Upholding the Australian Constitution - Volume Eight

Proceedings of the Eighth Conference of The Samuel Griffith Society

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Upholding the Australian Constitution

Volume Eight

Proceedings of The Samuel Griffith Society

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Foreword

John Stone

The Samuel Griffith Society's eighth Conference was held in Canberra, and the papers delivered to it constitute this Volume in its Proceedings, *Upholding the Australian Constitution*. The excellent attendance was more than matched by the excellence of the speakers' papers - to the point where, despite the invidiousness inherent in such comparisons, it may be fair to say that this Volume even outranks its predecessors.

Be that as it may, the Conference was again focused around a number of themes. At a time when it was still expected that the 1997 Constitutional Convention would not be confined solely to the republic, the papers on the opening morning covered not only that issue, but also the States' role in the appointment of High Court Justices, the need for the States to be able to initiate constitutional referendums, and the need to repeal the "race power" of the Constitution (section 51(xxvi)).

The Government's subsequent decision to confine next December's gathering to discussing only the republic has, however, lent added importance to what can only be described as Sir Harry Gibbs' definitive paper on that topic, *A Republic : The Issues*. That paper, which might almost be regarded as a "primer" for those wishing to inform themselves on the matter, has been separately printed by the Society as a booklet for wider distribution.

The Government's unwise decision to restrict discussion at the December Convention will not render the other constitutional proposals which the Society has been discussing for some time (including in Canberra), any the less desirable, or any the less necessary to prosecute. While there is much to be said, in politics, for masterly inaction, proposals which have real intellectual force, such as the need to amend the "external affairs" power of the Constitution, or the need to provide the States with a means of initiating constitutional referendums, will not go away merely by being, for the time, ignored. Their time, assuredly, will come.

Indeed, even as this Foreword is being written, we are witnessing an example of that kind in the native title area. Ever since the High Court's *Mabo* judgment brought about a judicial (read, legislative) revolution in June, 1992 on the nature of land title in Australia, more far-sighted observers have been pointing out the two most obvious consequences of that decision : the decline it would produce in public respect for the High Court, and the sharp deterioration it would produce in the relationship between Australians of Aboriginal descent and the rest of us.

When, eighteen months later, the Keating Government rammed through the Parliament its *Native Title Act*, to the applause of the Canberra Press Gallery assembled in the Senate for the occasion, the same observers again pointed out the quantum leap this would produce in the pace of deterioration of that latter relationship.

When, on the eve of Christmas Eve last year, the (somewhat differently composed) High Court again exercised what nowadays passes for its judgment in the *Wik* case, those same observers (by this time joined by a growing host of others) pointed out that this development, unless dealt with quickly and decisively by the Howard Government, would produce outcomes which would make the so-called "Pauline Hanson debate" look like a Sunday School discussion.

All these facts notwithstanding, for over three months now the Government has continued to refuse to face the bull : prevarication, `soothing' statements, the flying of one maladroit kite after another to a (still unrepentant) Canberra Press Gallery, these have been the "decisive" actions of

a Government with the greatest majority in over 60 years. Yet, like those constitutional questions referred to earlier, the bull has not gone away, nor will the feelings it is arousing throughout Australia now be assuaged by anything which falls short of resolutely taking it by the horns.
As to the outcome, we shall see - I hope, before this Volume appears. Meanwhile, however, as Mr S.E.K. Hulme, QC said, in introducing his paper herein on *The Wik Judgment*:

> "I suppose that at no time after 1788 was there greater goodwill towards Aborigines throughout the whole of Australia, than at the time of the constitutional amendment of 1967 .... .
>
> "No politician dares say so, ... ; but I fancy that [today] general community goodwill towards Aborigines is also at its lowest since 1967."

Mr Hulme's paper apart, two other papers in this Volume, by Dr John Forbes (*Amending the Native Title Act*), and by Mr Roger Sandall (*An Australian Dilemma : Reconciling the Irreconcilable*) gave us further clues about that deterioration in "general community goodwill towards Aborigines", particularly in recent years. As our President, Sir Harry Gibbs, said in his concluding remarks:

> "The relationship between the majority of Australian citizens and those of Aboriginal descent is perhaps the greatest cause of division in Australia today ....
>
> "Mr Roger Sandall went to the heart of the problem. The claim made by some that the Aboriginal people should have the best of two irreconcilable worlds, and should have the financial benefits which a developed society can provide, and yet enjoy special privileges because they are Aboriginal people, lies at the base of the conflict that is arising in our society today."

Everyone wishing to inform themselves, not only about that conflict, but also about the many other issues of importance to Australia's future with which this Volume deals, will find much to interest them in it. It is to that objective that, like its seven predecessors, it is dedicated.

Dinner Address

Why Canberra ?

