants attracted the expedited procedure. The first objections were heard by the Tribunal in September, 1995.

To May, 1996, in excess of 90 per cent of exploration/ prospecting licences were processed without native title objections. The following table summarises the position:

Western Australia - Expedited Objections - 24 May, 1996

Exploration/prospecting licence s.29 notifications	3504
Notification period completed	2759
No objections	2608
Objections lodged	151
Determined in favour of grant	49
Determined against grant	3
Withdrawn	39

The impact of the *Native Title Act* on exploration titles has been relatively minor, being largely limited to the State and some grantees and native title parties being required to participate in Tribunal inquiries.

Right to Negotiate Procedure in Western Australia

The situation is very different with respect to mining leases, the production title available under the *Mining Act* 1978 (WA). In April, 1995 the State also commenced issuing section 29 notices in relation to the grant of mining leases. As mining leases are production titles, these notices did not contain an expedited procedure statement. Where native title claims exist or are made within the two month notification period, the mining leases must be dealt with under the right to negotiate procedure.

Few agreements have been reached under the 4-6 month right to negotiate period. Multiple native title claims are obviously a significant impediment to achieving agreement. The problem is particularly acute in the Eastern Goldfields, where there are numerous overlapping claims and in excess of 2,000 mining titles are issued each year.

A native title claim must nominate a registered native title claimant. Any agreement under the right to negotiate procedure concerning mining or land development must be made with the registered native title claimant on behalf of the claimant group. In the case of multiple claims, the agreement of each registered claimant must separately be obtained. In the absence of agreement, all claimant groups are entitled to participate in the Tribunal proceedings in relation to the matter.

Following the expiration of the notification and negotiation period, the initial right to negotiate applications in relation to mining leases were lodged by the State with the Tribunal at the end of

December, 1995. The first two Tribunal hearings occurred in April and May, 1996 and decisions are pending. The position concerning right to negotiate applications is as follows:

Western Australia - Right to Negotiate (Mining Lease)
Applications - 24 May, 1996

Mining lease notifications	1269
Notification Period completed	1056
Subject to negotiation	734
Mining lease future act applications	229
Withdrawn	12
Mining agreed	25
Determined	0

Mining title applications continue to be made in Western Australia at a rate of approximately 5,000 per annum. Since April, 1995 the rate of grant of mining titles has fallen significantly and the area of land held under mining tenement has declined by approximately 8 per cent.

The rate at which mining titles are granted may increase after the initial backlog of titles is processed under the *Native Title Act*, but up to 12 months may generally be added to the time required to obtain a mining lease.

Tribunal Inquiries

The Tribunal has established procedures for inquiries in relation to right to negotiate applications.

Following the lodgment of an application, a directions hearing is convened, when the parties are ordered to exchange a variety of documentary material including contentions, submissions and outlines of evidence. The parties are the Government party, the proposed grantees and all registered native title claimants. Subsequently a listing hearing is held followed by the inquiry hearing which may take between several hours and several days. A recent expedited objection hearing concerning three petroleum exploration licences lasted 7 days. Evidence may be given orally or by affidavit. Cross examination is generally limited.

All of the hearings in Western Australia occur in Perth, but many also involve hearings at the location of the proposed title grant. The State and the native title parties are almost always represented by counsel. The grantees are sometimes represented by counsel, sometimes represent themselves and sometimes do not attend.

Some Comment

The Western Australian Government's concerns about the disproportionate impact of the *Native Title Act* upon Western Australia have largely been realised, both in terms of claims and land and resources management. It is a measure of the relative impact of the Act that outside Western Australia there has been only one right to negotiate application (subsequently discontinued) and no expedited objections.

The Federal Government issued a discussion paper on 22 May, 1996 which acknowledged the procedural shortcomings of the Act and proposed a variety of amendments to improve its workability. However, there are no easy solutions. The social, political and legal issues raised by native title are immensely complex. Finding a generally acceptable balance between native title interests and the interests of the community as a whole will be a lengthy and evolutionary process. It is unlikely that a workable legislative framework will be developed until knowledge and understanding of the issues has reached a much higher level. In the meantime both the claims and right to negotiate procedures need extensive revision.

Although the claims procedure is accessible for claimants, the scale and complexity of native title claims was not foreseen, particularly land tenure issues and the potential impact upon other interest holders and the wider community. A more consensual and inclusive approach to reconciling these interests is required.

A much more flexible future act procedure needs to be developed to accommodate differences in underlying land tenure and variations in the content of native title, particularly where native title rights are not exclusive. Where native title has been claimed but not yet proved, there should be more emphasis upon substantiation of the claimed rights and the actual impact of the future act on the claimants. Procedures are required to rationalise the interaction of future act procedures and multiple claims.

Finally, it is difficult to overstate the importance of the pastoral lease question, both to Aboriginal people and to the operation of the Act.

Endnotes

1 (1992) 175 CLR 1 (*Mabo No. 2*).
2 *Western Australia v. Commonwealth* (1995) 183 CLR 373.
3 (1947) 79 CLR 31.
4 *Mabo No. 2, op.cit.*; Brennan J at 58, Deane and Gaudron JJ at 110.
5. *Ibid*; Brennan J at 61.
6. *Ibid*; Brennan J at 70.
7. *Ibid*.
8 *Ibid*; Brennan J at 61.
9. *Ibid*; Brennan J at 59; Deane and Gaudron JJ at 90, 110; Toohey J at 188.
10 *Ibid*; Brennan J at 68, 69 and 72Ä3; Deane and Gaudron JJ at 110; Dawson J at 158.
11. *Ibid*; Brennan J at 68Ä70; Deane and Gaudron JJ at 89Ä90 and 94; Dawson J at 158.
12 *Pareroultja v. Tickner* (1993) 117 ALR 206.
13 (1992) 175 CLR 1 at 71Ä2.
14 *Ibid*., at 158.
15. *Ibid*., at 117.
16. (1995) 129 ALR 118.
17 (1995) 132 ALR 565.
18 (1996) 134 ALR 637.
19 (1996) 135 ALR 225.
20 (1995) 183 CLR 245.
21 (1996) 135 ALR 225.
22 (1994) 129 ALR 100 at 112.
23. 6 February, 1995.
24 Unreported, 24 August, 1995.
25 Cf. sections 66(1)(b) and 190(1)(a) of the *Native Title Act*; but see the flowchart produced in the then AttorneyÄGeneral's commentary to the Act.
26 *Op.cit*.
27. (1995) 183 CLR 245.
28 (1995) 68 ALJR 110 at 119.
29 (1995) 183 CLR 373.

Chapter Seven

Reflections on the Aboriginal Crisis

Ray Evans

We find ourselves here today in Adelaide debating major constitutional and political issues. To my knowledge no one here today holds high executive office, although some members of The Samuel Griffith Society have held such office in the past. But we see nothing untoward, at all, about such conduct. It is a part of our political life which we all take for granted, and in carrying this debate forward we assert the legitimacy, indeed the importance, of such participation in the way in which political decisions affecting the future of our nation are taken. This is something which happens in very few other nation states, and we should all be aware of that fact and its importance for us.

We are members or citizens of a nation state whose legal origins we trace back to 1770 and the annexation by Lieutenant James Cook on August 22 of that year of the eastern part of Australia. Two hundred and twenty six years later Australia exercises sovereignty over the mainland, Tasmania, a large number of small islands, and has claimed a large slice of Antarctica. We comprise about 18 million people, and we are recognised throughout the world as a still prosperous, albeit small, nation whose influence on world affairs has been greater than our numbers might suggest.

What characterises and distinguishes Australia as a sovereign nation is its legal system and its Constitution; its parliamentary institutions and how those institutions maintain their legitimacy; its military capacity to defend our borders and to participate in defence alliances; and above all, something intangible which the overwhelming majority of Australians share, the sense of belonging to a country whose place in the scheme of things is morally secure.

Those Australian citizens, and they change from time to time, who are entrusted with the governance of this nation, have important responsibilities to discharge. The first is the defence of the nation's borders and to exercise control over who comes here either temporarily or permanently; this is the essence of sovereignty. Second is the representation of Australia's interests within the global matrix of many other nation states. Third, they have a responsibility for the nurture of our political and legal institutions. It is these institutions which provide the framework within which we pursue our work and our cultural and religious activities.

A nation state which is successful for many generations can only prosper because of the commitment of the great majority of its citizens to a fundamental set of common values which enable the political life of the nation to continue peacefully and efficiently. Australia is one of the oldest democracies in the world. I think it is beyond argument that the overwhelming majority of Australians are committed to our political arrangements and our established way of doing things. They are particularly committed to federalism, and to the dispersion of political power which federalism prescribes. And it is this wide commitment which makes our country such an enviable place to live and work. We have made mistakes. All nations, being human institutions, have made mistakes. But we are capable of facing up to those mistakes, and capable of changing course in order to mitigate the consequences of past mistakes.

Despite our fortunate past, my theme today is that we are facing a crisis in our political life which, if not properly resolved, could cause great problems for us as we grow older and, more important, for future Australians. I quote the Oxford English Dictionary on the word "crisis". *A crisis is a critical and often unstable stage in a chain of events. It is often associated with a period of deep trouble or danger in politics.*

In discussing political crises it is helpful to begin by referring to Michael Oakeshott, and I quote the famous tin-opener passage from the celebrated 1951 Inaugural Lecture at the London School of Economics:

> "A tradition of [political] behaviour is not a fixed and inflexible manner of doing things; it is a flow of sympathy. It may be temporarily disrupted by the incursion of a foreign influence, it may be diverted, restricted, arrested, or become dried up, *and it may reveal so deep-seated an incoherence that...a crisis appears*."

- "And if, in order to meet these crises, there were some steady, unchanging, independent guide to which a society might resort, it would no doubt be well advised to do so. But no such guide exists; we have no resources outside the fragments, the vestiges, the relics of our own tradition of behaviour which the crisis has left untouched. For even the help we may get from the traditions of another society...is conditional upon our being able to assimilate them to our own arrangements and our own manner of attending to our arrangements. The hungry and helpless man is mistaken if he supposes that he overcomes the crisis by means of a tin-opener: what saves him is somebody else's knowledge of how to cook, which he can make use of only because he himself is not entirely ignorant. In short, political crisis...always appears *within* a tradition of political activity; and `salvation' comes from the unimpaired resources of the tradition itself."(1)

Having quoted the great scholar, my contention is that we have in Australia a crisis concerning the place of Aboriginal people within contemporary Australian society. Aboriginal people I take to be those who are descended, in full or in part, from the people who lived on the Australian mainland and Tasmania in 1788, when Captain Arthur Phillip and the soldiers, sailors and convicts under his command established the first European settlement in Australia, at Sydney Cove.

How is this crisis manifest? The obvious answer is to point to the column-inches devoted to Aboriginal issues in the press and the media generally, and to the amount of money spent on Aboriginal policy by the various governments in Australia. A more important manifestation of the problem is the palpable decline in the quality of life for very large numbers of Aborigines. The Governor-General referred to this fact three weeks ago. Although the evidence is never complete, it now appears beyond argument that over the last twenty years or more, life expectancy for Aborigines, both men and women, has fallen significantly. Other common indices of social morbidity - suicide, chronic alcohol and drug abuse, domestic violence, criminality, imprisonment, sexually transmitted diseases, as well as other diseases such as leprosy, trachoma, etcetera - have increased to an alarming extent. A recent report commissioned by the Northern Territory Government and compiled by Aileen Plant, entitled *Northern Territory Health Outcomes*, identifies in some detail the tragic decline which has taken place in recent years.

In 1971 Professor Colin Tatz, a prominent publicist and advocate in the Aboriginal cause (for better or worse is a matter of argument), visited 77 Aboriginal communities in the five mainland States and the Northern Territory. In 1991 he revisited these same communities, and in a report entitled *Aboriginal Violence: A Return to Pessimism* he wrote the following(2)

"We all must face up to a set of realities for which there is, regrettably, abundant evidence."

Tatz listed eight of these realities:

(1) The great deal of personal violence within Aboriginal groups, even within families;

(2) The great deal of child neglect, as in hunger and lack of general care;

(3) The considerable amount of violence and damage committed in sober states;

(4) The marked increase in Aboriginal deaths from non-natural causes;

(5) Much destruction of property, both white - supplied and own - acquired;

(6) Increasing numbers of attacks, often violent, on white staff who work with the groups;

(7) The vast amount of alcohol consumed, commonly and generally offered as the sole and total explanation of the above; and

(8) The constancy about the way Aborigines externalise causality and responsibility for all of this.

An even more tragic account of the crisis in contemporary Aboriginal life was written by Rosemary Neill in *The Australian* of June 18, 1994. Entitled *Our shame : How aboriginal women and children are bashed in their own community - then ignored*, it describes the epidemic of domestic violence and rape which has spread throughout Aboriginal communities in recent times. It is an awful story. I will quote just one paragraph:

"The book *Through Black Eyes*, published by the Secretariat of National Aboriginal and Islander Child Care, states that:

***** Up to and over 50 per cent of Aboriginal children are victims of family violence and child abuse.

***** In the early 1990s, a survey carried out among 120 Aboriginal households in Adelaide found 90 per cent of the women and 84 per cent of the young girls had been raped at some stage in their lives.

***** A related statistic says that, in most States, more than 70 per cent of assaults on Aboriginal and Torres Strait Islander women are carried out by their husbands or boyfriends."

These words refer to terrible human suffering and brutality which is taking place in Australia today. Further, and this is the important point, this violence and brutality has increased significantly during the last two decades or so. This tragedy is of recent origin.

Another important manifestation of crisis is the Hindmarsh Island story. A useful summary of that quite extraordinary affair is given in Chris Kenny's recent article in *The Independent Monthly:*(3)

"When Commissioner Iris Stevens delivered the report of the Hindmarsh Island Bridge Royal Commission to the South Australian Government she found:

***** The whole of the `women's business' was a fabrication.

***** The purpose of the fabrication was to obtain a declaration from the Minister ... to prevent the construction of a bridge between Goolwa and Hindmarsh Island.

***** The involvement of Aboriginal people in the anti-bridge lobby in October, 1993 was the direct result of approaches made by existing interests who had been unsuccessful in their efforts to stop the bridge.

***** Not only was the `women's business' unknown and unrecognised in the relevant literature, the existence of the `women's business' was not known to other Narrindjeri women. It was unknown to the 12 dissident Narrindjeri women who gave evidence, and all were credible witnesses. They had no interest in whether the bridge was or was not built. Their concern was for their culture.

***** There were, from the start of the Commission, indications and complaints of threats and of pressure being applied to witnesses."

I trust that a full account of this sorry tale will soon be written. But some immediate observations can be made. The first is that Australian anthropology is now under a serious cloud. Apart from Dr Philip Clarke and some of his colleagues of the South Australian Museum, who carried an enormous burden of professional responsibility in this issue, Dr Ron Brunton of the Institute of Public Affairs, Dr Les Hiatt, former Reader in Anthropology at the University of Sydney, and Professor Ken Maddock of Macquarie University, the entire anthropological profession was either silent, or joined in the attack on the so-called dissident women.

From a mining and resource industry perspective, it is clear we have a developing crisis manifest in the increasing incapacity to obtain secure title to mineral discoveries, or to obtain easements to build pipelines for gas or for mineral slurries. This loss of title security is the result not so much of the decision in *Mabo No.2* but of the effect of the Commonwealth *Native Title Act* (*NTA*), whose validity was upheld by the High Court in *Western Australia v The Commonwealth.*(4)

The ongoing delays with the Century project have focussed attention on the problem of title security, although some of our political leaders still seem to feel no real sense of urgency about the matter. This indifference may change in the next twelve months or so. Because of the *NTA*, construction of the Teneco pipeline in south-west Queensland has suffered continuing delay and I understand that, as a consequence, Brisbane may run out of gas within a year or so. We will then have a real political crisis. This crisis will be the consequence of the fact that the law of property in Australia, which had been slowly constructed over many centuries, was thrown into disarray by *Mabo No.2* and the passage of the *NTA*.

The Australian mining industry is facing an historic watershed. The inability to obtain secure title in much of Australia has resulted in exploration expenditure going off-shore, and a new mind-set emerging within the Australian mining industry which is overseas rather than domestically oriented. There is no doubt that some of this would have happened even if we still had pre-1992 security and predictability concerning mineral titles. But the Minerals Council's annual survey has cited problems with the *Native Title Act* as a cause for this phenomenon and the Industry Commission has commented similarly. This change in attitude and exploration expenditure will, a few years down the track, affect job opportunities in Australia, export income, the value of the Australian dollar, the current account deficit, and so on.

The tragedy in the lives of many of our Aboriginal Australian fellow citizens is much more immediate and personal than future economic decline and, I believe, impossible to continue to pretend away. But all of this personal tragedy, the growing political danger, and the future

economic decline are, I am convinced, merely different facets of the same crisis, and I wish today to take Oakeshott's advice, and try to find some hint of "salvation" to this crisis from within the "unimpaired resources" of our political traditions.