John Stone

Some of you may have wondered, on seeing the title for my talk this evening - *Why Canberra?* - what I had in mind.

This is the first occasion on which the Society has met in Canberra since its formation just over five years ago. For such an avowedly federalist body that seems appropriate.

So much so, indeed, that some of you, on learning of the Board's decision to hold our eighth Conference here, might well have said: Why Canberra?

I shall not respond tonight to that particular query, but rather address some more significant issues which developments in Canberra over the past 20 years or so have begun to provoke, namely:

- The increasing significance of the Australian Capital Territory (ACT) as a political entity within the federal Parliament, and the questions, to which that development gives rise, as to whether that is appropriate within the framework of our federal constitutional arrangements.
- The conferring of self-government upon the ACT in 1988 - in the face, incidentally, of the clear wishes of its people twice expressed at referendums on the matter - and the questions which the behaviour of its resulting Legislative Assembly is beginning to raise.
- Associated with that self-government issue, but distinguishable from it, there is also the issue of the ACT's finances - most notably, the clear refusal to date of both sides of ACT politics to face up to the need to cut their coat in accordance with the financial cloth available.

Let me now consider (in reverse order) each of those issues in turn.

On the ACT's finances, I shall be brief; that issue is not so much a matter of principle as of (political) practice.

In principle, all parties purport to accept the view that along with self-government goes the need for the ACT administration to pay its own way, subject to the Commonwealth Grants Commission's judgments on the adequacy of the Territory's taxation effort relative to the standard of services it is providing to its citizens (and with the Commonwealth meeting the costs of providing certain services which are singular to the national capital).

In practice, as the "special" Commonwealth payments to the ACT provided for under the "transitional arrangements" have diminished, clear signs have emerged of a complete unwillingness on both sides of ACT politics to face up to the practical financial consequences of that, in principle, purportedly accepted view.

Thus, although the ACT was launched into self-government with relatively little debt (compared with the States and the Northern Territory), there are already signs that borrowings - including, worse still, disguised ones such as the leasing arrangements for the ACTION bus fleet, so reminiscent of the Kirner Government's financial stratagems - are on the rise. In turn, those borrowings stem from an unwillingness to accept that the luxurious standard of services to which ACT residents have become accustomed simply cannot be afforded.

Much more could be said on this topic; but since it is more a symptom of a bigger problem - that of ACT self-government itself - than an issue in its own right, I shall leave it there.

Secondly, then, let us consider that ACT self-government issue.

The *Australian Capital Territory (Self-Government) Act* 1988, [1] most of the provisions of which came into force by proclamation on 11 May, 1989, was the product of a number of developments, of which three are most relevant to my theme tonight:

- The achievement of self-government by the Northern Territory in 1978 [2] had of course given rise to questions whether the same status should be accorded to the ACT, as the other significant Territory of the Commonwealth.
- The luxurious services enjoyed by ACT residents had led many observers to conclude that the only way in which those residents could be made to face up to financial disciplines was to impose self-government upon them and "cut them loose" financially from the Commonwealth's bottomless purse (subject to appropriate transitional arrangements to cushion the shock).
- The population of the ACT, which had long since outstripped that of the Northern Territory, was continuing to rise the faster of the two; at the 1986 Census it was 258,900, compared with only 154,400 for the Northern Territory. This fact alone tended to give rise to the view that, if self-government was appropriate for 154,400 people in the Northern Territory, it must be equally appropriate for 104,000 more than that in the ACT. Although this view ignored the fact that the ACT is not just any "other" Territory, but the Seat of Government for the federation, it nevertheless appealed strongly to the simple-minded.

Self-government has therefore now been operating in the ACT for almost eight years, and the cracks are showing.

In saying that, I am not referring merely to the more bizarre goings-on of the 17 elected "representatives" of the people of the ACT, which from time to time make headlines even in real Australia, or to the shifting coalitions in which they align and realign themselves.

I am rather referring to problems of the kind which, quite coincidentally, were well summed-up only last month by an ACT departmental chief executive in his retirement speech. As reported next day, Mr John Turner told a farewell gathering that "the system of government adopted in the ACT was not working", and that "the Legislative Assembly system was expensive and encouraged aggressive behaviour".

"In retrospect", Mr Turner said, "I believe setting up a State-type political system has not worked". By comparison, "a system like that of Brisbane's City Council .... would operate more effectively". In particular, "we have not yet convinced many in the ACT community that financial sustainability and planned economic development are essential to maintaining our quality of life ..." [3]

I rest (that part of) my case.

I now come to my first issue, namely the growing significance of the ACT as a political entity within the federal Parliament, and whether that is appropriate within the framework of our federal constitutional arrangements - the aspect principally germane to the concerns of this Society.