When we look back over 208 years of European settlement of Australia, we can find two opposing attitudes towards the Aborigines. One attitude was enshrined as policy by the British Government in the commission given to Governor Phillip. This commission was read out at the proclamation of his office on 7 February, 1788. I quote:

> "You are to endeavour, by every possible means, to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence. You will endeavour to procure an account of the numbers inhabiting the neighbourhood of the intended settlement, and report to our Secretary of State in what manner our intercourse with these people may turn out to the advantage of this colony."

The Aborigines, then, from the very beginning, were invited, encouraged and, regrettably, at times compelled, to enter into the benefits which Western civilisation affords. For nearly two hundred years, up until the late 1960s, an enormous amount of official, and private, time and money were expended in projects and programs designed to bring Aboriginal Australians into full partnership of European-Australian society.

It is worth noting that Phillip's commission excluded any notion of enslavement. Slavery within Britain had been declared illegal by Chief Justice Mansfield in 1772. The English Quakers presented an anti-slavery petition to Parliament in 1783. In 1807, the Imperial Parliament abolished the slave trade in British colonies. When England annexed Eastern Australia in 1770 and settled it in 1788, enslavement of the inhabitants was never considered. "Intercourse", "conciliation", "amity", "kindness" and "protection" were the key words in Phillip's instructions.

In our present state of cultural despair and pessimism we should recall that slavery, as an institution, has been part and parcel of human affairs everywhere, except in Western society, and that only recently. It was first found to be unacceptable in the British Isles, and Phillip's instructions are evidence of that fact.

In our own times, ongoing endeavours to welcome Aboriginal people into the mainstream of Australian life, begun by Phillip, were discharged most ably by the late Sir Paul Hasluck. A book has just been published which discusses Hasluck's career and influence in Aboriginal policy in Australia.(5) The author is Geoffrey Partington and his book is entitled *Hasluck versus Coombs: White Politics and Australia's Aborigines*. I quote from it what is arguably Hasluck's most important articulation of his policy. It was adopted at a conference in Darwin in 1963 by the Commonwealth and all State Governments, irrespective of party complexion.

> "The policy of assimilation means that all Aborigines and part-Aborigines will attain the same manner of living as other Australians, and live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, hopes, and loyalties as other Australians. Any special measures for Aborigines and part-Aborigines are regarded as temporary measures, not based on race, but intended to protect them from any ill effects of sudden change, and to assist them to make the transition from one stage to another in such a

way as will be favourable to their social, economic, and political advancement ... The whole tendency in Australia ... is to eliminate laws that apply especially to the Aboriginal people."

Hasluck used the word `assimilation'. It is a word which I believe has been given new connotations, taking the word far away from Hasluck's understanding of it, to the point where it is now resented by many Aborigines. In recent debates, `assimilation' has often been taken to mean the enforced or coerced obliteration or submersion of all traditional Aboriginal cultural identity. There is no evidence that I am aware of that Hasluck ever sought to obliterate, through compulsion or coercion, traditional customs which were consistent with the law. Nevertheless the word `assimilation' has been damaged by misrepresentation. I therefore wish to use the word `inclusion' as conveying a much broader and more liberal sense than the meaning now often imputed to the word `assimilation'.

`Inclusionism', therefore, does not seek an enforced transition to modernity, and seeks to accommodate the customs and traditions of Aboriginal people to the degree of their consistency with Australia's legal structure. But at the same time `inclusionism' rejects for Aborigines an enforced, or financially compelling, on-going immobilisation in time within a hunter-gatherer culture. It rejects the proposition that taxpayers' money should be spent in supporting a hunter-gatherer lifestyle.

The best way of illustrating this is by example. One such example, this time an example of sacrifice and devotion, not just words on paper, is described by Theodore Strehlow in his great book *Journey to Horseshoe Bend*.

The scene is the Hermannsburg Mission in Central Australia. The year was 1922. Pastor Carl Strehlow, aged 52, who had worked at the Mission since 1894, and who had never had a day's sickness before, was suddenly struck down, first with pneumonia and then with pleurisy. He ignored the early symptoms but found himself getting weaker. He was a proud man and did not think it possible that he could be seriously ill. If he had left early to seek medical assistance he would have survived without difficulty, but when at last he agreed to go, it was too late. The journey was a long and arduous one, and he died 100 miles or so south-west of Hermannsburg, at a place on the Finke River called Horseshoe Bend.

He was at the height of his powers as a linguist, missionary and pastor, and his death was a terrible tragedy.

His son Theodore, who accompanied his mother and father on that tragic journey, grew up to be a famous Aboriginal linguist and anthropologist. He wrote a book about that journey, and his boyhood amongst the Aranda people, the book called *Journey to Horseshoe Bend*.

One of the most poignant scenes in this book is the description of the departure of the dying pastor from Hermannsburg. He had been painfully lifted onto the buggy, and the crowd of sad and silent Aranda people pressed around. The driver of the buggy said to them, "Sing a farewell hymn".

A voice in the crowd began to sing 'Karerai wolambarinjai," the Aranda translation of the great Lutheran chorale, *Wachet auf, ruft uns die Stimme* (Sleepers Wake). The whole congregation joined in and soon the tears were running down from the missionary's red and pain-worn eyes. At the end of the hymn Strehlow said softly, "May God bless you all, my friends", and the horses began the journey in the vain attempt to carry the sick man to medical care. Strehlow's persistence with the translation of the scriptures and liturgy into Aranda, and his policy towards traditional ceremonies and practices, are important in this context of the meaning of inclusion, and I will refer to this below.

I will briefly mention two other important examples of inclusionist sentiment, practice and policy. First is the Aboriginal Cricket Team, under the leadership of Charles Lawrence, George Smith and G W Graham, which toured England in 1868! Save for the white entrepreneurs, who came from Sydney, the rest of the team, all Aborigines, came from around Edenhope in the Western District of Victoria and around Naracoorte in South Australia.(6) I commend John Mulvaney's enthralling account of that enterprise.

Second is the fact that, prior to the rise to power of the Australian Shearers Union which became, in due course, the Australian Workers' Union (AWU), Aborigines played an important part in the shearing industry. The story of Aboriginal participation in this vital industry is told by Patsy Adam Smith in her book entitled *The Shearers*. Aboriginal women in particular were very successful shearers, although very slow compared with other shearers of the day.

I have picked out just a few examples of inclusionist sentiment and policy. It would take very many books to describe in detail the full story. I wish now to consider some examples of the history of exclusionism, the opposite sentiment, in Australian life since 1788.

We should note first of all that one can find both inclusionist and exclusionist attitudes in the same people. Even Phillip, when exasperated by the failure of his attempts to successfully engage the local Aborigines in the life of the new colony, was prone to swing to an exclusionist attitude. Today, we can often find quite contradictory sentiments in the same paragraph of policy or rhetoric.

Much has been made, in recent years, of the murders of Aborigines by criminal sadists such as Constable William Willshire, who was beyond any doubt responsible for deaths of many Aborigines in central Australia a century ago. Although subjected to an enquiry, he escaped conviction. Contrariwise, such a miscarriage of justice did not happen after the Myall Creek massacre of June 10, 1838. After drawn-out proceedings, instigated by Governor Gipps, Judge William Burton, a firm believer in the strict application of English law to colonial conditions, with tears in his eyes, sentenced seven of the defendants to be hanged. The sentence was carried out on December 18, 1838.

It is not the policy of exclusionism as an idea used to justify criminal activities that concerns us today. Nobody, today, defends Constable Willshire, and we greatly admire Pastor Carl Strehlow, who maintained his mission at Hermannsburg as a sanctuary for refugees from Willshire's murderous expeditions. What is of concern, however, is the ambition, often found amongst anthropologists, to preserve aboriginal society as they believe it was at some time in a perceived golden past, or as they found it at a very early stage of contact with European society. Baldwin Spencer, arguably the greatest of the Australian ethnographic pioneers, provides a good example in this regard. He was strongly, even bitterly, opposed to Pastor Strehlow's work at Hermannsburg. An example of this exclusionist sentiment is found in Spencer's report of the Horn expedition of 1894:

> "To attempt ... to teach them ideas absolutely foreign to their minds and which they are utterly incapable of grasping simply results in destroying their faith in the precepts which they have been taught by their elders and in giving them in return nothing which they can understand. In contact with the white man the Aborigine is doomed to disappear: it is far better that as much as possible he should be left in his native state and that no attempt should be made either to cause him to lose his faith in the strict tribal rules, or to teach him abstract ideas which are utterly beyond the comprehension of an Aborigine ..."(7)

In our own time Dr Nugget Coombs has, since the late 1960s, written many thousands of words, and exercised great influence on Aboriginal policy. His basic position is that mainstream

Australian society is unworthy of including Aborigines within it, and he has persistently argued for separatist policies and programs. His disciples have argued for Aboriginal self-government, financed from the rents levied as a consideration for the occupation of the rest of the continent by the descendants of European and other immigrants.(8)

It is well known that the early trade union movement was violently opposed to Chinese workers in our mines and horticultural industries. It is not so well known that the trade union movement also drove the Aborigines out of the shearing industry in the 1890s. The early trade unionists thought it completely justified to engage in violence, including threats of murder, to achieve their ambitions of monopoly control of labour in the pastoral industry. There was no place for the Aborigines in their rigid world. Many years later, in the early 1980s, the AWU sought to drive Maori shearers out of the industry in the wide comb dispute. They failed in that enterprise, but it was a close run thing.

One of the most destructive decisions taken by white Australians against their black fellow-Australians was that by the Commonwealth Conciliation and Arbitration Commission in the 1966 *Northern Territory Cattle Station Industry Case*.(9) It was this decision, under the chairmanship of President Sir Richard Kirby, which made unlawful the employment of many thousands of Aboriginal stockmen on Northern Territory pastoral leases on terms and conditions which were beneficial to both parties, but which were far removed from the terms and conditions mandated for non-Aboriginal employees. The destruction of Aboriginal society in the Northern Territory which followed that decision was both predictable (indeed it was foreshadowed in the Commission's decision) and morally culpable. It was entirely exclusionist in sentiment because it knowingly made unlawful the inclusion of Aboriginal people in a major Northern Territory industry, and in so doing, brought to an abrupt and tragic end a process of slow but steady transformation of a hunter and gatherer society into communities coming to terms with the contemporary world.

It is a paradoxical fact that this decision took place when Sir Paul Hasluck was still a leading figure in the federal Government as Minister for Foreign Affairs, and that his department was, I understand, a strong supporter of the Commission in its decision because it feared foreign accusations of exploited Aboriginal labour.

The great dilemma which inclusionists have to resolve is what policy should be adopted when the Aborigines do not want to enter into mainstream Australian society, or want to enter on terms which are impossible to fulfil? Arthur Philip answered that dilemma by kidnapping Benelong and forcing him to engage, at least temporarily, with the newly arrived Europeans. Pastor Strehlow handled what was for him the most difficult problem of all by refusing to attend their corroborees and ceremonies, although he had gained the respect of the elders to the point where they entrusted him with the care of their most sacred *tjuringa* and knowledge of their most secret information. Hermannsburg was a place where many Aborigines crossed over from their society into the new world in order to escape from payback killing, or from promised marriages, or from other demands of tribal law. Strehlow's authority was such that within Hermannsburg they were safe.

The inevitability of the collapse of hunter-gatherer society was discussed by Pastor Carl Strehlow's son, Professor Theodore Strehlow in a letter which he wrote just before he died to Justice Michael Kirby, now of the High Court. He wrote:

> "I believe that in 1978 no completely untouched Aboriginal communities exist anywhere in Australia. All Aboriginal Australians, even in the furthest regions of the outback, have by now come into contact with European ideas, with white Australian cultural notions, and with

white Australian legal notions. I believe that this is a process that can be neither arrested nor reversed; for even Aboriginals living in some form of tribal organisation wished to live on the white man's foods - flour, tea, sugar and beef; and everywhere the young people, *i.e.* the future `black' folk, are demanding also access to liquor. It seems therefore that in another 50 years or so there will be no Aboriginals at all whose beliefs, languages or cultures have remained even relatively unaffected by `white' ideas, concepts and values; and the original indigenous traditions in consequence are irretrievably on the way out.

" ... I [am] left with the impression that few, if any ... experts and spokesmen ha[ve] any deep knowledge of Aboriginal customary laws anywhere ... I know that the modern young Aboriginals and part-Aboriginals who have never been trained by any of the old local group elders in Central Australia are so unconversant with the old norms that they always use the term `Aboriginal law' when talking about matters in which they feel `black' behaviour differs (or ought to differ) from `white' behaviour. Others talk about `The Law'; but few of them seem to know much about the old terms in which breaches of `The Law' used to be defined. These terms themselves would at least indicate what breaches of `The Law' were regarded as meriting death, which breaches could be punished by the infliction of what *we* might term `grievous bodily harm', and which breaches could be left to be dealt with by private persons (provided their `punishments' were kept within certain limits).

"The loose use of `The Law' or `Aboriginal law' so freely indulged in nowadays by people who have only the haziest notion of what it is all about I find completely misleading and just as obnoxious as the universally promulgated term `The Dreamtime' - a completely misleading white man's term substituted originally for the Aranda word *altjira* (which meant `eternal' or `uncreated' or - used as a noun - `eternity'). Single legal definitions do demand clarity rather than prevarication. I think that experts giving explanations before a legal commission should first be clear in their own minds what they are talking about. I note that ... you say `The Law, no doubt, as in ancient Hebrew times, is religious Law'. This is true, but ... what happens when the old religion dies?"

A more pungent expression of the same view was recently put by Barry Cohen, former Minister for the Environment in the Hawke Government:(10)

"The romantic myth is perpetuated that some Aborigines can continue to maintain the hunter-gatherer life style they enjoyed prior to the advent of European civilisation. No one has the courage to say publicly that hunting kangaroos, eating bush-tucker and painting bark pictures will not prepare Aborigines to compete in a 21st Century that will require sophisticated technological education just to keep pace ... to suggest they remain frozen in time for the amusement of anthropologists and tourists is absurd."

The difficulty with inclusionism as a sustained policy is what to do when Aborigines do not want to relinquish those aspects of their traditions which are in conflict with our Australian legal framework.

We can look at every major piece of legislation since 1976 as an attempt to grapple with this problem. For example, the Woodward Royal Commission of 1974 and the Commonwealth's consequent 1976 *Northern Territory Aboriginal Land Rights Act*, sought to set aside what was officially estimated at the time to be 8 per cent of the Northern Territory for the purposes of enabling members of traditional communities who wished to continue to live, in significant degree, according to their customs and practices, to do so. The inalienability prescribed to this

land by the Act is an example of benevolent paternalism, but also of intellectual confusion, because by prescribing inalienability the legislators have actually built a prison. Inalienability has tied the traditional communities to a particular area, land over which they have no legal control, and prevented them from using that land as a vehicle for moving into contemporary life. The people in these communities have been forced into the role of living exhibits in a walled museum. That museum now occupies approximately 50 per cent of the total land area of the Northern Territory.

Similarly, the views expressed by Brennan J in the High Court's *Mabo No.2* judgment can be interpreted as an attempt to provide legal protection to those traditional Aboriginal communities who wish to retain at least some aspects of a hunter-gatherer lifestyle, and to do so on areas of land on which they and their forebears grew up. In seeking to achieve this outcome the law of property in Australia, however, has been thrown into complete confusion. Since June, 1992 several legislative attempts have been made in an effort to resolve this confusion. In this process the confusion has been compounded rather than resolved.

In early December, 1993 the WA Parliament passed the *Land (Titles and Traditional Usage) Act*. That Act sought to resolve the difficulties embodied in *Mabo No.2* by replacing the common law native title in WA with an equivalent statutory title. The statutory title was well defined and enabled all parties with interests in land to enjoy their rights within a secure legal framework. The rights accorded to Aboriginal people under this Act not only enabled them to live in a traditional lifestyle, if they chose, but also gave them the option to move more rapidly into mainstream Australia by provision of an alienable title.

Three weeks later the Commonwealth *Native Title Act*, amidst tumultuous applause in the Senate from the press gallery, was passed at midnight on December 23, 1993.

In the subsequent constitutional battle the High Court found the WA Act, through Section 109 of the Constitution, to be inoperative. The vote was 7 to nil. I wish to quote from Justice Dawson's opinion:

> "However, notwithstanding my own views from which I do not resile, I think that I ought now to follow the decisions of the majority in *Mabo No.1* and *Mabo No.2*. The issues which were determined by those cases are of fundamental importance and deal with questions of title to land. It is desirable that the law now follow a consistent course in order to achieve maximum certainty with the least possible disruption. No good purpose is to be achieved by my continuing to follow a line of reasoning which has been rejected. In my view, the doctrine of precedent, notwithstanding that it is not rigidly applied in this Court, requires me to adopt the course which I propose to take. No interpretation of the Constitution requiring fidelity to the text rather than to judicial decision is involved and the words of Gibbs, J., in *Queensland versus the Commonwealth* have even greater force here than in that case:
>
> `No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.'"

Those words of Justices Dawson and Gibbs require the most careful attention.

The *NTA* has formally divided Australian citizens into Aborigines and non-Aborigines with respect to property rights in land, and has set them one against the other in a process with a potential for virtually unlimited litigation. The WA Act sought to provide security for Aborigines who did not want to relinquish key aspects of traditional customs, but it did not seek to discourage those who did. The *NTA*, contrariwise, promotes and encourages separatism. It entrenches a black against white mentality. It is as if the class warfare of a century ago, and the industrial relations legislation of 1904 which entrenched and encouraged hostility and resentment between employers and employees, has been replicated ninety years later with Aborigines replacing the oppressed working class, and non-Aboriginal Australia replacing the exploiting employers, of the socialist rhetoric of the 1890s.

It has taken decades of argument and the pressures of economic decline to turn opinion into support for major reform of our nineteenth Century industrial relations arrangements. I don't think we can afford to wait for decades to deal with the problems created by the *NTA*.

We have already seen the beginning of a strong current of public indignation against such policy. The election of Pauline Hansen in the seat of Oxley with a swing of 23 per cent, and the defeat of the former Minister for Aboriginal Affairs, Robert Tickner, in the suburban seat of Hughes with an unrivalled swing (in the Sydney metropolitan area) of 13 per cent, suggests to me that the overwhelming majority of Australians have rejected exclusionist ideas. Oxley and Hughes in particular are not seats in remote country areas. They are located in the suburban heartland of contemporary Australia.

All of the problems we face in Aboriginal policy arise from the great difficulties which arise when people born into and brought up in a hunter-gatherer society, try to adapt to a world characterised by a very high degree of specialisation in the labour market, and a high degree of freedom and responsibility in the choices one has to make in life.

The dilemma is this. A hunter-gatherer life is not really attractive when compared to life in mainstream Australia. Even those older Aborigines who do retain something of the old way of life and traditions generally recognise the force of Barry Cohen's argument. But crossing the gulf between one society and the other is not easy. Since the 1970s the difficulties have been greatly exacerbated because official policy has moved from the assimilationism of Paul Hasluck to the separatism of Nugget Coombs. Aborigines have been told, over and over again, that mainstream Australian society is morally deeply flawed and they should regard that society with resentment and contempt.

In this complete intellectual and policy confusion it is no wonder that the plight of Aborigines has become much worse. Charles Perkins captured this on March 18, 1993 when he complained bitterly, but in my view with total justification, that:

> "Aboriginal Affairs policies are not properly debated and, as such, are impossible to articulate. We are a captive people as never before in our history."

Official insistence and exhortation, including that of the former Prime Minister, Paul Keating, that Aborigines should disdain and resent mainstream Australian society as being responsible for their poverty, have been all too frequent. These arguments were ubiquitous during the preparations for the Bicentennial. A characteristic example was John Stevens, writing in *The Age* in February, 1988:

> "Our guilt, shame, concern or whatever, is this - that the wealth now enjoyed by so many whites has been gained by dispossession of the blacks".

It is a short step from arguments of that kind to demands that Aboriginal children should learn their tribal languages at school, should practice their tribal customs and live within their customary law. Such arguments are clearly part of a policy of separatism and exclusion. It is at the same time a policy for extending and entrenching Aboriginal poverty. In every part of the world where the problems of aboriginal peoples trying to adjust to contemporary life have been exhaustively studied it has been shown, beyond argument, that policies of reservations, exclusion, separation, have been disastrous for the health and well-being of those people entrapped by such policies.

It is important to understand the distinction between respecting the wishes of people, all our people, to live as they wish to live, within our legal framework, on the one hand, and providing not merely official exhortation, but also very large sums of public money, which is used to deter, rather than encourage, Aboriginal people from becoming fully part of contemporary Australia, on the other.

The logical end of exclusionism as a sentiment and a policy is a separate Aboriginal nation-state. This is openly advocated by many Aboriginal activists.

After a conference entitled Koorie 2000, held in Melbourne on March 18, 1993, an SBS reporter said:

> "For the so-called Aboriginal Provisional Government, the Koorie answer to the challenges of the next Century is the creation of a sovereign state, which they say could survive on the income from mining and tourism."

Geoff Clarke, spokesman for the Aboriginal Provisional Government, responding to this comment, said:

> "It may be $2 billion, $3 billion, who cares. The fact is it would be an economy derived from the resources that, you know, is owned by the people."

- Now that we have a new federal Government, and debate about amendments to the *Native Title Act* 1993 is running strongly, I do hope that this opportunity to return to fundamentals will not be dismissed. It is a tribute to the new Government that some of the rancour and vitriol of former argument has dissipated. But, if we do not take steps to resolve the current impasse, then division, resentment and violence will increase. The wretched plight of many thousands of our fellow citizens, who are Aborigines, will further deteriorate. The warning signs are impossible to ignore.

The immediate solution to the problems that have been created by the *Native Title Act* is, in my view, to follow the example set by the WA *Land (Titles and Traditional Usage) Act* of the same year. That WA Act is, I believe, illuminated by inclusionist sentiment and thinking. It accepted the common law rights discovered in *Mabo No.2*, but sought to replace those rights with statutorily defined rights of a usufructuary kind which enjoyed the same legal protection as other titles issued by the Crown. The High Court, however, said the WA Act was inconsistent with the *Racial Discrimination Act* and the *NTA* and it thus failed through the operation of section 109 of the Constitution.

The *Racial Discrimination Act* (*RDA*) has been elevated by some into a quasi-constitutional document. It is, nevertheless, just a Commonwealth statute, neither more nor less, and its standing in our polity should surely be judged on what it has actually achieved for Australia, not on the symbolism which its supporters claim to see within it.

It seems to me clear that, 21 years after the acrimonious passage of the *RDA*, racial tension and acrimony have increased within Australia, not diminished. It is beyond argument that the plight

of Aborigines has worsened, not improved since 1975. The March election results in seats such as Hughes, Oxley, Kennedy and Kalgoorlie should be taken as evidence that there is an important political issue here which requires cool, careful analysis.

One of the problems has been that debate has been suppressed. The terms "redneck" and "racist", for example, have been used indiscriminately, and people have been frightened off from expressing a viewpoint and engaging in open debate. This is not healthy in a democracy. If the *RDA* has in fact contributed to the increase in racial division and tension then it should be judged accordingly. It should be put to the test of argument and evidence, not placed on an elevated pedestal beyond the reach of criticism.

- In my view the future unity, cohesion and well-being of this great nation are of far more consequence than a technical legal opinion on a complex piece of legislation which was empowered, constitutionally, only by an international convention drafted by far away people, none of whom were accountable to us.

At the same time the political problem of unfulfillable expectations, now ubiquitous amongst many Aboriginal groups, has to be faced. The *Northern Territory Land Rights Act* of 1976 was supposed to solve the problems resulting from the 1966 Northern Territory Cattle Stations Industry Award. We had a number of *Aboriginal Land Rights Acts* passed in various State jurisdictions during the 1980s. The High Court gave us *Mabo No.2* in June, 1992 and then the Keating Government gave us the *NTA* in December, 1993. All of these measures were presented to us as providing a solution to the very real problems of Australia's Aborigines. Nevertheless the problems have increased, not diminished.

I conclude by going back to Oakeshott. We can only solve this crisis by referring to the traditions and modes of thought that we have. There is no other recourse. We do have a long history of inclusionist sentiment and policy. We also have a long history of exclusionist sentiment and practice which, in its darkest form, was manifest in murder and massacre. Many, although not all, of these murderers escaped from any judicial process. Our difficulties in carrying out inclusionist policy have always arisen when customary law has clashed, irreconcilably, with our law.

There are obviously situations where we cannot compromise. Payback killings, for example, cannot be recognised as anything but murder. We cannot condone the violence now increasingly meted out to Aboriginal women as just another manifestation of blackfella' law, which has, therefore, to be condoned. But within the framework of our legal system and our economic activities we can accommodate, in large measure, the desires of those of our citizens who wish to continue to live, in some degree, the life of a hunter-gatherer. But it is one thing to accommodate in that regard. It is another to pursue policies and maintain a rhetoric that such a life is a more noble thing than life in mainstream Australia, and that it ought to be preserved, if necessary by the expenditures of very large sums of taxpayers' money, and the winding down of Australia's most internationally competitive industries, the pastoral and mining industries.

I do believe we can change course and begin a process of amelioration of the contemporary tragedy of Aboriginal life. But it will not be possible to move forward if the bitter rhetoric and invective, and the intellectual confusion, of recent years, continues. Contemporary failure has to be acknowledged. Clarity of vision has to be upheld. The economic consequences of past mistakes has to be recognised. If these things can be done I am confident that we will be able to find, within our political traditions and modes of behaviour, a resolution to the crisis.

Endnotes

1. *Rationalism in Politics and Other Essays*, Liberty Press, 1991.

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3. Chris Kenny, *Unfinished Women's Business*, The Independent Monthly, May, 1996, pp.44Ä47.
4 (1995) 183 CLR 373.
5 Partington, Geoffrey; *Hasluck versus Coombs*: *White Politics and Australia's Aborigines*, Quakers Hill Press, Sydney, 1996.
6. D. J. Mulvaney, *Cricket Walkabout: The Australian Aboriginal Cricketers on Tour*.
7 Quoted by Mulvaney and Calaby, *So Much That is New*, 1985, Melbourne University Press, p.126.
8 See for example, Greg Crouch, *Visible and Invisible: Aboriginal People in the Economy of Northern Australia*, published jointly by the North Australia Research Unit and the Nugget Coombs Forum for Indigenous Studies.
9. See Sir John Kerr in *Arbitration in Contempt*, Vol. 1, Proceedings of the H R Nicholls Society, 1986.
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Chapter Eight

Soft Totalitarianism and Centralism

Christopher Pearson

Last April Peter Coleman addressed The Samuel Griffith Society's fifth conference. His topic was political correctness and his theme was one of hope -- that the oppressive orthodoxies that blight debate in Australia might be receding. He titled his speech *Dividing the Great Australian Consensus,* and it was an influential and timely contribution to that process.

One of the most important elements of Peter's speech was its definition of the problem. "Political correctness" is a phrase which has been so loosely used and abused as to verge on being useless. Instead Peter offered the more diagnostic term "soft totalitarianism". He said:

> "If you offend, you do not get a bullet in the neck or end up in a slave camp in the Gulag. But you will be marginalised, boycotted, perhaps vilified, and in a bad case brought before the thought police and fined. Your career will be damaged, perhaps ruined."

He also pointed out how the new orthodoxy is enforced, using the Orwellian analogy of Newspeak:

> "In *1984* the department that invents all the political lies is the Ministry of Truth. Government-sponsored Diversity does not mean diversity in ordinary language -- that is tolerance, pluralism, a pleasure in variety. The New Diversity means Conformity, enforced by the opinion formers or network managers of the media, academia, the political parties."

Peter invoked people like Geoffrey Blainey, Commissioner Fitzgerald, Gabriel Moens and David Stove, each a melancholy example of why the notion of the thought police is not merely overblown rhetoric. He found comfort though in the fact that some whispers of dissent were coming from unexpected quarters. Helen Garner's analysis of feminism's fiercer tribes in *The First Stone* had been released the week before. David Williamson's play *Dead White Males* was playing to packed houses, exposing post-modernist relativism to the kind of attack it has far too seldom received and championing liberal humanism, another intoxicatingly rare response. On the multicultural front he cited the example of Alan Duff's *Once Were Warriors*, and the Maori writer's embrace of the ethic of self-help, independence and spirited involvement in the modern world. In the realm of gay politics he singled out the writings of Robert Dessaix and he was also kind enough to mention my work.

He concluded:

> "There are other straws in the wind which suggest that the Great Australian Consensus is losing ground, that its heyday is passing. The question remains : what can we do to hasten the process?"

When I read a condensed version of his speech the next day I rang him and said: "What we can do is to compile a book of essays on the subject, and you must edit it." Peter was convinced; within a matter of days Jennifer Byrne, publisher of Reed Books, was convinced and on the Monday following the federal election we launched it, with a splendid speech by the novelist

Peter Goldsworthy who, I'm delighted to see, is here this evening. We called the book *Doubletake -- Six Incorrect Essays*, and I commend it to those of you who may not have seen it yet.

Mention of the federal election is a happy reminder that political correctness is a soft totalitarianism rather than the hard kind. Peter Coleman would, I'm sure, have been with us tonight if it weren't for the fact that he's in Russia, researching in the KGB's archives. But were he here, I'm equally sure that he would have been warning against any blithe triumphalism about the end of P.C., and reminding us that the Liberal Party has not wholly escaped its taint. I shall return to that theme in a moment. But first I want to turn to the People's Convention which has formed a significant part of today's deliberations. I believe that there is a strong case for deferring the Convention until after there has been an indicative plebiscite, and that there could be no more fitting occasion than this to make it.

Prior to the election, the Coalition promised to hold a People's Convention to mark the centenary of the Adelaide Convention at which the bulk of the Australian Constitution was settled.

The People's Convention would:

***** be half appointed, half elected, with some delegates appointed to ensure that minorities were represented;

***** consider the question of the Head of State first; and

***** then consider other matters such as overlap between the Commonwealth and the States, a Bill of Rights, and the use of the foreign affairs power.

If the Convention reached a consensus about the Head of State -- a consensus which was not defined -- the Coalition promised to put that consensus to the people in a referendum which the Government would support.

If no consensus was reached, a Coalition Government would hold an indicative plebiscite to gauge people's views about the Head of State, with a range of options on offer (such as the *status quo*, a ceremonial President elected by the Parliament, a ceremonial President elected by the people, or an executive President elected by the people).

Presumably, if one of the republican options received a plurality of votes, it could form the basis of a possible referendum.

At that time, the Coalition had two objectives: to remove republicanism as a potentially divisive issue in its own ranks; and to ensure that the constitutional debate was driven, as far as possible, by the people and not by the then Prime Minister, Mr Keating.

Unfortunately, implementing this policy in precisely this form could damage the Government.

A type of general election for the delegates to the Convention means that constitutional issues and pro- and anti-republican personalities will dominate the political landscape for the three months prior to any election and from then until any Convention concludes.

The Convention and its delegates -- because of their novelty -- will eclipse Parliament and MPs as a source of political interest and even, symbolically, of potency.

No doubt it will all be very jolly for the delegates, swanning about Canberra, dressed in a little brief authority. It will be like the United Nations writ small -- an unedifying prospect best not lingered over. And yet the unemployed, small farmers and small businessmen, and everyone else who is feeling the pinch, will know a protracted bunfight when they see one.

The election alone will cost about $50 million, at a time when health, education and welfare budgets are being cut, and proceeding with it would be a grotesque distortion of priorities. If

other gatherings, such as the Constitutional Centenary Foundation's convention of April last year, are any guide, the People's Convention will end in deadlock over the Head of State. To the extent that there is agreement, it is likely to be that other subjects have more urgency. It is a very expensive way to deal with Keating's great political diversionary ploy now that its author is himself politically dead.

If an indicative plebiscite is almost certain to be necessary, why not skip the Convention and go straight to the vote? This will shortcircuit much argument over who should be appointed delegates, the basis for election and the nature of consensus. It will save $50 million. And it will most likely find support from both sides of the constitutional divide, who think that the issues have already been amply canvassed.

If the plebiscite is conducted concurrently with the next federal election, taxpayers will save the cost of electing delegates *and* the cost of running a separate vote on the issues. Running the plebiscite at election time means that the politicians and the media will have other things on their minds (such as who will form the next government), it won't happen in a political vacuum and people will be able to consider this issue more or less unpressured by the hectoring classes.

The Convention should then take place *after* the plebiscite, not before. The same arguments against electing delegates will still apply, so why not ask the States to appoint two-thirds of the delegates if there are concerns about the federal Government stacking the Convention? If a republican option gains most support, the Convention can look at its implementation. If, however, the existing Constitution is the most favoured option, delegates can then consider the other possible changes.

This proposal involves no broken promise. The Government promised a vote and it promised a Convention, and the people will get both. But they will get them in a way which is cheaper and more likely to produce a "clean" result one way or the other.

If there is any sense of the adventurous -- of daring -- that still attaches to such a commonsense suggestion, it is not because it involves a breach of faith with the electorate, but because it begins from the premiss that governments have a responsibility to set their own agendas rather than following those of their predecessors, and some elements of this Government have only just begun to get used to the idea. The Greiner-Fahey Governments and the Brown Government are, among other things, reminders of the danger of spending so much time second-guessing your opponents and thinking in their terms that you become difficult to distinguish from them.

It's different in federal politics. I doubt, for example, whether we will hear very much from the Howard Ministry on the subject of `social justice'. But is it too much to hope for a definitive analysis of that cant term and all the objectionable rhetoric that goes with it? It would be a long-overdue purification of the dialect of the tribe, and that of journalists in particular.