Just as, in the 1980s, the conferring of self-government upon the ACT owed much to the facts that: (a) the Northern Territory already enjoyed self-government; and (b) the population of the ACT already far outstripped that of the Northern Territory, so we shall face in future arguments along precisely the same lines about Statehood.

Over a decade ago the Legislative Assembly of the Northern Territory began a serious quest for Statehood. [4]

Now it may be said that proposals for Statehood for the Northern Territory partake a little of the same quality as proposals, chiefly from much the same sources, for the Alice Springs to Darwin railway.

Indeed, the two proposals do have this in common: when the day comes when it truly is economically sensible to build a railway from Alice Springs to Darwin, there is a fair chance that the economic and associated population development of the Northern Territory will truly have become such as to warrant a realistic appraisal of the case for Statehood for that Territory.

Note however that, while in my respectful opinion such a development in the near future would be highly premature, I would not seriously question that, at some future time, it will be appropriate for the Northern Territory to become the seventh State of the Commonwealth.

The problem then will be this: if the Northern Territory (which at 30 June last had a population of about 177,700) can become a State, and possibly qualify for even more Senators than the two (too many) it enjoys at present, why should not the ACT (with a population at the same date of about 307,500) do likewise?

Indeed, in an editorial last June, *The Australian* newspaper argued that, despite some problems which it enumerated, "it still seems likely that once the ACT's population exceeds that of Tasmania" (473,400 last June) "pressure for it to become a State will increase". [5]

Now it is one thing for the Northern Territory to aspire to Statehood; it is, I submit, quite a different thing for the ACT to do so. For one thing, unlike the ACT, which partakes of that quality which I understand is described today as "virtual reality", the Northern Territory is, after all, a real place.

More importantly than that from a purely constitutional viewpoint, Statehood for the ACT would mean that the federal Seat of Government, which the drafters of our Constitution clearly saw as merely a piece of federal territory situated geographically within an Original State, would become a State in its own right.

As an aside, I note that some of the problems to which this would give rise can already be seen in microcosm as a result of including the ACT within the Council of Australian Governments (COAG). Whereas that body was constituted by the State Premiers as a forum for discussion of State interests (including for that purpose the largely similar interests of the Northern Territory), the inclusion of the ACT involves the presence of an invariably centralist entity whose interests tend to line up with those of the Commonwealth. This is a point which, I suggest, State Premiers should seriously consider.

That point aside, however, there is also the matter of the effect upon the federal Parliament itself of such a development.

Section 121 of the Constitution states that:

> "The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit."

Let us briefly consider then what the extent of that "representation in either House of the Parliament" might be. In doing so, bear in mind that, as a result of a whole sequence of events which I do not have time to go into here tonight, the *Commonwealth Electoral Act* now provides that:

- the ACT and the Northern Territory are to be represented in the House of Representatives "in proportion to their populations, population quotas being determined in the same

manner as for the original States under s.48 of the Act, subject to the proviso that they each have at least one Member". [6]

- Commonwealth Territories are to be represented in the Senate "on the basis of one Senator for every two Members of the House of Representatives to which they are entitled, subject to the proviso that the ACT and the Northern Territory each have at least two Senators". [7]

As noted earlier, on the basis of the Statistician's preliminary estimates of population figures for the States and Territories at 30 June last, the Northern Territory had a population of 177,700 and the ACT a population of 307,500. At the same date the population of Tasmania, which as an Original State of the Commonwealth has today 12 Senators and (by virtue of s.24 of the Constitution) 5 Members of the House of Representatives, was 473,400. [8]

We have already in the 1996 election seen the ACT acquiring a third member of the House of Representatives; and although I understand that the next electoral redistribution will result in it losing that third seat again (to Queensland), experience over the past 40 years or so suggests that, in due course, not only will that third seat be regained, but a fourth, and a fifth, and a sixth will in due time be acquired, as the "great wen" of Canberra continues its bloated expansion. With a sixth House of Representatives member will come a third Senator. By that time (or more likely, in advance of that time, depending upon the progress of the Northern Territory's claim for Statehood) we shall see those demands for full Statehood to which I referred earlier.

Let me therefore be blunt: from a federalist viewpoint, it is simply not acceptable that the ACT should become a State, on all fours either with the Original States of the Federation, or with such a new State (in due course) as the Northern Territory. Such an outcome would be akin to half a dozen federalist larks (say) not merely rearing a centralist cuckoo in some kind of communal COAG nest, but then also devolving full lark status upon the overgrown intruder.

The unacceptability of such an outcome leads in turn to the question, what can be done to prevent it? And *that* is what has led me to my title, *Why Canberra?*

In addressing that question I recall the famous words of John Dunning's motion, passed in the House of Commons in 1780, that "the influence of the Crown" (he was referring to George III) "has increased, is increasing, and ought to be diminished".