Talk of social justice and cant brings us back to the subject of soft totalitarianism and Newspeak. One of my more intriguing tasks over the year since Peter Coleman's speech has been to note the ways in which P.C.'s defenders have dealt with criticism. Some, like Philip Adams, want to have a bob each way. That is to say, they deplore its more comical excesses while seldom questioning the solid core of left-liberal pieties. Others, like Eve Mahlab and Pat O'Shane, think that P.C. is just good manners turned into public policy and that to question it is, in the latter's phrase, "rubbish talk". The more devious exercises in denial have come from John Clare, Eve Mahlab and, more recently, Chris Puplick. P.C. is no more than conformity, which they say has been with us from the beginning of time. It is a moral equivalence argument -- this year's orthodoxy is no worse than its predecessor and may even be better, more progressive.

Chris Puplick goes even further. On the 27th of May he delivered a remarkable speech in which he claimed that all talk of political correctness was "nonsense on stilts". The term, he said:

> "... is a piece of American Newspeak about 5 years old, imported into the Australian debate in exactly the same way that the Thatcherite terms `wet' and `dry' were imported previously. They were imported for the same reason -- to obscure debate and label the political enemies you were not prepared to debate; and by the same people -- those without the moral and intellectual capacity to win their arguments without recourse to the use of meaningless slogans."

I am sure that I am not alone in being struck by the impudence of all this. As I hope to persuade you, if anyone in this debate is lacking moral and argumentative capacity it is the former Senator and now President of the New South Wales Anti-Discrimination Board. When Newspeak is being spoken, his the tongue. Others have called him the Crown Prince of complaint. But given his attitude to the Constitution, I think it more apt to conceive of him in terms of the Roman Empire in decline and the title then given to sub-imperial despots -- "Corrector of the East". In the same speech he talks with pride of being "an unashamed social engineer". It is something which, I think, no serious person nowadays could say, inviting as it does the charge of moral cretinism as well as dimwittedness. Perhaps we should be content to call him Nanny Puplick and leave it at that.

But a bad nanny may do a lot of harm, unchecked, so let me pursue the argument. First of all, Nanny's history is awry. It was that former doyen of the New Left, Bob Catley, who recently pointed out that they first used the term, and in earnest. I recall a variant of it in the gay movement in the mid '70s, when people were forever worrying about whether, as Chairman Mao used to say, "error has been committed" and whether they were "ideologically sound". I remember straighfaced feminists in the early '80s debating whether positions were "politically correct", and in Aboriginal activist circles like the Central Land Council there was interminable discussion in the mid-'80s about "correct line thought" -- or C.L.T. for short. It may be painful evidence of what humourless numbskulls the Left and members of the "social movements" of the last 40 years have tended to be -- and how preoccupied with orthodoxy -- but this little history lesson will I hope make it clear that P.C. is not a recent, American, right-wing import. Oh Nanny, No Nanny, No.

Puplick's speech repays close reading -- not for the quality of its logic, but because it is a classic example of the way in which P.C. attempts to colonise the world of argument. He starts from a basic premise -- the concept of equity -- so much more fashionable these days even than motherhood and at least as rhetorically manipulable:

> "The concept of equity itself derives from something which is far older, far more deep-seated and resonant than any formal system of law could be -- it derives from a sense of how we see ourselves as sentient creatures, which in turn determines how we see others and how we interact with them. It derives, as does the concept of fairness, from some deeper, spiritual, moral sense -- something which we know even if do not understand; something we can recognize even if we cannot articulate."

Now this is simply visceral politics, the appeal to gut feelings. And, as Les Murray memorably put it, "the emotions are not skilled workers." Sorting out what is fair is often a complex matter, calling for the judgment of Solomon, often counter-intuitive and a process in which instinct has no role. The idea that a sense of fairness is innate, universal in human beings is at best naive.

Still, from asserting that we all share an understanding of this sacral urge to saying "I'm from the Government and I'm here to help you" is no vast step for Puplick. Who could object to ending unfairness and discrimination, after all? Besides, Nanny knows best. Doesn't she? Oh Nanny, No, Nanny, No.

An example of how complex the issues are and how far from perfect the Anti-Discrimination Board's understanding of them emerged last week. Marlene Goldsmith wrote about it in *The Sydney Morning Herald* of Monday, June 3:

> "The NSW Legislative Council is about to debate new transgender vilification legislation that will, in effect, allow transsexuals free access to most female sport. In spite of a theoretical exemption for women's sport, the legislation will, by providing female birth certificates to transsexuals, allow them to compete in all but the elite levels, where chemical testing may occur.
>
> "If women should have separate sporting competitions from men because of their different physiology, then this legislation is grossly unjust. While transsexuals identify as female, they have physical characteristics that give males an advantage in sports.
>
> "Yet in 1991, when sportswomen tried to point out the unfairness of allowing Ricki Carne, a transsexual, to compete in female sports, they were howled down and attacked by the media."

There are many for whom transsexuals are intrinsically funny or contemptible and a concern for their civil rights seems ludicrous. I don't share those views, and recently found myself defending those transsexuals who were threatened with exclusion from the revels which follow the Mardi Gras. But the idea that self-defined identity should triumph over biological reality is bizarre, utterly misconceived and profoundly unfair. It is noteworthy that the media, our moral arbiters, should have attacked the sportswomen who objected -- a lesson in how contemporary power élites work.

I have referred to a certain obtuseness in Puplick's argument and some of you may think that I have made out my case, perhaps run the risk of over-egging the pudding. Even so, let me conclude by trying to sort out one last categorical confusion into which Nanny has fallen.

"The first truth about so-called political correctness," he tells us, is that it represents "the emergence into the Australian political debate of the heretofore marginalised and ignored -- women, indigenous Australians, gays and lesbians, the poor, people with disabilities, non-native English speakers, those concerned with political agendas which are not about economic growth, making money, distributing wealth or rearranging the deck chairs on the financial Titanic."

> First another short history lesson. Curtin and Chifley's shades would be distressed to think that the poor and the marginalised had had to wait until Nanny and the 1990s to enter the political debate. Catherine Helen Spence would take a similarly dim view on behalf of last century's feminists. Note again how his argument expects the past to suck up to the present -- as a pale, shabby portent of our enlightenment. Such is his triumphalism that he cannot resist quoting Tennyson -- Arthur speaking from the barge: "The old order changeth, yielding place to the new
>
> And God fulfils himself in many ways,
>
> Lest one good custom should corrupt the world."

Casting a cold eye on these triumphs, it is clear that P.C. disenfranchises people in a different dimension to the economic, corralling them into the world view and the political constituency Robert Hughes identifies as the culture of complaint. It is not, as far as I can see, true of those who have written about P.C. in Australia that they object to the enfranchisement of the economically or socially marginalised, that they support gay-bashing or are indifferent to the predicaments of Aboriginal people. Rather they tend, like the rest of us, to look at actual trends in the distribution of wealth and actual erosions of liberty, and to distrust the *hubris* of Big Government and the tactics of Big Brother.

Chapter Nine

Overlap and Duplication in Federal -- State Relations

David Trebeck and Greg Cutbush

The original recipient of the invitation to address this conference was subsequently summoned to New Zealand to deliver a second paper, on another topic, but at the same time. This seems a good example of overlap and duplication at work! Hence this paper has two authors.

Overlap and Duplication vs Commonwealth/State Power

"Overlap and duplication between the Commonwealth and the States" is one of those expressions which rolls easily off the tongue. Most people are against it. Everyone is talking about it -- like the galah in the petshop chattering about microeconomic reform, as Paul Keating once remarked. Indeed, the subject has been discussed before this Society on an earlier occasion, by Des Moore.(1) His paper focussed on the increasing grab for power by the Commonwealth as it "seeks to involve itself more and more in the provision of the services administered by State Governments". In this sense, he suggested that:

> "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."

In considerable detail Moore's paper then discussed specific purpose payments from the Commonwealth to the States, with the conclusion that they should be abolished in favour of general purpose payments.

Since last November's conference, a good deal of water has flowed under the bridge. The change of government in March has, of course, seen issues of Commonwealth-State relations take on a new life. Following on from the Auditor-General's February, 1994 Special Purpose Payment report and the Industry Commission's Annual Report coverage of the issue in September, 1994 (both mentioned by Des Moore), the subject was included in the terms of reference of the Commission of Audit, the report of which is due to be handed to the Government within the next 10 days. Term of reference (vi) states:

> "The Commission should focus on identifying duplication, overlap and cost shifting between the Commonwealth and the State/Territory tiers of government in delivering services, and recommend measures needed to promote more efficient service delivery, having regard to the need to improve outcomes for clients and value for money for taxpayers. This should include examination of the appropriate roles of the Commonwealth and the States/Territories, the relationship between service funder and service provider and the scope for contestability in service provision."

It is likely that the subject will feature strongly in the forthcoming Budget, if not before.

Some of the work on which Des Moore's paper drew was the major project sponsored by the Leaders' Forum (comprising State Premiers and Chief Ministers) under the title of "The Australian Federation 2001" and with the following general focus:

> "What the roles of the different levels of government in the Australian Federation, and the relationships between them, should be."

The Institute of Public Affairs was commissioned, via the Victorian Premier's Department (which was then chairing the Leaders' Forum), to undertake this work. In turn, IPA commissioned ACIL to conduct one sub-project:

> "Specify, and where possible quantify, the costs to the States and Territories, the Commonwealth, the economy and the community resulting from overlap and duplication".

Our task was not to question the existing disposition of roles and functions between the Commonwealth and the States but, taking that as a given, to assess and quantify the costs involved. Thus we were focusing on `genuine' overlap and duplication of the type which Des Moore, in his context, found to be a misnomer.

As is now known, the Leaders' Forum research was somewhat de-railed late last year when an unrelated paper, which revisited the case for a broad-based consumption tax, was placed on the public record in an attempt to secure political gain. The Premiers responded by making the remaining material publicly available without giving it any overt publicity. Some references subsequently appeared in the press, but there was little coverage, let alone analysis, of the issues.

Against that background, in this address we will highlight some of the main points from our research and conclusions. We will then go beyond that brief to make some observations about what should be done in the disposition of functions between the Commonwealth and the States, which to us is the bigger and more important issue.

What is Overlap and Duplication?

While the common understanding of "duplication and overlap" is synonymous with "waste", and therefore undesirable, some people acknowledge that a degree of overlap and duplication is an inevitable consequence of a federal system of government. Indeed, it may be seen as part of the checks and balances to the unbridled use of executive power, or as adding value to the quality of decision making or service delivery and, as such, to be desirable.

A threshold issue is to define what the terms actually mean. In our study, we took *duplication* as implying an identical function being undertaken by both tiers of government in a non-contestable market. One example, now thankfully resolved, was that of meat inspection, where both Commonwealth and State officials previously had responsibilities requiring a physical presence in abattoirs, performing virtually identical functions, one to provide export certification, the other in a domestic market context.

Overlap, in the normal management decision-making framework of setting goals, deciding strategy, implementing decisions and monitoring performance, could be said to exist whenever responsibility for a particular type of decision is shared between different levels of government in ways which are likely to raise the cost of service provision. In this sense, it is possible to identify different degrees of overlap:

- there is no overlap when one layer of government has sole responsibility;
- there is a low degree of overlap (some requirement for monitoring of performance) when one party is clearly the principal (setting policy) and the other is the agent (implementing policy);
- there is substantial overlap when both levels of government are actively involved in making policy in a particular area, with only one level involved in implementation; and
- there is complete overlap (duplication) where both layers are responsible for making policy and implementation in respect of a particular function.

We also identified *direct* and *indirect* overlap. In plain language, we defined the direct costs of overlap as the needless repetition of effort. The indirect cost of overlap, by contrast, we took to be the waste caused by the pressures created on State and Territory governments to alter the mix of their spending and effort.

Special Purpose Payments to the States

In 1993-94, nearly $17 billion, or just over half of total payments from the Commonwealth to the States, were in the form of Special Purpose Payments (SPPs). A common condition imposed on SPPs is a requirement for matching funding. It is also common for SPPs to require that funds be applied to a particular project and not be redirected. Other conditions may apply. For example, in the transport sector, funding for the Australian Bicentennial Roads Program included a "maintenance of effort" requirement whereby the States were required to maintain average real expenditure on roads at or above the average level that had occurred over the five years prior to the program's commencement. Similarly, Medicare SPPs prevent the States means testing access to public hospitals, and so on.

More generally, SPPs are used by the Commonwealth to provide a degree of control over the application of funds by the States. They allow the Commonwealth to channel funds toward "national priorities". In cases where the recipient jurisdiction is required to provide matching funding as a condition of the payment, SPPs can also leverage federal funding. For example, in the field of mental health, where the Commonwealth currently provides less than 2 per cent of total funding, it is able to exert a disproportionate degree of influence, according to the States.

Some State and Territory governments and economic commentators have suggested that SPPs limit budgetary and policy flexibility and contribute to duplication of administration and role confusion.(2) SPPs have also been criticised on the basis that they may reduce incentives to improve productivity, since savings achieved through efficiency improvement cannot be redirected. The Industry Commission has suggested the need for "further analysis of the effects of SPPs on the budget flexibility of State and Territory governments, as well as an assessment of the extent of duplication between governments and its costs to the economy."(3) The Industry Commission notes that, if SPPs result in duplication of services or excessive administration, resources that could be better used delivering services, or allocated elsewhere, will be wasted.

The Practicalities of Measurement

It follows from this description that overlap and duplication are more likely to arise in the areas of specific, rather than general purpose payments. Therefore, attention in ACIL's study focussed on the four major expenditure categories of transport, housing, education and health, where SPPs are concentrated.

In principle, there are two different benchmarks which could be used to assess the extent to which running costs of government programs are raised by overlap and duplication associated with present funding/administrative arrangements. Under the first benchmark, all Commonwealth funding would be provided to the States and Territories via general purpose payments, so there would be no Commonwealth administrative effort required to administer specific programs. Under the second benchmark, the Commonwealth would undertake all activity and no costs would be incurred by the States. The two benchmarks would give different results if either the Commonwealth or the States were able to provide the services at a lower cost, for example, as a result of economies of scale (which would favour a centralist approach) or the advantages of decentralisation (such as being closer to service recipients). In practice, making carefully considered quantitative estimates against these benchmarks is not easy.

Utilising ABS data and departmental annual reports, we first attempted to ascertain estimates of corporate overheads, covering such activities as corporate support, accounting and project management, policy, computing, training, communications, human resource management, internal consulting services, and the like. These do not involve direct service delivery to final clients. They also comprise those areas of expenditure where different tiers of government interact extensively.

It turns out that departmental annual reports, especially at the State and Territory level are quite variable in the detail, form and quality of presentation, which makes the compilation of a consistent picture at even an aggregate level more complicated than it should be.

This "first pass" over the data leads to estimates of *direct* overlap and duplication. In the case of transport, for example, after determining estimates of overhead costs across various functional categories, we applied one of three, somewhat arbitrary, "factors for potential overlap and duplication":

***** a 10 per cent factor -- for those activities where the Commonwealth is the main service provider, but undertakes some liaison, policy development, standards setting or other works involving the States;

***** a 20 per cent factor -- for activities where there is substantial interaction with state agencies; and

***** a 100 per cent factor -- for activities where the Commonwealth has no direct program delivery responsibilities but merely administers funds to or through the States, or programs entirely devoted to national regulation issues.

Typically, these estimates of direct overlap and duplication are low relative to total program expenditure -- of the order of 1 per cent or less for overall departments or large programs, and somewhat higher for smaller or newer programs.

The next stage was to examine in greater detail particular programs where significant overlap and duplication is suspected. Our view was that such *indirect* overlap on duplication was likely to constitute the real story, but that details were likely to be well hidden, possibly deliberately so, from public documents, or the effects more subtle than a quick glance would reveal. For this reason, we held discussions with appropriate officials in line departments and central agencies and then undertook some specific case studies.

A paradox here is that the finer the level of disaggregation, the less is overlap likely to be identified in the sense that, say, no two public servants (one at the Commonwealth level, the other at the State level) are likely to be engaged in *precisely* identical tasks over any extended period of time.

A third source of information is provided by recent external studies, such as the Industry Commission's review of public housing(4) or the House of Representatives Standing Committee on Transport, Communications and Infrastructure's review of road funding.(5)

Indirect overlap and duplication come in various forms. They include costs of policy and strategy negotiations (including Ministerial Councils), incentives which reward inefficiencies or have perverse effects, additional staff resources used in accounting for fund transfers and communications, and travel and conferences. Some of these items may be minor in financial terms, others more costly. They represent the leverage impacts of administrative and policy decisions on the actual program areas where the major expenditure occurs. Examples include:

* the costs of delays to a major capital works program as a result of an unwieldy decision making process;

* the costs of failing to address the most worthy projects because the funds allocation processes may involve a trade-off between differing Commonwealth and State objectives; and

* the costs of delays in implementing decidable regulatory reforms, or of sub-optimal outcomes, as a result of complex trade-offs and "lowest common denominator" effects which can occur when several jurisdictions have overlapping responsibilities.