In the same way - and for not wholly dissimilar reasons - it could also be said of the population of the ACT that it too "has increased, is increasing" (to the point where it is already beginning to give rise to the question I have referred to), "and ought to be diminished".

Now clearly, we cannot have some sort of St Bartholomew's Eve massacre to "diminish" the ACT population, attractive as that thought might be in some quarters outside Canberra.

No, the solution is not to be found in shrinking the population of the present Australian Capital Territory: it is rather to be found in *shrinking the present Australian Capital Territory* , so that most present ACT residents would simply become, overnight, new residents of New South Wales.

So my question, *Why Canberra?* , really becomes three questions. First, is there any constitutional impediment to "shrinking" the present ACT?

Secondly, does the federal Seat of Government require an area the size of the present ACT to accommodate it?

Thirdly, if, as I hope to show, it does not, can we suggest a sensible "redefinition" of the ACT by diminishing its present boundaries, thereby removing the problem which will otherwise loom for the Federation at some time in the future?

I shall now focus upon those questions. To start at the beginning, s.125 of our Constitution reads, in part, as follows:

> "The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.
>
> "Such territory shall contain an area of not less than one hundred square miles, ..."

Given that constitutional requirement, I shall not question the choice of Canberra, *per se* , as the site of the national capital. All of you would be generally familiar with the painstaking investigation which, after the birth of the Federation, was put in hand to choose a site; and while I have many criticisms of Canberra as it has evolved today, they do not extend to the location itself. On the contrary, in a newspaper column some years ago I said of it that it conformed perfectly to the words of Bishop Heber's famous hymn, as a place where "every prospect pleases, and only Man is vile".

I do note, however, that even so early as 1908 the then Commonwealth Government was already displaying in this area those megalomaniacal tendencies which, over the years, have so burgeoned.

Although s.125 envisages that what we now call the Australian Capital Territory "shall contain an area of not less than one hundred square miles", the *Seat of Government Act* 1908 provided in s.4 as follows:

> "The territory to be granted to or acquired by the Commonwealth for the Seat of Government shall contain an area not less than nine hundred square miles, and have access to the sea."

In the end, the area of the ACT (including the Jervis Bay area, which provided that "access to the sea") was finally determined at 937 square miles; or, in today's nomenclature, at 2,428 square kilometres: in short, more than nine times the minimum size envisaged by the framers of our Constitution.

So the answer to my first question, then, is this: nothing in the Constitution would prevent us "shrinking" the ACT, so long as the "diminished" Territory still exceeded 100 square miles (almost 259 square kilometres) in area.

Now to my next question, namely: does the Seat of Government require an area the size of the present ACT to accommodate it?

To address that question we might ask ourselves what we would define, in Canberra today, as "essentials" of the Seat of Government? Let me suggest the following list:

- Government House at Yarralumla;
- the Parliament;
- for heritage reasons, presumably also the old (temporary) Parliament;
- the Prime Minister's Lodge (even though, quite rightly, Mr John Howard has ceased to occupy it on a permanent basis);
- the area where at least most (and preferably all) foreign Embassies and High Commissions are located;
- and in truth, if we define "essentials" strictly, not much else.

If now we relax somewhat the strictness of that definition, we might also include some or all of the following:

- the Australian War Memorial (and Anzac Parade leading up to it);

- the American-Australian War Memorial at Russell Hill;
- the Defence complex in the same vicinity;
- the Royal Military College at Duntroon;
- the Australian Defence Force Academy in the same vicinity;
- Lake Burley Griffin and its immediate foreshores;
- possibly, the Canberra Railway Station at Kingston;
- possibly, Canberra Airport;
- possibly, Fairbairn RAAF base in the same vicinity;
- possibly also, because of their association with air traffic control into those latter, the areas of Mount Ainslie, Mount Majura and Russell Hill, whose summits all carry air navigation beacons;
- possibly again, as the other "summit" in the area, Black Mountain, with its major telecommunications tower; and
- arguably, the Australian National University where we are meeting tonight.

If only as a kind of "reality check" - incongruous though that phrase may sound in Canberra - it may be worth comparing the Canberra situation in these regards to that in Washington, DC, where I once worked for four years. (Significantly, my family and I did not live in the District of Columbia, but in the adjoining State of Maryland.)

In Washington, DC the White House, the Capitol Building which houses the Congress, the various foreign Embassies, and a good many of the major federal government offices are located in the District of Columbia - rather like my list of "strictly essentials" enumerated earlier.