These impacts of overlap and duplication may not be all negative, nor may the costs necessarily outweigh the benefits. As one commentator has observed:

> "Proponents of a more efficient system of government usually support a greater, and more clearly defined, role for Commonwealth and State governments... but eradicating duplication and overlap can be synonymous also with reducing available policy options... Administrative checks and balances contribute to the overall stability of the federal system; citizen demands are more likely to be addressed by the combined operations of several governments rather than through the limited efforts of one central authority."(6)

According to this view, duplication and overlap between the different levels of government help to ensure that checks and balances are maintained in the policy formulation process, with the different levels of government "keeping each other honest".

While acknowledging these advantages, our conclusion is that the disadvantages, in terms of unclear objectives, poor accountability, perverse incentives and additional costs, outweigh them.

What We Found

Before coming to quantitative estimates, some of the qualitative conclusions we have drawn from our research are as follows:

* the extent of overlap and duplication has been tending to increase over time, especially as the Commonwealth extends its involvement into issues once largely or exclusively the domain of States and Territories; quite apart from changing constitutional interpretations, the Commonwealth's financial dominance provides the muscle for this increasing role;

* direct overlap and duplication are low and variable relative to total program expenditure; moreover, while they occur at both levels of government, care must be taken to avoid double counting;

* in a number of situations, the conditions imposed by the Commonwealth can exert perverse incentives on the States:

- for example, in the health arena, the set of Bonus Pools and the Medicare Benefit Supplement contain penalties which, while designed to reduce costs to the Commonwealth, have the effect of encouraging the States to divert patients away from private hospital care, in the process adding to their own costs, not the Commonwealth's;

- other health cases where similar perverse effects arise are associated with the Home and Community Care Program and the National Mutual Health Strategy; these are described in some detail in ACIL's report;

***** while attempts have been made in many areas of expenditure in recent years to streamline Commonwealth-State relations and reduce overlap and duplication, significant problems still remain and in some areas have intensified; and

***** a common criticism by the States is that the Commonwealth insists on remaining too involved in the details, and that the process for obtaining funds and accounting for their acquittal are excessively drawn out, complex and costly.

The following table provides our estimates of the extent of overlap and duplication in the four program areas studied, in 1993/94.

Tentative estimates of the direct and indirect costs of overlap and duplication, 1993-94 ($m)

Activity	Direct	Indirect
Transport	45	17
Housing	30	12
Education	6	70
Health	39	50

Despite the detailed research which underpins these estimates, we remain cautious about their robustness, let alone the appropriateness of extrapolating them across all areas of government expenditure.

To many people, the estimates may appear surprisingly small in the total scheme of things. Certainly, we have sought to err on the side of conservatism. Our two overall comments would be that:

***** merely "eliminating overlap and duplication" will not of itself solve the Commonwealth's fiscal problems; but

***** opportunities to reduce, if not eliminate, such costs -- largely in the nature of deadweight losses on the economy -- should be vigorously pursued wherever they may be found, because doing so will make a valuable contribution to more efficient as well as smaller government.

Sovereign Risk Arising from Overlap and Duplication

The second, and in many ways the more interesting part of our study was to examine the issue of sovereign risk arising from overlap and duplication. The question being posed here is: to what extent would investors and financiers take a different, more favourable view of Australian projects if the risks flowing from the additional government involvement that is implied by overlap and duplication of decision-making responsibility between the Commonwealth and the States were eliminated? This is not an issue which, to our knowledge, has been widely or systematically studied previously. That it is an important one goes without saying.

This is a somewhat different (more confined) concept than the more popular understanding of sovereign risk in current business parlance. Therefore we used the term *government approval risk* to denote that element of generalised country risk which relates to the possibility of government approval for a project being withheld or withdrawn, or the terms of such approval being unilaterally modified in a manner prejudicial to the project.

To explore the concept we focused mainly on four recent examples: woodchip export licensing; Shoalwater Bay mineral exploration; the Hindmarsh Island Bridge construction; and the Port Hinchinbrook Resort proposal. These examples served to illustrate that government approval risk incorporates a wide range of actions by governments which can impact on the commercial

performance of projects. Duplication and overlap between different levels of government turns out to be a factor in some, but not all, cases. Incumbent government effects (that is, following a change of government at an election), policy effects ("shifting the goalposts") and legal effects (such as the *Mabo* case or changes to royalty regulations) can be observed, both at an intra- and inter-government level.

Cases such as Shoalwater Bay owe little, if anything, to overlap and duplication between tiers of government, as they stem from decisions made by a single level of government. Other cases, such as Hindmarsh Island Bridge and the Port Hinchinbrook Resort, clearly involve Commonwealth intervention to override State authorisations. A third group (such as the Tully-Millstream Hydroelectric Project and the Century Zinc Project) involves indirect overlap of responsibility in that the Commonwealth's role, while crucial, was not directed against a project *per se*, but at a wider issue (such as world heritage listing or native title).

The result of the Commonwealth having become more active in matters previously the main preserve of the States is to make the approvals processes more conservative: both tiers of government need to reach a positive decision for a project to proceed.

In the course of ACIL's analysis, discussions were held with representatives of the business community -- both project developers and financiers -- to ascertain first-hand experience in dealing with government approval risk. There are clear examples of breakdowns in approval processes which have entailed significant costs for developers. The evidence suggests that the market has responded to the incentives built into these complex and often unpredictable approvals processes by adopting a particularly conservative approach to development prospects -- projects which stand a good chance of receiving approval are not being considered for development because of perceptions of the risks involved.

The overall conclusion is that the risks which can be attributed to interactions across tiers of government constitute a relatively small component of project risks, and even of wider government approvals risk, for most projects. For the types of projects we considered, the approvals processes are complicated, costly and probably discourage the more marginal proposals, but are unlikely to cause great damage across the economy as a whole.

However, in specific areas where past experience indicates a greater chance of projects being de-railed -- such as sandmining and tourism development in sensitive areas -- there is evidence that prospective developers are declaring "no go" areas in which the investment conservatism referred to above is probable. It is difficult to quantify the extent of these effects on the economy but, based on the examples and evidence assembled, it is likely to be quite significant.

Specific issues identified during these discussions include:

***** widespread and continuing anxiety that the validity of existing or future approvals remains suspect, particularly in the light of the Sackville decision;

***** the "shifting of the goalposts" problem is more apparent when a tier of government becomes involved in an approvals process midstream, such as in the case of the Wesley Vale pulpmill project;

***** some State agencies now seem loth to make decisions because they may be invalidated by the Commonwealth or the courts, inducing a form of decision-making paralysis at State level; and

***** financiers endeavour to pass the risks of approvals failure on to developers, but they note that, once proposals are put to financiers, they are rarely stopped because approvals are not forthcoming.

The balance between pro-development and pro-conservation forces can be better managed by making decision-making processes clearer and less susceptible to manipulation for political expediency or other reasons. Clear, robust and explicit guidelines, based on agreed principles, will allow improved decision-making accountability and transparency, regardless of who makes a decision and whether it is favourable or not to proponents.

It is not difficult to show that this matter is important to the economy.

According to official figures, private investment (expressed as "gross fixed capital expenditure by the private sector" in Australia) in 1994-95 totalled $78.6 billion.(7) If an amount equivalent to just 0.5 per cent of that figure were deterred, that would represent roughly $400 million of investment not taking place. The GDP contribution of an investment will be the value added it generates (that is, wages and other returns to factors net of bought-in goods and services) and this is likely to be at least 25 per cent. Thus the GDP loss caused by deterred investment could be roughly $100 million annually.

This is separate and distinct from the direct and indirect costs of duplication we referred to earlier. It suggests that the total costs of overlap and duplication to the Australian federation might be close to $400m per year in today's money. And since this is an annual cost, it may be fair to say that it is equivalent to a once-only lump sum of GDP of $4 billion -- an amount well worth saving indeed.

Some Thoughts on Policy

In concluding, we will stray briefly beyond our terms of reference, both as regards the ACIL study and this paper, to offer some thoughts about what we should be doing in a policy sense to address costs created by overlap and duplication. This is a more interesting question than the one we were set. Of course, we will be watching carefully what the Commission of Audit has to say on the subject the week after next.

Vertical fiscal imbalance (VFI), a problem central to the subject of Cliff Walsh's address which we were to hear this morning, is partly to blame.

However, we assert that the needless and pointless aspects of duplication and overlap -- that is, essentially the costs of SPPs which have no offsetting *policy coordination* or *spillover internalising* or *uniformity of standards* benefit for Australia -- arise only partly because of the mismatch of responsibilities and taxing powers of the two levels of government (ie VFI), and more particularly because of a deep-seated confusion at both levels about the proper role of government in society in the first place. Bureaucratic empire building is also a cause, but arguably a subsidiary of the other two.

We would say this prognosis holds whether you view the States or the Commonwealth as the main perpetrators of duplication and overlap waste. Either way, it boils down to one or the other of them not "knowing their business" or not "minding their own business". But if you accept, as we do, the subsidiarity principle (which can be liberally interpreted as saying: "when in doubt leave it to the lower tier of government"), then much of the problem can be laid at the Commonwealth's door.

One is particularly struck by conclusions such as Mark Harrison's about the higher education budget. For example, on tuition subsidies he recently observed:

> "It is difficult to give current tuition subsidies an efficiency rationale. The pattern of subsidisation does not reflect any plausible notion of externality production. Tuition

subsidies for all are poorly targeted at capital market imperfections, as those not facing capital market constraints receive them as well. Rationing by academic merit not only creates efficiency costs but also means those least likely to face capital market imperfections are most likely to receive the subsidies. Moreover, current subsidies are inequitable".(8)

The implication one may draw is that the rationales for many long standing policies would not stand up to close examination.

VFI has probably been given ample coverage, and in any case, duplication and overlap are not its most important casualties. By contrast, it occurs to us as economists that the analysis of the proper role of government, at any level, warrants much greater attention. The Commonwealth, in particular, should sponsor more analysis of this kind. We are confident that a substantial rationalisation of duplication and overlap would follow.

The most lasting contribution of work such as the study ACIL undertook for the Leaders' Forum through IPA, may be the way it helps uncover and bring into public view the complex tangle of measures which many of the traditional SPP areas entail. Upon seeing them in detail for the first time, our reaction was that a great many would be difficult to justify no matter which level of government undertook them.

Endnotes

1 Des Moore, "Duplication and Overlap: an Exercise in Federal Power", in *Upholding the Australian Constitution*, *Proceedings of the Sixth Conference of The Samuel Griffith Society*, November, 1995, pp.37Ä64.

2. For example, Industry Commission (1994), *1993Ä94 Annual Report*, p.29.

3. *Ibid.,* p.31.

4 Industry Commission (1993), *Public Housin*g, Volumes I & II, Report No. 34, November, 1993.

5. House of Representatives Standing Committee on Transport, Communications and Infrastructure (1994), *Report on the Efficiency Audit Review of the National Highway Program.*

6. Fletcher, C (1991), *Responsive Government: Duplication and Overlap in the Australian Federal System*, ANU Federalism Research Centre, Discussion Paper No 3, p.1.

7 Australian Bureau of Statistics, *Australian Economic Indicators*, November, 1995 (Catalogue 1350.0).

8. Mark Harrison, *Government Funding of Higher Education in Australia: Rationale and Performance*, Unpublished Working Paper, Department of Economics, Australian National University, October, 1995, p.21.

Chapter Ten

Parliamentary Democracy in Australia : Some Supplementary Thoughts

Rt. Hon. Sir Garfield Barwick, AK, GCMG

In the paper on parliamentary democracy which was read on my behalf to The Samuel Griffith Society in April last year, I emphasised the need in the future to restore the authority of Parliament, but I did not pause in that article to develop the steps by which this might be attained. I propose now to do that.

Much that I will write will appear trite to those familiar with our system of government but it is necessary for me to round off what I have to say by referring to this material.

At a general election the participants nominate the party which they support, so that when the result of the general election is known it is possible to say how many of those elected support one party or the other. Therefore, when the Governor-General performs his duty of selecting a ministry which he will head to form the Government, he can tell which party has received majority support of those elected to the Parliament, Senate and House of Representatives. As the ministry he will appoint must depend upon the Parliament for the funds necessary to carry on government, naturally he will choose the leader of the party with majority support as his chief minister. I need not pause to consider the question in the instance of a hung Parliament.

In a Labor administration the ministry is chosen by election by the elected members who will provide the majority support and the Prime Minister can assign the portfolios amongst the elected ministers. When the Governor-General's appointed ministry to govern the country is complete those elected to Parliament, whether to the Senate or the House of Representatives, from whom the ministry has been chosen, fall into two distinct groups: the ministry, and the elected members of Parliament who are not ministers.

These two groups have divergent functions: the ministry is to govern the country; those who are not in the ministry have the function of controlling the funds which will be made available to govern the country. This function is performed by consideration of and voting upon the proposals for revenue raising and expenditure put forward by the ministry, first in the broad when the Budget itself is considered and then in detail when the estimates go before the Parliament as a committee of the whole. The process of choosing a Government is really not beyond question until the Budget estimates have been accepted by the Parliament.

To cover the period which must necessarily elapse whilst the Budget and estimates are considered and voted upon, it is customary for the Parliament to grant temporary Supply, which is expressed to be available to a date late in the year, but this is done on the premise that the Budget will be carried. If the Budget is not carried, temporary Supply will be available to fund an election, but not to enable the Government to continue to govern.

The other function of those elected to Parliament and not chosen as ministers will be to consider the terms of any legislation proposed by the ministry and any executive action taken by any of its members. Thus my first point is that, although all the members of Parliament are elected, those who support the party which has won the majority of seats, Senate and House of Representatives,

have these two distinct and separate functions: the ministry to govern, the rest to control the finances of the country and to supervise legislation and executive action.

Now in Labor administrations for more than thirty years all the elected members of the Labor Party are lumped together to form a Caucus in which the policies of the Government and the detail of legislative and executive action are discussed and determined. The important point here is that by the adoption of a Caucus the distinction between the function of the ministry and the function of those who are not chosen as ministers is completely blurred.

Another result is that when Caucus has decided on the terms of the legislation to be proposed to the Parliament or executive action to be taken, the whole Caucus is bound to support the proposals, notwithstanding any difference of view which the members of the Caucus, may have expressed with respect to the legislative or executive action. When the proposal or executive action comes before the Parliament its fate is already determined, the Parliament being denied the chance of knowing what has taken place in Caucus, and members of Caucus who may have dissented from the Caucus decision will be bound not to disclose their differences to the Parliament. In brief, the Parliament as such is expected to rubber stamp the ministry's proposals or executive action. I believed that this use of the Caucus was probably a by-product of the long period Labor was in opposition during the years of the Menzies and Holt administrations, but I have been told, and I accept, that it developed at an earlier time. However, it was a product of Labor's egalitarian view that all members of Parliament should be entitled to receive the same information and participate in government decisions.

The necessary consequences of this Caucus control of the Parliament, whether designed or not, is that the much vaunted checks and balances of parliamentary democracy are bypassed and no longer operate, particularly when Labor is in government. In other words, particularly under a Labor administration, the Parliament is treated as a rubber stamp for the Caucus, and the country is not governed by a parliamentary democracy at all but by the Caucus, which is unchecked except that it must formally obtain the predetermined consent of the Parliament.

On the other hand, in my experience as a minister of the Menzies administration, in a Liberal Party meeting of members the distinction between the ministry and the rest of the elected members was maintained, the ministers being seated behind the Prime Minister at one end of the room and the backbench (as those not chosen as ministers are commonly described) occupying the other end. Questions of the ministry are put by the backbench as well as suggestions for action to be taken. Ministers are called to make explanations of the legislation which is proposed in their portfolios, and generally are required to answer questions from the body of the meeting. Thus, although in the Parliament the backbench will be expected to support the ministry, a degree of dissent on the part of the backbench will be tolerated, certainly as to the detail of the legislative measure or executive action which is concerned. In other words, in the ultimate resort the Whips are available to the Government.

In my experience this adequately describes the differences between the Labor administration and the operation of a Liberal group so far as the recognition of the difference between the function of the ministry and that of the backbench is concerned. Whilst some differences of opinion between the ministry and the backbench would be tolerated, no doubt the backbench would be expected to support the ministry, and does so.

There ought to be some understanding as to the matters upon which the backbench is expected to support the ministry. A rule could be made that, as to any policy which had been nominated by the party at election time, and for which it might be claimed it had an electoral mandate, the members could be required to support legislation to effect such a policy. That would leave the

detail of the legislation for discussion and decision. It is of course a breach of parliamentary privilege for a member to be subjected to any disadvantage because of the way he voted in Parliament. Such a rule as I suggest might be accommodated to the idea of parliamentary privilege.

Now in relation to the authority of Parliament, this failure adequately to distinguish between the functions of the ministry and that of the backbench has meant that the Parliament has become, as it were, a rubber stamp for the ministry, and legislative proposals and executive action are not adequately discussed in the Parliament, decisions having been taken in the Caucus.

With the formation of the Caucus as an undifferentiated body and the resultant effect on the Parliament, the country ceases to be governed by a system of parliamentary democracy after the Westminster system and becomes governed by Caucus, and a Parliament whose decisions are pre-empted by those of the Caucus.