As to my further list of "not-so-strictly essentials", Arlington National Cemetery (perhaps the nearest thing the US has to our National War Memorial) is across the Potomac in the State of Virginia, as is the Pentagon. Union Station is in the District. Both National Airport and Dulles International Airport are also across the Potomac, in what would otherwise be Virginia, but both, I understand, are now included in areas specifically ceded to the District of Columbia. By contrast, Andrews Air Force Base, from which the President departs in Air Force One, is in the State of Maryland. West Point Military Academy is some 230 miles away in the State of New York. Moreover, although the Treasury, the State Department, the Supreme Court and the Federal Reserve buildings are all located in the District of Columbia, many other very significant federal government offices are located outside it, including not only the Pentagon but also the Central Intelligence Agency (at Langley, Virginia). The University of Georgetown is in the District, and so is (just) the American University; but the nearest University to Washington of real distinction, Johns Hopkins University, is in Baltimore, Maryland. [9]

In short, the Washington, DC comparison bears convincing testimony to the view that in by far the greatest federation in the world it has *not* been found necessary to enclose all the activity associated with the Seat of Government within federal territory.

Incidentally, in laying down the appropriate size of the Seat of Government as "not less than one hundred square miles", our constitutional founding fathers (who in so many other respects certainly drew heavily on the U.S. constitutional model) may well have had in mind the fact that, when initially laid out in 1791, the District of Columbia was exactly 10 miles square - that is, 100 square miles.

However, instead of expanding to over nine times the size originally envisaged, the District of Columbia today is actually *smaller* than initially designated - some 69 square miles. [10]

There is, finally, one other aspect of this "reality check" against the District of Columbia. At the 1995 Census, the resident population of the District was some 0.21 per cent of the total U.S.

population at that time. [11] By contrast, the estimated resident population of the ACT at 30 June, 1995 was some 1.68 per cent of the estimated resident population of Australia at that time [12] - some eight times the comparable District of Columbia proportion.

So the answer to my second question - does the Seat of Government require an area the size of the present ACT to accommodate it? - is clearly and overwhelmingly in the negative.

Moreover, and in general anticipation of detail which I shall come to shortly, it will already be clear that everything which I have listed both as "strictly essential" and as "not-so-strictly essential" could be easily accommodated within an Australian Capital Territory of no more than the 100 square miles (say 260 square kilometres) which the Constitution requires.

So that brings me to my third question: can we suggest a sensible "redefinition" of the ACT, diminishing its present boundaries to something more nearly approaching that 260 square kilometre area, while retaining all those strictly, and not-so-strictly essential elements?

Before stating my detailed proposals, let us briefly explore how, if one were to embark on that process, one would do so.

The relevant section of the Constitution is s.123 (Alteration of Limits of States); clearly, any diminution in the present area of the ACT would involve a small increase in the present area of New South Wales. Section 123 is as follows:

> "The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected".

In short, there is clearly no constitutional hindrance to prevent the restoration to New South Wales of most of that territory (including the Jervis Bay area) which it originally agreed to cede to the Commonwealth.

My detailed proposals, then, are roughly indicated on the small map at page xxviii, namely:

- Some 7 suburbs only (Barton, Deakin, Forrest, Griffith, Parkes, Red Hill and Yarralumla) would in fact include everything (except, possibly, one or two of the smaller Embassies) enumerated on my "strictly essential" list.
- Those suburbs, together with 8 others (Acton, Campbell, City, Duntroon, Kingston, Majura, Reid and Russell) would in fact include everything (except Black Mountain) enumerated on both my "strictly essential" and "not-so-strictly essential" lists.
- Including Lake Burley Griffin, they would cover an area of almost 129 square kilometres, of which Majura accounts for over 70 per cent (see Table 1).
- In order to ensure that the "new ACT" was not less than 100 square miles in area, there would be a need to "throw in" another 130 square kilometres to "make weight":
- The inclusion of the Black Mountain Nature Reserve area (including the telecommunications tower) and the adjoining area (north of the Molonglo River) bounded by William Hovell Drive and Coppins Crossing Road would complete my list of "not-so-strictly essentials". To this we might also add the small area to the west of Yarralumla, between the Cotter Road and the Molonglo River, and bounded to the west by Coppins Crossing Road and Uriarra Road.
- Extension of the resulting area east to the ACT/NSW border, and, so to speak, "filling in the gaps", would result in the addition of a further 8 suburbs (Fyshwick, Harman,

Jerrabomberra, Kowen, Narrabundah, Oaks Estate, Pialligo and Symonston) and would raise the total area to above the 260 square kilometres mark (see Tables 1 and 2).