So the first step towards reinstating the authority of Parliament would be to identify and emphasise the difference of function between the ministry and the backbench. The second step would be to foster discussion in the Parliament of the detail of the legislation and of executive action. In other words, the independence of the Parliament of the ministry needs to be secured.

The fact that a ministry is appointed as such to hold office during the time it retains the confidence of the Parliament needs to be recognised. The blurring of the difference between the functions of the ministry and the backbench should not be allowed to support the assertion that the Government is elected as such, whereas it is in truth appointed as such. Parliamentary democracy depends upon an independent Parliament performing the functions of controlling the finances of the country and participating in the legislative function of the Government.

Whilst an undifferentiated Caucus is established there is little chance of an independent Parliament developing. Indeed, the undifferentiated Caucus not only prevents an independent Parliament from developing, but encourages the notion that the Government itself is an elected Government whereas, on the contrary, it is an appointed Government holding office on sufferance. So essential steps to reassert the authority of an independent Parliament will need to begin by the abandonment of the Caucus system and the differentiation of the appointed ministry and the elected backbench, and an emphasis upon the divergent functions of each group: the ministry to govern, the backbench to see to the raising of revenue and its expenditure and the discussion of principles upon which legislation should take place.

This step in the case of a Labor administration is unlikely to occur because of the entrenched Caucus system with its undifferentiated distinction between the ministry and the Parliament. In the case of the Liberal coalition it would involve abandonment of the requirement that members of the party necessarily support the action of the ministry by endorsement in the Parliament. It would involve a change in the way in which the Parliament functions, allowing for dissent on the part of the members of the backbench and a more discursive conduct of the affairs of the Parliament. But if parliamentary democracy is to be restored it is unquestionably essential that an independent Parliament be fostered.

In my earlier paper I called attention to the effect of the party system on parliamentary democracy, and it is evident that to sustain parliamentary democracy there must be some drastic modification of the party system.

I have suggested that the party can insist upon its members voting for policies which had been nominated at election time and for which the party has received an electoral mandate. This would leave the detail of the manner in which the policies are implemented to be discussed and decided, and in this discussion and decision members of the party should be free to express their own

opinions. I realise that this proposal would create difficulties for a Labor administration but if parliamentary democracy is to be restored they must be overcome, no doubt by discussion and agreement.

Concluding Remarks

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

I have been accorded the privilege of making a few remarks on our proceedings. It would serve no useful purpose if I were to summarise, still less if I were to repeat, what has already been said. Thus I shall not attempt to reproduce the valuable remarks made by the Honourable Dean Brown on his experience of the working of the federal system, although I should, I think, mention one question of basic principle which he raised, namely, whether the end (the attainment of a desirable uniformity of legislation) justifies the means (the subversion of the process of parliamentary democracy). Nor could I hope to recapture the wit with which Mr Christopher Pearson excoriated the practitioners of political correctness, although I cannot forbear to notice how one of those practitioners used the words of Jeremy Bentham ("nonsense on stilts") in a context which would have excited Bentham's scathing ridicule.

We have been promised a Peoples' Constitutional Convention in 1997. One wonders how it will be convened and what it will achieve. One hopes that no centralist or republican lobby will be allowed to get control of its proceedings. No doubt the idea of the Convention was a response to the clamour of those who would convert Australia to a republic. However, if the Convention meets, there are other constitutional issues, of great practical significance, that would warrant urgent attention. One of these is the question how one can inhibit the intrusion of Commonwealth legislative power into areas of power which were obviously intended to be entrusted to the States.

One important reason for the unwarranted expansion of Commonwealth legislative power is, as we all know, the wide effect that has been given to the power to legislate with respect to external affairs. Professor Howard has suggested an amendment to the relevant paragraph of the Constitution which might well serve as a basis for discussion at the Convention. I must confess to a certain attachment to Senator Durack's draft, since it echoes the words of a judgment of my own, but I can see the force of some of Professor Howard's criticisms of that.

However, at this stage, it would be idle to commit ourselves to one draft or the other. A person would need to be optimistic to suppose that any particular draft would survive, unamended, the scrutiny of a Constitutional Convention, that is, supposing that the Convention was favourably disposed to recommend an amendment to the external affairs power. For our purpose it would surely be enough that either, or both, of these drafts should be taken as the starting point of a serious attempt to confine the external affairs power within proper limits.

Another grave defect of our present Constitution is that it results in an overlap or duplication of bureaucratic effort, when Commonwealth and State officials operate in the same field. The ability of the Commonwealth to intrude into State affairs in this way is largely due to its power to make special purpose payments under section 96 of the Constitution. Dr Trebeck's paper showed that there are very considerable indirect costs as well as direct expenses resulting from this situation. The Constitutional Convention would perform a useful function if it could produce an acceptable definition of the respective roles of State and Commonwealth Governments, if it could attempt to remove the vertical fiscal imbalance that presently exists in

Commonwealth/State relations, and if it could solve the very difficult question of how the power to impose conditions on Commonwealth grants could be sensibly limited.

If the Constitutional Convention comes to consider the republican issue, I hope that it will heed Professor Howell's recommendation that what should be put to the people is the entirety of the constitutional amendment that would be necessary to bring a republic about. To put only the question, do you want a republic, or, even more disingenuous, do you want an Australian Head of State, would be to disguise the true nature of the issues from the public.

For the purpose of changing Australia from a constitutional monarchy to a republic, it would be necessary to decide a number of difficult questions - for example, how can one devise a method of appointment and dismissal of the Head of State that will preserve the political impartiality of the holder of that office, should one codify the reserve powers, and if so, in what form, and what should be the position of the Governors of the States? It may be that the complications of any necessary amendment would deter most voters from supporting it, but to place before the voters anything less would be tantamount to fraud.

The question whether the flag should be given constitutional protection should be considered by the Convention. An amendment to the Constitution, entrenching the position of the flag, would be easy to draft, simple to understand, and likely to be acceptable to the public. Until the Constitution is amended in that way the statutory provision proposed by Mr David Jull has much to commend it. True it is that such a statute would not bind a future Parliament, but a statutory requirement that the national flag should not be altered except in accordance with the wishes of the people expressed at a plebiscite would have considerable moral force.

Dr Craven's paper on the appointment of High Court Justices reminded me that when Lord Halsbury was Lord Chancellor he was widely rumoured to have made judicial appointments as a reward for political allegiance rather than because of legal merit. Before I go on I should perhaps mention, for the benefit of those whose Latin may be a little rusty, that the phrase I am about to use, *ceteris paribus*, means "other things being equal". A loyal supporter who could not accept the truth of these rumours once asked Lord Halsbury whether, *ceteris paribus*, the best man would be appointed to the position. Lord Halsbury is said to have replied, "*Ceteris paribus* be damned; I'm going to appoint my nephew". I really do not think that the Commonwealth Attorney-General in response to a similar enquiry would reply, "I'm going to appoint a progressive".

Sometimes judges may be appointed because of their perceived views, but more often it is not until they have assumed office that their political or legal philosophy, if any, becomes apparent. My own, perhaps naive, view is that the sole criterion for judicial appointment should be merit, a term which of course includes character and disposition, as well as legal experience and ability.

The suggestion that persons other than experienced lawyers should be appointed is seen to be quite ludicrous when one considers that the Court is often called on to decide complex questions in abstruse areas of law. I incline to the view that a proper attitude on the part of the Attorney-General (and possibly also of the Prime Minister) and his knowledge and insight, are much more likely to be effectual in ensuring that the best person is appointed to the bench than any procedural safeguards are likely to be.

If the Convention does consider possible restraints on the power of the Executive to make judicial appointments, I hope that it will not allow any House of Parliament to play a part in the process. The involvement of Parliament would be likely to lead committees of one House or another to conduct inquisitions of candidates along American lines, and so to deter from seeking appointment many of the persons best suited for the position. I share Dr Craven's views as to the

doubtful value of a judicial commission in the selection of judges, for the reasons he has given. If it is thought necessary to alter the present system, perhaps the idea that three States should concur in any appointment to the High Court has a good deal to commend it.

Finally, I would mention one question which threatens to divide Australian society and to shake the foundations of the nation. The question what rights should be accorded the Aboriginal people involves issues of history and ethics which are usually bitterly disputed although not always properly understood. Discussion of these questions is clouded by passion and sometimes distorted by self-interest.

The papers given at this Conference by Dr Forbes, Mr Humphry and Mr Ray Evans showed beyond any doubt that the *Native Title Act* is not merely unworkable; it also produces inconvenience and injustice, not only as between Aboriginal people and others, but also within Aboriginal society itself. The interests of the nation demand an entirely new approach, and demand it urgently.

May I conclude by thanking those responsible for their efforts in organising the Conference, in particular Mr Bob Day for the special help he gave to enable the Conference to be held in Adelaide, and you all for your attendance.

Appendix I

Address Launching *Upholding theAustralian Constitution*, Volume 3

Alan Jones, AM

Ladies and Gentlemen, it is my privilege to be amongst you today and to share one or two views with you. If I could begin though by taking, as part of my text, some of the comments that Sir Harry Gibbs made by way of introduction, I suppose one could say that speaking is both my trade and my profession. Let me take up that point, by way of an aside, in relation to the nature of the debate on the Constitution and constitutional change.

Sir Harry said that often that debate is conducted through the media in superficial and ill-informed terms, and I think that is certainly true. I would however just like to say, as a person within the media, that it is important that we don't allow the opposition to occupy all the territory. I suppose I will get into trouble for saying this, but I am increasingly disturbed at the extent to which the media is dominated by opinion and forces of the Left, advocates of change for the sake of change. They really often succeed, not because they win the debate, but because the other side doesn't always fight; and whether we like it or whether we don't, the media happens to be a very powerful and influential force within our community. Unfortunately, it is not always a force for good. Many would argue it is not often a force for good; and they would be able to mount a fairly strong case in support of that argument.

So, in the context in which we meet today, it is incumbent upon me just to urge you to recognise that, wherever your scholarship or your opinion can be used to influence the views of others, often it is through the media, and through the electronic media, that that can happen. I often say to people who ring the much maligned talk-back segment of my radio programme - there are only two half hours of it, and they often have tremendously anguished concerns about some things and they wonder about the futility and impertinence of making a simple phone call, until you explain to them that there are probably half a million people listening to them. So often we try to speak to people, and they are either too precious to be available, or lacking in confidence to present simply a viewpoint. It seems to me that is a golden opportunity to seek to neutralise to some extent the points Sir Harry made - superficiality, and the ill-informed nature of the remarks that often pass for sensible and proper debate.

I suppose today an outsider might wonder why Volume 3, which contains the proceedings of the Perth Conference of The Samuel Griffith Society, should be entitled *Upholding the Australian Constitution*. Why, someone might ask, is it necessary to defend or uphold the Constitution? - which ordinary "Struggle Street" Australians actually think has served Australia for almost 100 years, and done so very well.

I say again that often the views of those people out there who are terrified by the rapid pace of change are not considered, and they really feel quite defenceless and without support. So it is fair to say, if you believe what you read in *The Sydney Morning Herald* and other newspapers, that the Constitution is under threat. It has become almost trite, in the wake of the March, 1993 federal election, to point out that there are some who have adopted an agenda for change, and they specify the date as being "by the turn of the century". Change for change's sake. They

describe their so-called "vision for change" in one word. "We want a republic", they say. They won't come on radio programmes like mine to debate it, because they themselves don't know what it means; and, in fact, it has never been defined. They propose, if you try to flesh out some of the things, "minimalist symbolic constitutional alterations"; and that, paraphrased and put into everyday language, means "remove the links with the British constitutional system and the monarch". I think that is what they are saying.

But what is meant by the concept of a republic? As I have said, that has never been explained. When you break down the rhetoric, it seems that the so-called "demand for constitutional reform" may well have more to do with nationalism than with republicanism. Now we are all undeniably in favour of nationalism, if by nationalism we mean, as I am sure we do, national pride. But of course, nationalism can very easily be exploited, and I wonder if it is proper to use national pride in that way - especially amongst the young - to rally up national pride to deny our history. History has shown that nationalism often has been cynically manipulated to destroy genuinely democratic, including republican, governments.

Suri Ratnapala is a senior law lecturer at the University of Queensland and, while reading some of his writings recently, I was greatly interested by his observations on how nationalism, masquerading as republicanism, was used in his native Sri Lanka to undermine its genuinely republican government. According to him, taking the classic definition of republic as government for the public good, Australia is, or would be if its Constitution were properly interpreted, already a republic. The distinction, as he sees it, between republican government and other forms of government is that the former has built in checks and balances to prevent governments from putting their own self-interest above the common good. So under that definition of republic, notwithstanding our remaining constitutional links with Britain, the Australian Commonwealth ought to be synonymous with a republic. The key words are "ought to be", because Suri Ratnapala goes on to argue that some of the classic republican foundations of our Constitution are already being undermined.

I am not referring to here, and I don't think we should dwell on it too much, all this business about monarchy and the British Parliament. For one thing, republicanism, in the sense of government for the common good, has always relied on the separation of legislative, executive and judicial powers, and it is this separation of powers which imposes checks and balances on the power of the elected representatives, and prevents them using power to pursue self-interest, or the interest of any special interest group, ahead of the public interest. As long as the executive, for instance, has no control over the legislative power, then it cannot legislate to suit its own whim.

To use a sporting analogy, cricket is played according to certain rules determined by a ruling body. During a match, umpires adjudicate according to those rules; but if the umpires both made and adjudicated the rules, they could decide perhaps that the team they thought had played more meritoriously should be the winner of the game. While this might benefit a particular team, it would in no way establish an objective standard in the best interests of all cricketers.

The same principle applies where executive power is also effectively legislative power, because without separation of power, law making and its administration can both be undertaken at the point of law enforcement. In other words, the administrators, being also the legislators, can make the law to suit themselves for any particular case.

The result is that laws are made in our country in response to pressure from individual or special interest groups, rather than founded on common principles designed to benefit everybody. The political system ends up in the market place, where the votes of special interest groups can be

traded for preferential treatment. Yet, despite these dangers, the Australian Parliament has continued to delegate legislative powers to the executive - and "executive" is often in the singular - which, in turn, delegates powers to tribunals and bureaucracies which have not even been elected at all. This process has continued pretty well unchecked even though, as Suri Ratnapala argues, it is against the spirit if not the letter of our Constitution.

Of course, common wisdom is that, because a government can be removed from office for offending the electorate at the next general election, then there is no need for any other limitations on its power; but this assumes that the electorate at the end of the government's term of several years is capable of methodically auditing its performance and producing a balance sheet of deeds and misdeeds. Yet, as you know, it is possible to win elections, as has happened through the passage of time, by simply lying to the electorate. This also ignores the fact that a great deal of damage may be done by a government before the ultimate censure of the ballot box comes into play.

I am no constitutional expert, but it does seem to me that Suri Ratnapala is making some very relevant points. No-one participating in this so-called republican debate has ever, so far as I know - and I have tried to challenge them all - properly defined what is meant by the term "republic". I am asked, "Do you approve of Australia becoming a republic?". I reply, "I don't know what I am being asked to approve. Tell me what it is you are about, then I will tell you whether I like it or not."

You ask people out there, and they are bemused; but I will tell you one thing - they are terrified by change. They have had change up to here; it is thrown at them in every form, and this is another one of them. In general people do associate change with pain - that might be the greatest bulwark we have. The Prime Minister has described his preferred model republic as requiring only minimal changes to the Constitution "in order to simply" - and he uses that word - "substitute the symbols and representatives of the British Crown." But is the impetus for this change truly republican in spirit, or is there a danger that nationalism under the banner of republicanism could be manipulated to undermine the already essentially republican principles of our Constitution?

There is every reason to be vigilant about upholding our Constitution and its spirit. The American politician Madison once said, "If men were angels, no government would be necessary, and if angels were to govern there would be no need to control them; but since government is administered by men and women (he didn't say "and women" - I'm adding that), it is necessary not only to enable the government to control the governed, but also to compel it to control itself." Apart from the ballot box, only a strong Constitution can provide that means of control.

The symbols of our Constitution are important and, as Sir Harry Gibbs said in introducing me, perhaps they should be debated; but if we are going to have a constitutional debate about republicanism, let's first define our terms, and let's also look at some subordinate constitutional issues. Our Constitution may have flaws - nothing is perfect - but its spirit is basically right, and I will fight to uphold that spirit from all that would threaten it.

As I have said, it is because there are subordinate constitutional issues that need to be addressed that we are here today, because *Upholding the Australian Constitution* (Volume 3) directs the attention of the community to some of those issues, presented to us by some of the most learned minds in the country. I thoroughly recommend it to you and I am happy to launch it herewith.

Dame Leonie Kramer: In offering this vote of thanks, I think the best thing I can do is to comment on the three substantial points that Mr Jones made.

First is the failure to consider the views of what he dramatically called "Struggle Street". This has concerned all of us for a very long time. The republican movement is not a grass roots organisation. Who has seen anybody marching down Pitt Street or Collins Street with a placard saying, "Let's have a republic tomorrow - or by the year 2001?" If anybody has seen that I would be delighted to know, because I don't want to go around spreading false ideas. That is interesting, isn't it, because in the absence of that we can only assume that what we are now being asked to consider - and what looks to us, or at least to me, more like a threat than a promise - is an elitist imposition on the public, for reasons which it is not proper to speculate about now.