- As at 30 June, 1995 the resident population of this "new ACT" was approximately 31,300, and as at 26 May, 1994 (the date of the last ACT electoral redistribution) there were only 20,330 persons enrolled in the area. [13]
- The remaining 276,200 people resident in the ACT at 30 June, 1995 would become, overnight, proud new citizens of our self-designated Premier State, New South Wales.
- They would, of course, need to be constituted by that State into appropriate local authority areas, including (as necessary) new ones. I do not explore that point of detail further.
- So far as federal Parliamentary representation is concerned, the status of the "new ACT" would revert to that which obtained when my wife and I first came to Canberra. It would have no Senators, and a single member in the House of Representatives who could vote only on issues directly affecting the Territory. [14]
- As a result of its overnight gain in population, N.S.W. would gain an extra two members in the House of Representatives.

Now that really *is* a worthwhile topic for discussion at the proposed 1997 Constitutional Convention.

Table 1

Statistical Local Name	Suburb Area (Sq.Kms)	Population at Equivalent 30.6.95	Current No. of Electors [13] Enrolled 26.5.94	Projected 31.3.98
0089 Acton	2.91	1750	363	429
0369 Barton	1.19	645	411	404
0909 Campbell	3.10	3054	2401	2405
1449 City	1.40	365	46	50
1809 Deakin	3.60	2659	1936	1909
2169 Duntroon	2.40	1950	1385	1685
2789 Forrest	1.57	1204	821	799
2979 Fyshwick	9.81	75	37	35
3429 Griffith	2.76	3292	2232	2411
3789 Harman	0.91	232	155	160
4589 Jerrabomberra	17.56	38	20	5
4959 Kingston	1.35	1621	879	1047
5769 Majura	93.11	349	157	162
6219 Narrabundah	4.11	5361	3453	3321
6309 Oaks Estate	0.40	340	210	213
6759 Parkes	1.81	27	4	8
7029 Pialligo	2.32	128	128	97
7119 Red Hill	4.81	3150	2178	2193
7209 Reid	0.96	1663	998	958
7479 Russell	0.54	5	0	0
7929 Symonston	9.81	458	336	401
8919 Yarralumla	7.21	2845	2149	2127
	173.64	31,211	20,299	20,819

ACT Totals (a) 304,125 192,096 210,538
Proportions(%) 10.26 10.57 9.89
(a) Excluding Jervis Bay
Table 2
Locality Area (Sq.Kms) Population at 30.6.95
(1) 22 Suburbs (Table 1) 173.64 31,211
(2) Balance of Weston Creek
Statistical Sub-Division (a) 8.05 36
(3) Black Mountain and
adjoining area to be
designated (b) (c) (d)
(4) Kowen 78.04 47
259.73 (e) 31,294

(a) Statistical Local Area (SLA) 8829. This is the area adjoining Yarralumla and extending west, between the Cotter Road and the Molonglo River, until bounded by Uriarra Road and Coppins Crossing Road.

(b) Part of Statistical Local Area 0549 (Balance of Belconnen Statistical Sub-Division), including Black Mountain Reserve (and the telecommunications tower), and the adjoining area (north of the Molonglo River) which is bounded by William Hovell Drive and Coppins Crossing Road. (To the south, this adjoins SLA 8829 - see (a) above.) The total area of SLA 0549 is 75.34 sq.kms and its total resident population at 30 June, 1995 was 73.

(c) See (b) above.

(d) Negligible.

(e) Plus Black Mountain Nature Reserve and adjoining area - see (b) above.

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1 . Act No. 106 of 1988.
2 . By the *Northern Territory (Self-Government) Act* 1978.
3 . *The Canberra Times* , 4 February, 1997.
4 . "On 28 August 1985, the Legislative Assembly of the Northern Territory of Australia ..... established the Select Committee on Constitutional Development ..... The original resolutions were passed in conjunction with proposals then being developed in the Northern Territory for a grant of Statehood to the Territory within the Australian federal system .....": Introduction to the *Final Draft Constitution for the Northern Territory* : Sessional Committee on Constitutional Development, Legislative Assembly of the Northern Territory, August, 1996.
5 . *The Australian* , 6 June, 1996.
6 . *House of Representatives Practice* , 2nd Edition, 1989, p.169.
7 . *Ibid.*
8 . *Estimated Resident Population by Sex and Age: States and Territories of Australia* ; ABS Catalogue No.3201.0.
9 . I am indebted for many of these facts to the U.S. Information Service Research Centre, Canberra, whose courteous assistance is gratefully acknowledged.
10 . "Initially laid out as a 10 mile square, the District extended across the Potomac, occupying lands ceded in 1791 by Virginia and Maryland. In 1846 the portion given by Virginia Ä

including the city of Alexandria and what is now the urban county of Arlington Ä was returned to the State, and the District thereafter comprised only the former Maryland territory on the north bank of the river." *Encyclopaedia Americana* , International Edition (1994), pp.192-3.

11. U.S. Information Service Research Centre.

12. ABS Catalogue No. 3201.0, *op. cit.*.

13. Australian Electoral Commission: *Redistribution of the Australian Capital Territory into Electoral Divisions* (1994): AGPS, Canberra, pp. 18-21. According to the projections supplied to the Electoral Commission by the Australian Bureau of Statistics in connection with the 1994 ACT redistribution, the number of electors in the area at 31 March, 1998 would be only 20,860 (see Table 1 of text).

14. This was the role performed for many years by the then Member for Canberra, the late Jim Fraser, after whom the current ACT seat of Fraser is named.

Introductory Remarks

John Stone

Ladies and gentlemen, welcome to this, the eighth Conference of The Samuel Griffith Society, and the first to be held in Canberra. As I said last night, for such an avowedly federalist body, that seems appropriate.

That said, however, it would be remiss of me not to acknowledge, with pleasure, the splendid attendance this weekend. I do not know how much that owes to the relative closeness of Canberra to both Sydney and Melbourne, or how much to the recently heightened topicality of many of the matters which are to be on our Agenda today and tomorrow. Whatever the reason, it is pleasing indeed to see such a roll-up. Thank you all for coming.

When I have made introductory remarks of this kind to previous Conferences, I have usually begun by commenting in some degree on the address given us by the speaker to our dinner on the Friday evening. Clearly, that would not be appropriate in this case.

There will, however, be no lack of material before us over the next day or so. Having in mind the Commonwealth Government's recent confirmation of its intention to hold, next December, a Constitutional Convention, we shall be opening our Conference this morning with four papers dealing with topics which might appropriately be discussed at any such Convention.

In doing so we are, of course, building upon the earlier groundwork of that kind which was laid at our Adelaide Conference nine months ago. Then, as you will recall, we also discussed four such topics: a proposed constitutional amendment of the "external affairs" power (section 51(xxix)); the republic issue; the need to constitutionally entrench our present Australian flag; and the possibilities for reforming the High Court.

Today we shall be returning, more definitively, to two of these topics, the republic, and the High Court. In addition, we shall hear from Professor Jeffrey Goldsworthy on a role for the States in initiating referendums; and from Dr Colin Howard, QC on the so-called "race" power (section 51(xxvi)).

Beyond the ambit of the prospective Constitutional Convention, several issues have assumed particular prominence since we last met. The most pressing and immediate of those issues is that of "native title", where the High Court's original "fairy tale" as told in its *Mabo* judgment has now been followed by a sequel in its equally (or in some ways even more) fanciful judgment in the *Wik Case*.

Tomorrow we shall devote the whole morning to three papers on what we have customarily called "the Aboriginal question". As well as papers from Dr John Forbes on *Amending the Native Title Act*, and from Mr S E K Hulme, QC on *The Wik Judgment*, we shall also hear what I can promise you (because I have already had the privilege of reading it) will be a fascinating paper from Roger Sandall on what I might call the cultural verities of the so-called "reconciliation" issue. All in all, tomorrow morning promises to be
a feast indeed.

The other issue which, since we last met, has taken on a certain immediacy is that of the conduct of the High Court itself - or more precisely, of certain of its members. Three months or so ago, I asked Dr (now Professor) Greg Craven to speak to us this weekend on *The Engineers' Case*, in which the then High Court went out of its way in 1920 to ignore the plain fact that the Constitution it was interpreting was, first and foremost, a *federal* one. Naturally, I had no idea at

that time that during this past week today's High Court would be, in effect, reconsidering one of its more recent examples of judicial activism, namely the views on the law of defamation which it stated a few years ago in the *Theophanous* and *West Australian Newspapers* cases.

As it happens, that portion of Professor Craven's paper which, at his request, I shall be reading on his behalf this afternoon is specifically directed to that very issue - namely, the process whereby our High Court in recent years has begun to "find" in our Constitution whatever the Justices in question have wanted to discover. It is a paper which, I predict, will be read with some interest in legal circles long after this Conference has disbanded.

While I have mentioned a number of the particular papers on our Agenda because of their current topicality, I would not like it thought that others, which I have not mentioned, will be of any less value or interest. On the contrary, I am prepared to make what I feel to be the proud claim that our Agenda as a whole for this Conference will be no less satisfying than its predecessors.

It is now time to move into that Agenda itself, which we shall do with our opening paper this morning from our President, Sir Harry

Gibbs, who is going to speak to us on the topic *A Republic: The Issues*. Ray Evans will chair this Session, and I shall now hand over to him the task of introducing Sir Harry.

Chapter One:

A Republic: The Issues

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

It is not my intention now to enter into the debate on the question whether Australia should become a republic. I remain unconvinced that the Constitution of Australia would be made more democratic, efficient or just by breaking the existing links with the Crown, and I regard as fanciful the suggestion that under a republic the Head of State would give Australia a sense of unity and would heal the divisions that are said to exist in our society. However, this is not the occasion to press arguments of that kind.