The second thing that Alan Jones said is very important. It is a real question as to whether the present republican movement is in fact a nationalistic movement, in the worst sense of that word, rather than a republican movement. I think it probably is. If that were not so, there would be absolutely no reason why the republicans would be so desperately anxious to redefine Australia. I have just read the latest effusion, could I say, from Donald Horne's ideas. It is a curious concoction of false definitions of citizenship, distorted history and various slogans. So we are now invited to consider negotiating a new Australia and, to use this terribly clichéd word, reinventing ourselves. Now that displays such an extraordinary lack of understanding of how society or a political culture works that one would just want to throw it away. Don't they know that society is not to be manipulated? It develops and evolves, things change - unless of course you are bent, as Alan Jones implied, on manipulating it; and I think that has to be a real concern.

Alan Jones' third point, which is also very important, has to do with the question of the separation of powers. I have been thinking about this a good deal in the last few weeks because we have a seminar about it here in Parliament House tomorrow, and it has suddenly struck me that one of the great strengths of our constitutional arrangements at the moment is that we have a Head of State who is, in the executive sense, totally powerless. Now that might sound a strange thing to say, but that is the strength of the system - that there is someone at the head of the system who can do all sorts of things, who can go around and talk to people in ways which encourage them, which help them, which support them, which no other citizen in this country, or any other country unfortunate enough not to have a system like ours, could possibly do. Politicians can't do it. Business people can't do it. Academics can't do it for a whole variety of different reasons. But a person who is seen to be in the middle, literally in the middle of a society or a State or a nation, can do it because they are seen to have no allegiances at all except to the welfare of every person in that State. Now that alone is an argument for preserving what we have.

Thank you, Alan, for giving us a splendid and heartening speech. People in this situation often say you are talking to the converted, but I like such talks, converted though I am - especially when they are in terms which are so eloquent and so sensible, and make such important and substantial points. Thank you very much for being with us.

Sydney
8 June, 1994

Appendix II

Addresses Launching *Upholding the Australian Constitution*, Volume 4

1. Geoffrey Blainey, AO

I pay tribute to Volume 4 of *Upholding the Australian Constitution*, the latest of the published Proceedings of The Samuel Griffith Society. Its 340 pages contain many observations that will be illuminating to those interested in Australian history, as well as those absorbed in the state of the Constitution and the state of the nation. Indeed I never thought the day would come when the health or ill-health of the Constitution and the ill-health of the nation would be so closely linked. At least five of the authors of commentaries in Volume 4 - John Stone, S.E.K. Hulme, QC, Dr Colin Howard, Ray Evans and Sir Harry Gibbs - are here tonight.

For more than two years Mr Keating's policy has been to undermine Australia's Constitution, especially the role of the monarch, without saying what he wants in the monarch's place. Against Australia's flag he wages the same guerrilla war.

In a democracy, every institution and symbol can be legitimately criticised. But when the nation's leader directs the attack and offers no alternative, he begins to resemble the leader of a gang which breaks the street lights and then, in the darkness, moves on.

I do not think there is any parallel in the history of the Commonwealth for such behaviour by a leader. Symbols and institutions are more easily destroyed than created. Mr Keating should think twice about his tactics.

Presumably the Prime Minister hopes that he can further undermine the Australian monarchy and then thrust his own solution on the Australian people. And yet as soon as the serious debate begins on the question - what replaces the monarch? - the republicans will begin to fight amongst themselves.

While opinion polls increasingly favour the republicans, the polls are not sound forecasters of the people's final attitudes to major constitutional changes. It is a mistake to think that the Australian people now want a republic, at any price, and that therefore a republic is just around the corner.

If, next Sunday, Mr Keating outlined exactly the kind of republic he wanted, and speedily sold it to the Dark Greens and Democrats who hold the reins in the Senate, he would still be unsure of victory. If he then put his proposals, as required, to a nation-wide referendum, they probably would be defeated.

The Heir

One event could perhaps rescue Mr Keating's proposal from defeat: another royal blunder or scandal. Such an event, by chance occurring just before the day of the referendum, would boost the republican hopes. The real danger is that such a royal scandal or blunder might persuade Australians to accept, almost on the spur of the moment, what proved to be the worst kind of republic.

Royal behaviour is now a stick of gelignite, perhaps capable of largely determining whether or when a republic will come.

It is therefore unwise for those who favour the existing system to wait patiently until Mr Keating proposes an alternative. Thereby they become bystanders instead of participants. It is legitimate

to support the present system until there is a better one, but also to take the strongest interest in alternatives, especially dangerous alternatives.

Prince Charles might prove impeccable as monarch. But this year he has harmed the cause of the monarchy in Australia. In a normal year his televised reminiscences might not matter; but to talk as he did when the future of the monarchy here was under intense scrutiny was to climb high up the Beaufort Scale of folly.

Prince Charles was indiscreet in disclosing that he had been offered the post of Governor-General - if he really was offered it - sometime before 1988. To claim that he was offered the Governor-Generalship, apparently without Mr Hawke as Prime Minister knowing anything about it, is to show weak understanding of that part of Australian politics and constitutional practices which he, of all people, should have understood.

Prince Charles was also a dash out of touch in thinking he could usefully accept the post of Governor-General. The day of the Briton arriving as Governor-General, whether a British Prince or a British miss, has quietly passed; and Prince Charles should have known that reality.

The role of the monarchy in Australia is even more sensitive than in the United Kingdom. It calls for long silences, for unfailing discretion. Here the monarchy is on trial, more so than in the United Kingdom.

The Queen has been impeccable in her dealings with Australia, always respecting its independence and sovereignty. She has always treated Australian leaders with respect, and I imagine they have done likewise. I include Mr Keating in that category, despite public criticism of him for touching the Queen: patently he did it as an intended courtesy.

Prince Charles, however, does not seem to realise that in Australia he is required, even as heir, to walk a more difficult tightrope than in Britain. If his various remarks about Australia, made on television this June, had been made about Britain there would have been outrage amongst large sections of the British public. Incidentally, I am not talking about his private life: that is primarily his own affair, though with public implications.

In essence, Australia's decision on the monarchy and the republic is now being influenced by events outside its control. The decision should be debated in terms of Australia's long-term interests rather than the excitable headlines from London or the strong but sometimes inarticulate passions from Canberra.

A Puppet President

There is a widespread feeling in Australia that Mr Keating wants a puppet President. The perception might be exaggerated but it is there.

At present he alone can appoint a Governor-General. Few people, however, want him to appoint the President, if there is to be one.

It is astonishing to see that at least 80 per cent of Australian voters at present favour the idea of an elected President. While Mr Keating was playing cat and mouse and refusing to declare what kind of President he wanted, the public made its choice. They want a people's President : they want to elect the President.

As sensibly pointed out by Sir Zelman Cowen, the former Governor-General, we now run the danger of tumbling into an entirely new and unfamiliar political system.

Most Australians appear to think that, if we become a republic, the new President in Canberra will be an Australian version of the President of the United States. But it is impossible to impose that very different American system on top of our Australian system. Such an American-Australian sandwich would quickly prove unpalatable. That combined system of government would be unworkable.

Mr Keating on 3 November, 1994 denounced the idea of an elected President. His argument was not very coherent, but left no doubt that he did not want the people to interfere. Inspected closely, his argument against an elected President was more applicable as an argument against the present attitudes of the High Court : "I think", said Mr Keating, "this is a terribly strong thing from our democracies that you don't have figures who are walking around hearing voices saying, I've been anointed by the gods: I'm wearing a national mandate; I have some position of authority about the Parliament ... "

It should be added that if there were to be a President, and if on rare occasions they had to find a way of resolving a parliamentary deadlock like that of 1975, their authority, in that sense, must be above that of the Prime Minister and Parliament. Mr Keating's comment suggests he will try not to confer on the hypothetical President the powers which Sir John Kerr exercised in November, 1975.

In any case, I think Mr Keating's recent denunciation of the concept of the people electing the President in Australia could well be too late. The dog is out of the kennel and running. Public support for an elected President is actually much stronger at present than support for a republic itself.

Australia is one of the oldest continuous democracies in the world. Therefore to elect a President does not necessarily mean taking a hazardous step into the unknown.

If Australians were to elect a President, they would have to limit severely his or her powers. Otherwise the President and the Prime Minister would become competitors, elbowing each other for power. The idea of electing a non-executive President is not original. Austria, Ireland and Iceland do it.

If we should become a republic - and that probably lies years away - I too would prefer an elected President rather than a puppet President. But a President's powers must be severely limited.

To try to incorporate in the Constitution strict limits on the Presidential powers is in itself a delicate and controversial task : that task was tackled by Malcolm Turnbull's Republic Advisory Committee. Whether you or Mr Keating accept the committee's conclusions is another matter.

A virtue of our present system of government is that in Canberra, unlike Washington, the ceremonial and symbolic functions are kept separate from the executive and law-making powers. The Governor-General is intended mostly to unite and even inspire the nation, whereas the far more powerful Prime Minister, in the course of his duties, sometimes has to divide the nation.

Mr Keating probably thinks he and his cronies should personally appoint a President. The idea already makes most people squirm. If Australia becomes a republic, most Australians hope that the office of President quickly acquires a higher prestige than the present office of Governor-General.

The first two Presidents, so long as they are not political stooges, are likely to confer unmatched prestige on the position. The President will represent the nation abroad in a distinct way, and receive the kind of honour a Governor-General could not receive. The President will speak for the nation on special commemorative occasions.

Ceremonially the President will stand high above the Prime Minister. Accordingly, Mr Keating, if by chance he ushers in a republic, might well do his best to cut the President down to size. If Mr Keating cannot tolerate the competition from Sir Robert Menzies, a dead Prime Minister, he is not likely to tolerate the competition from a living President.

Long after Mr Keating has gone to his reward, other Keatings, Labor or Liberal, will arrive at The Lodge; and some will arrive with delusions of grandeur and try to cut the President down and so grasp more prestige as well as power for themselves.

Therefore it is essential that as Prime Minister they do not have the crucial say in appointing the President. It is also essential that the President's powers over the Prime Minister are strictly defined, though they must include the power to solve parliamentary deadlocks. The Whitlam-Fraser deadlock of 1975 will assuredly arise again, in different form.

Mr Malcolm Turnbull, the civilian leader of the republican movement, proposes a way of ensuring that neither Prime Minister nor Parliament installs a puppet as President. The proposed way consists of bringing the two federal Houses of Parliament together and insisting that the favoured candidate must gain two-thirds of the total votes. Mr Turnbull argues that, with the stipulation of such a sweeping majority, the favoured candidate for President will never be elected unless a certain number of Opposition votes as well as all Government votes are on side.

The idea, contrary to Turnbull's assumption, does not permanently prevent a prime-ministerial puppet from being elected as President. It is true that in the last 50 years no government - not even the Fraser government elected at the end of 1975 - has had a two-thirds majority of the combined Chambers. But Mr Turnbull forgets that if the Commonwealth abolished or amended proportional representation for elections to the Senate, a government could sometimes control more than two thirds of the combined seats in the upper and lower Houses.

In the old days some governments or coalitions actually gained a two-thirds majority in the combined Houses. For example, as recently as 1947 Labor had 69 per cent of the combined Members and Senators. In short, the Turnbull proposal is not quite as secure as it seems.

Who owns the Constitution?

The Commonwealth Constitution, and this point is central to this debate, belongs to the Australian people. More perhaps than any Constitution in the world, Australia's Constitution was created, step by step, by the people. Indeed, many Australians of that era were proud of that fact, and one of my grandfathers used to display on a wall his ornamental certificate stating that in Victoria he voted in the federal referenda of the 1890s. He was so interested in the well-being of the Commonwealth that, when the search for a federal capital site was under way in the Edwardian years, he rode his push bike along the hilly gravel roads to Cooma, Dalgety, Bombala and the other competing sites.

A quiet propaganda campaign has been under way in recent years. It subtly claims that the Commonwealth Constitution really belongs to the federal Government, to Canberra. It is implied that the people have proved unworthy of their Constitution and must be made to stand red-faced in the corner of the national schoolroom.

We hear often the complaint that the Constitution is an early T Model Ford and is striving to keep going in the 1990s against the nippy Hondas and fast Commodores. And who is to blame for this anachronism? Why, the Australian people are said to be to blame. The centralists complain that the Australian people are too frightened of change - and not too bright into the bargain, too.

On 42 separate occasions the Australian voters were asked to vote for a new version of the Constitution and yet on all but 8 occasions they voted "no". As a result the Australian people are said by some commentators to be amongst the most conservative people in the world. This allegation misses the mark.

The voters in Australia had had an intimate say in shaping the Constitution in the 1890s but since then have never been given the same say. The federal Government of the day decides when an

attempt should be made to change the Constitution, and it usually tries to impose changes that are more in its party's interests than in Australia's interests.

There is another reason for the Australian people's reluctance to obey Canberra and to vote for changes to the Constitution. Most of the proposed changes tried to centralise power in Canberra.

Mr Keating, not well-informed about Australian history, has made it perfectly clear that *in his opinion* he controls the Constitution and will determine the agendas for abolishing the monarchy in Australia.

So far he has tried to exclude supporters of the present system from any serious say in discussing his republic. The federation of the six Australian colonies, however, was not achieved in 1901 by bullying, but rather by cultivating a spirit of compromise.

The same is true today. The monarchy in Australia cannot be touched, if the people in three of the six States say "no". Compromise is vital if the monarch is to be removed from Australia's Constitution.

What kind of compromise would give Mr Keating a chance of victory? He will have a far stronger chance of victory by adopting several of these compromises:

1. By reserving a minor or nominal role for the British monarch: perhaps the Queen could be patron of Australia but not Head of State.

2. By locking the present flag into the Constitution, thus preserving the flag until such time as the Australian people decree otherwise.

3. By rewriting the controversial "external affairs" clause in the Constitution. At present section 51 (xxix) enables a collection of foreign dictatorships, banana republics, and Third World satraps to exert far more control over Australia's internal affairs than any British monarch has exercised here during the last sixty years.

4. By agreeing that the President be elected, with the powers of the President being strictly controlled.

5. By re-asserting the core principle of the original Australian constitution - a principle increasingly violated - that the States are vital in the governance of Australia, and will remain so.

Some millions of Australians would like even more concessions but they must also, like Mr Keating, be willing to compromise.

Such concessions would perhaps enable Mr Keating to achieve a republic. But to do so will be far, far more difficult than recent opinion polls suggest.

Melbourne
17 November, 1994

Appendix II

Addresses Launching *Upholding The Australian Constitution*, Volume 4

2. Judith Sloan

Thank you very much for inviting me here today to launch *Upholding the Australian Constitution*, the Proceedings of the Fourth Conference of The Samuel Griffith Society held in July, 1994. I must admit to feeling somewhat uncertain about this task, being anything but an expert on things constitutional. There was a certain irony as I began to think yesterday about what I would say today - I was travelling on a plane returning from Canberra. At least, I was returning *from* Canberra.

Notwithstanding a liberal schooling with no time for cooking or sewing (much to my longer term disadvantage), I am not sure I recall the Australian Constitution being much mentioned or discussed. And notwithstanding three university degrees, my knowledge of the Australian Constitution was little progressed.

To be sure, through my study of economics, I gained an appreciation of what economists arcanely call "institutions", which is a clumsy term for the rule of law, the establishment and protection of property rights, the separation of powers and the minimisation of sovereign risk. It is only with stable and credible "institutions" that economies can prosper and societies flourish. A very important aspect of "institutions" in Australia is the Constitution.

I have also developed a different perspective on where States fit in from my time living in South Australia. While a Melburnian, the omnipotence of Canberra is much less evident than from the purview of St Vincent's Gulf. Canberra basically responds to Victoria and New South Wales, with scant regard for the other States.

There also seems to be an increasing tendency to confuse *national* policy with good policy. They are of course not the same thing. A case in point is the recent discussion of national competition policy. While there are many fine propositions in the Hilmer Report, the watering down of some policies and the complete failure to proceed on other policy fronts are now such that the overall policy thrust is looking quite inferior. Yet still the advocacy for having a national policy may outweigh the case for having a good policy.

Let me turn to the handsome volume which is the subject of our attention today. It is a very impressive list of contributors to say the least, including SEK Hulme, QC, John Stone, Dr Colin Howard, Senator Rod Kemp, Professor Geoffrey Walker and Sir Harry Gibbs. I was pleased also to see my friend and colleague Dr Geoffrey Partington, writing about the historical basis of *Mabo*.

The volume addresses some key Constitutional issues. These include:

***** International treaties and tribunals;

***** The activism of the High Court;

***** *Mabo*; and

***** The Republic.

I am sure you will agree that these topics are extremely pertinent in terms of current debate.

As far as my own interests are concerned, the first of these - international treaties and tribunals - is in fact an issue about which I know something in the context of industrial relations. I was therefore very interested to read Rod Kemp's chapter, *International Tribunals and the Attack on Australian Democracy*, which deals with both ILO and UN conventions and tribunals/committees.

Take industrial relations. The Constitution is very clear on this matter. Under section 51(xxxv), the power to make industrial relations laws vested with the States save for those involving interstate industrial disputes. In any case, the Federal Government can only enact laws in respect to conciliation and arbitration. In other words, the intention of the Constitution-makers was to carve out a small niche for the Federal Government (in reality, to cover the maritime industry, shearing and coalmining), with the vast bulk of law-making in this area reserved for the States. It is also interesting to note that the Constitution-makers passed this section by the barest of margins (with Henry Bournes Higgins holding the crucial vote); but in any case, the system of conciliation and arbitration was intended to be voluntary, rather than compulsory, as the Second Reading Speech of the Conciliation and Arbitration Act 1904 will bear out.

Industrial relations is an area where High Court activism has been very important. A series of decisions over the years expanded the scope of the federal tribunal, to the point that the State tribunals became mere sheep, following the trail of what is now known as the Australian Industrial Relations Commission.

Even so, probably the most radical development in legislative relations in Australia since 1904 was the reliance on powers other than the conciliation and arbitration power in the new *Industrial Relations Reform Act* 1993. The two new powers are the corporations power and the external affairs power. It is because of our being signatory to a number of International Labour Organisation (ILO) Conventions that the external affairs power has been invoked.

In point of fact, Australia has been signatory to many ILO Conventions for many years. (Cynically, however, the federal Government rammed through our signature to the ILO *Termination of Employment Convention* just prior to the March, 1993 election). It is not clear that we were violating any of them (apart perhaps from the *Freedom of Association Convention*, which the federal Government conveniently ignored, other than when backing away on the minimum membership size for registered trade unions). In other words, resort to the external affairs power (section 51(xxix)) in the *Industrial Relations Reform Act* 1993 was a cynical attempt to override States' authority in this area (particularly that of Victoria, which had abandoned compulsory arbitration) and to concentrate authority in the federal tribunal.

There is a lot more I could say about industrial relations and the Constitution. But this Volume's coverage is very broad and exciting. The papers are well-written and extremely clear, even to the non-expert. Most particularly, they are important, authoritative material for our debate.

The basis of our Constitution was to have strong State Governments and a weaker but supportive federal Government. The reverse has, of course, occurred. Moreover, we increasingly have a federal Executive that has only scant regard for parliamentary processes. It is this concentration of power and decision-making that should make us feel very uneasy.

It therefore gives me great pleasure to formally launch *Upholding the Australian Constitution*, the Proceedings of the Fourth Conference of The Samuel Griffith Society.

Adelaide

25 November, 1994

Appendix III

Address Launching *Upholding The Australian Constitution*, Volume 6

Christopher Pearson

Ladies and Gentlemen, it is a privilege to speak to you and to launch Volume Six - on the day that the First Howard Ministry is announced. Notwithstanding some rash talk during the campaign about the possible exercise of the notorious foreign affairs power, I am confident that it will be much more conscious of constitutional propriety than its predecessors.

It was the misuse of the foreign affairs power, in the proposed Privacy Legislation to over-rule the Tasmanian law regarding sodomy, which first brought the work of The Samuel Griffith Society to my attention. The Privacy Legislation so infuriated me that I wrote a series of columns about it for *The Australian* newspaper, which in turn led to John Howard asking me to write some speeches for him. But let me go back for a moment to set the scene - to August, 1994.

I was having a conversation with Tony Abbott. As his editor, I was goading him about a much-needed, much-discussed book he was going to write - a defence of the Constitution called *The Minimal Monarchy* which most of you will, I trust, have read. Partly to change the subject and partly because, I think, he reckoned it was time I did a little writing of my own on constitutional issues, he asked me what I thought the Liberal Party should do in response to Lavarch's Privacy Bill. "Were the rights of gay Tasmanians seriously infringed by the criminal sanctions in the State law?", he asked. "Was the use of the foreign affairs power justifiable?"

The answer to the first question was simple. While criminal sanctions may encourage discriminatory behaviour on the part of private citizens and even the State bureaucracy, the law itself was not enforced. There hadn't been a successful prosecution since just after the Second World War. As well, as the South Australian experience had shown, anti-discrimination laws didn't prevent either private or bureaucratic discrimination. Sometimes they even intensified it, but they drove it underground - made it covert.

The answer to the second question was even simpler. Given that the infringement of rights was peripheral and for the most part a notional problem, there was no justification for using the foreign affairs power whatsoever. Even if the Tasmanian Government had been prosecuting gay men and heterosexual sodomites with a zeal to rival Torquemada's, and had set about renovating Port Arthur to house the multitude of the newly convicted, it would have been none of the Federal Government's business because it was not a matter within its jurisdiction.

Abbott agreed with me wholeheartedly, but pointed out that there were problems with running a line like that. In the era of political correctness, the only person who could get away with saying so was someone involved with gay law reform. I remember the conversation quite clearly because it was my birthday, and I cancelled lunch in order to write the article for *The Australian*.

As those of you who know me can testify, and those of you who have noticed my ample form may guess, sacrificing a meal as important as lunch is above and beyond the call of duty, but it had to be done.

Lavarch's gambit was an attempt to divide the Coalition over a matter of high constitutional principle, characterising those of them who wouldn't support his legislation as homophobes and hoping to corral the gay and "gay-friendly" vote for the A.L.P. It was contemptibly cynical, especially when you remember that there were plenty of reform measures affecting homosexual people for which there was a broad bi-partisan support - on questions like superannuation, which involved substantial sums of money. Lavarch, as Attorney-General, preferred rhetorical flim-flam and further debauch of the Constitution, to borrow a line from Gough Whitlam. The reform you have when you're not having real reform.

The problem Tony Abbott alluded to - that only gay people could get away with talking critically about a gay rights measure - is symptomatic of the grip of the new orthodoxy of political correctness (P.C.). I was reminded of it again yesterday, at Writers' Week, listening to earnest young men who no longer allowed themselves the luxury of female fictional characters because they thought it would be presumptuous of them to act as though they could understand the world from a woman's consciousness or point of view - let alone a *black* woman's point of view. These must surely be "the mind-forged manacles of man", and grimmer and more all-encompassing than any orthodoxy that Blake could have observed in eighteenth Century England. Among its other horror attributes, P.C. is a denial of the power of art and the imagination to generalise, to universalise, to speak for us and to us about the issues which most profoundly affect us.

Like fish taking water around them for granted, many political pundits deny that political correctness exists in Australia, or deny that it's a problem. It exists, all right, and it's a problem of the first order, because it subverts our capacity to talk about the world as it actually is. Instead, we are expected to pay lip-service to various left pieties, and pilloried, even reviled, if we do not. Thus, in the name of "honouring our international treaty obligations" - and who could argue with that? - the Commonwealth has abused the foreign affairs power. Like the United Nations, the environment and gay rights are "*unchallengeable greater goods*" which will warrant any undermining of the checks and balances on Federal power. Yet never in our history have Australians been more in need of protection from overweening Big Brother government than in the Keating years. For those of you who are interested in an analysis of political correctness in contemporary Australia, may I commend a book launched on Monday. It's called *Double Take - Six Incorrect Essays*, edited by Peter Coleman and published by Mandarin. Peter Coleman needs no introduction to members of The Samuel Griffith Society, I'm sure, because he is a distinguished contributor to its Proceedings. The essayists are Frank Moorhouse, Les Murray, David Williamson, Jamie Grant, Beatrice Faust and me, and - even if I say so myself - a grumpier, more sceptical bunch of writers would be hard to find.

In Volume Six, which I am here to launch, we have worthy, indeed distinguished rivals in the sceptical stakes. Three of the twelve are regular contributors to *The Adelaide Review,* and the rest are writers any editor would give his eye teeth - and ready money, what is more - to publish. Many of you will be personally acquainted with Austin Gough, former Professor of History at Adelaide University. His analysis of the Hindmarsh Island affair and the La Trobe case involving sacred, non-human archaeological remains is a fine example of his good sense and great wit. His argument is that Aboriginal culture, and reconstructed versions of it, have acquired the status of the New Official Religion, privileged in ways undreamt of by the Church of England. Having had some involvement in the Hindmarsh Island affair myself, I can recommend it as the most lucid and compelling assessment of the matter which has yet been published.

With equal warmth, let me draw your attention to Ken Minogue's wonderful speech on *Constitutional Mania* - the elevation, as he says, 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.

Vanity of vanities - the vanity at the heart of political correctness, that reform and entrenchment of the values of the Zeitgeist, the spirit of the age, will guarantee anything apart from what Peter Coleman calls "a soft totalitarianism", let alone a millennial transformation. As Brian Friels, the playwright, put it, trying to define political correctness:

> "There is a terrible danger when civilisation becomes enmeshed in a linguistic contour which no longer matches the landscape of fact."

Time and again, reading these papers, I have been reminded of the struggle between those who believe in the perfectibility of Man and the perfectibility of Society, and those men and women, the hard-headed, the sceptical, who want to hang on to the framework of rules which maximise individual freedom. Keating would lump them together - Garfield Barwick, Harry Evans, Colin Howard, SEK Hulme - not to mention Des Moore and Jan Wade - as the straighteners and the punishers, the enemies of vision. In their various ways these essays are all arguments for restraint, deliberation, a sense of proportion. Unlike the window dressing world of Big Picture and the dreams of Big Government, this is fine-grained writing about the world as it is, writing that matches the landscape of fact, writing that demystifies the operations of State Power. Each essay is a blow for liberty.

Adelaide,
8 March, 1996

Appendix IV

Contributors

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1 Addresses

The Hon. Dean BROWN, MLA was educated at Unley High School, Adelaide and then at the University of New England (B. Rural Science, 1967). After a period of employment with the South Australian Department of Agriculture (1967-73), he entered Parliament as the Liberal Member for Davenport in 1973. He served as Minister for Industrial Relations and Minister for Public Works in the Tonkin Government (1979-83), but returned to the private sector in 1985 after losing his seat following an electorial redistribution. In May, 1992 he became the Member for Alexandra and Leader of the Opposition, and following the State election in December, 1993 (when he became the Member for Finniss), he was appointed Premier, Minister for Multicultural and Ethnic Affairs and (more recently) Minister for Information Technology.

Christopher PEARSON was educated at Scotch College, Adelaide and at Flinders (BA Hons, 1972) and Adelaide (Dip. Ed., 1974) Universities. After a period of High School teaching and lecturing at TAFE (1974-75), and some years working as a freelance journalist, he joined the Aboriginal Studies Unit, University of Adelaide (1981). As well as founding (and editing) *The Sydney Review* (1988-91), he founded in 1984, and has since edited, *The Adelaide Review*, Australia's largest circulation arts monthly magazine. Through his writings in that magazine, in *The Advertiser*, *The Australian*, and elsewhere, he has become a prolific contributor to the public debate.

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).

Greg CUTBUSH was educated at Ballarat College and The University of New England (B.Rur.Sc., Hons, 1970; M.Ec., 1973). After brief periods working in Kenya and the United Kingdom, he worked as an economist at the then Industry Assistance Commission (1975-88), as well as at the OECD in Paris (1979-81) and on numerous World Bank assignments in Africa and Washingdon, D.C. After becoming an Assistant Commissioner of the IAC (1983-88), he joined the Canberra economic consultancy firm, ACIL in 1988, where he continues to work today, mainly on issues of microeconomic reform and competition policy.

Ray EVANS was educated at Melbourne High School and the University of Melbourne (B. Eng. Sc., 1960; M. Eng. Sc., 1975). He worked as an engineer with the State Electricity Commission of Victoria (1961-68) and then lectured in Engineering, first at the Gordon Institute of Technology and then at Deakin University (1976-82), becoming Deputy Dean of its School of Engineering. In 1982 he joined Western Mining Corporation (now WMC), and has since worked as executive assistant to its Chief Executive Officer, Mr Hugh Morgan. In 1971 he was a founding sponsor of the Australian Council for Educational Standards, and foundation editor (1973-75) of its journal. He was one of the founders of The H R Nicholls Society in 1985 and has been its President since 1989.

Dr John FORBES was educated at Waverley College, Sydney and the Universities of Sydney (BA, 1956; LLM, 1971) and Queensland (PhD, 1982). He was admitted to the New South Wales Bar in 1959 and subsequently in Queensland and, after serving as an Associate to Mr Justice McTiernan of the High Court, practised in Queensland as a barrister-at-law. He is now Reader in Law at the University of Queensland Law School, and has published texts on the History and Structure of the Australian Legal Profession, Evidence, Administrative Law and Mining and Petroleum Law.

The Rt. Hon. Sir Harry GIBBS, GCMG, AC, KBE, was educated at Ipswich Grammar School and Emmanuel College at the University of Queensland (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 (1962-67), a Judge of the Federal Court of Bankruptcy (1967-70), a Justice of the High Court of Australia (1970-81) and Chief Justice of the High Court (1981-87). Since 1987 he has been Chairman of the Review into Commonwealth Criminal Law (1987-91) 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.

Associate Professor Peter HOWELL was educated at St Virgil's College, Hobart and the Universities of Tasmania (MA, 1965) and Cambridge (PhD, 1972). After teaching at the University of Tasmania (1962-66), he has been lecturing at the Flinders University of South Australia since 1968, becoming Reader in History in 1982. He has specialised in British and Australian constitutional history, the best-known of his books being *The Judicial Committee of the Privy Council: its Origins, Structure and Development*. He is a Fellow of the Royal Historical Society (London), and since September, 1995 has been Chairman of the South Australian Constitutional Advisory Council.

Chris HUMPHRY was educated at Hale School, Perth and the University of Western Australia (LLB, 1969). After admission as a barrister and solicitor of the Supreme Court of W.A. in 1971, he worked in Perth as a solicitor (1972-76) and subsequently partner (1976`92) in what is now

the firm of Mallesons Stephen Jaques, including a period of two years (1985-87) as partner-in-charge of the London office of (then) Stephen Jaques Stone James. From early 1993 he was seconded to the State Crown Solicitor's Office, advising the W.A. Government on native title matters. In February, 1996 he established the Perth firm of Hunt and Humphry, specialising in all aspects of resource development and land use, including native title and Aboriginal heritage matters.

The Hon. David JULL, MHR was educated at Church of England Grammar School, Brisbane, where he matriculated in 1962. After a period working in radio and television he was elected in 1975 as the Liberal Member for Bowman (1975-83). In 1984, after a brief period as Deputy General Manager of the Queensland Tourism and Travel Corporation, he was again elected to the House of Representatives as the Member for Fadden, continuing to hold that seat until, following the recent Coalition election victory, he was appointed Minister for Administrative Services in the Howard Government.

David TREBECK was educated at Sydney Church of England Grammar School and the Universities of Sydney (B.Ag. Sc., Hons., 1968) and New England (M.Ec., 1971). After working for over a decade with Australia's farming organisations, including as Deputy Director of the National Farmers' Federation (1979-83), he established in 1983 an economic and policy consulting business (ACIL) of which he is still the senior partner. During 1985-87 he undertook a consulting assignment as Policy Director for the Federal Liberal Party. Today, his consulting work focuses on issues relevant to the microeconomic reform agenda and international competitiveness.

3 Book Launching Addresses

Professor Geoffrey BLAINEY, AO was educated at Wesley College, Melbourne and the University of Melbourne, at which he subsequently taught for many years, becoming Reader in Economic History (1963-68), Professor of Economic History (1968-77), Ernest Scott Professor of History (1977-88) and Dean of the Faculty of Arts (1982-87). He has written some 25 books, including *The Rush that Never Ended* (1963), *The Tyranny of Distance* (1966), *Triumph of the Nomads* (1975) and *A Shorter History of Australia* (1994), as well as contributing columns regularly to several newspapers (*The Australian, The Melbourne Herald, The Age*) since 1984. As well as continuing his writing, he is today a Governor of the Potter Foundation and Chancellor of the University of Ballarat, and a prominent contributor to the public debate.

Alan JONES, AM was educated at Toowoomba Grammar School and at the Universities of Queensland (BA) and Oxford. After a period teaching French at Brisbane Grammar School (1963-70) and English at The King's School, Parramatta (1970-74), he became a senior adviser and speech writer to the then Prime Minister, Rt. Hon. Malcolm Fraser (1978-81). During 1981-85 he was Executive Director of the Employers' Federation of NSW, before becoming one of Australia's most prominent broadcasters on public affairs with Radio 2UE (Sydney) from 1985 to date. He also coached, from 1984 to 1988, the Australian Rugby Union team.

Professor Judith SLOAN was educated at Lauriston Girls School, Melbourne, the University of Melbourne (BA Hons., 1975; MA, 1978) and the London School of Economics (M.Sc.Econ., 1979). After tutoring in economics at Melbourne University (1976-78), she became Research Fellow (1981-84) and Senior Research Fellow (1984-89) at the National Institute of Labour Studies, Flinders University of South Australia, before becoming Professor of Labour Studies at that University in 1989 and Director of that Institute in 1991.