My present purpose is to discuss what issues would have to be decided before our Constitution could be converted to one that would be republican in form as well as in substance.

Much of the commentary in the media, which is not infrequently superficial and biased, suggests that the principal question to be decided would be how the Head of State under a republic should be chosen. That question is only one of many, and it is obvious enough that it cannot sensibly be discussed until it is known what role the Head of State is intended to have, and what powers it is proposed should be given to the holder of the office.

An initial question is whether, under a republic, there should be a Head of State who is appointed or elected to that office alone. An alternative possibility is that the role of the Head of State could be filled by the holder of an existing office, e.g. by the Prime Minister, the Speaker, the President of the Senate or the Chief Justice, or that the functions of the Head of State could be divided between the holders of those offices or some of them.

There would be obvious objections to the adoption of any expedient of that kind. If the powers and functions of a Head of State were given to someone who held another political office, the result would be to enhance the status and influence of that office in a way that might be regarded as unacceptable. If all such powers and functions were conferred on the Chief Justice, the result would be that that office would be given a political character, and if only ceremonial functions were conferred on him the heavy burden of that office would be unduly increased.

The representative and symbolic role which a Head of State is intended to have would be attenuated if there were no separate Head of State. In what follows I shall assume that if a republican Constitution were adopted it would provide for a separate Head of State, although that is a question that would have to be decided.

The question would then arise, what title should be given to the Head of State under a republic? Those advocates for change who wish to minimise the significance of the conversion might prefer to retain the title of Governor-General, but any title which ingenuity or ambition might suggest could be selected. However, President seems a likely choice, and for ease of expression I shall use that name to refer to the Head of State under a republican Constitution.

An important question that would have to be decided at the outset is what type of republican Constitution Australia should have if the conversion were to be made. Existing republican Constitutions throughout the world differ widely in detail. At one end of the range the President has full executive power, and is not responsible to the Legislature for the exercise of that power. That is the position in the United States. However, a President who has extensive executive power may be required to share that power with a Prime Minister (as in France) or may operate

under a Constitution which provides for responsible government (as in a number of former British colonies).

At the other end of the range the President exercises little more than ceremonial functions; that is so in Germany and the Republic of Ireland. In between these extremes there are Constitutions under which the Presidency is largely a ceremonial office, but the President still retains some important powers.

For Australia to adopt a Constitution which provided for an executive President on the American model would be to effect a change of the most radical kind, but the influence of American society in Australia is so strong that it is possible that this model might attract some support. On the other hand, a Constitution which allowed the President in practice to exercise only ceremonial functions would be likely to find favour with those who share the opinion which was held by the framers of the German Constitution, that democratic institutions are most likely to be preserved if the position of the Head of State is purely a titular one.

A more pragmatic (if unattractive) reason for adopting a Constitution of that kind is that such a President would lack the ability to check governmental abuses - an argument which may have appealed to Mr De Valera when the Constitution of the Republic of Ireland was under preparation. It is not my purpose now to discuss fully the a

Chapter Two

The Role of the States in High Court Appointments

Professor Gabriël A Moens

1. The assistance in research for this paper (especially in relation to the Canadian situation and the Meech Lake and Charlottetown Accords) of Mr John Trone, of the T C Beirne School of Law, is gratefully acknowledged.

1. Introduction

If a federal system is to work well, the appointment of judges to its highest constitutional court cannot be the exclusive province of one level of government. The division of legislative power between the Commonwealth and the States means that both levels of government have a vital interest in the appointment of High Court Justices who will determine the distribution of that power. The community at large also has a profound interest in the appointment of those who decide these issues. This is because of the manifest advantages of a federal system as a form of governance.

The advantages of a federal system would seem too obvious to require elaboration, if they were not questioned so frequently in Australia. To restate them is unlikely to convince the doubters. However, it will give friends of the federal system cause to reflect upon the importance of that system, and the crucial role of the judiciary who interpret and apply the Constitution creating that system.

Hence, in part two of this paper I briefly review the advantages of a federal system. In part three, I describe the present process of consultation between the Commonwealth and the States in the appointment of High Court Justices. This description will be followed, in part four, by a consideration of the constitutional framework of a number of other federations in respect of appointments to their federal judiciaries. In the final part, I argue that the most workable and most easily adopted model for State involvement in appointments to the High Court is that proposed by the Queensland Government in the 1980s.

2. The advantages of a federal system

In the political sphere, because a federal system divides power, it imposes a powerful limitation upon arbitrary government. [2] In an American context, Justice O'Connor of the United States Supreme Court stated in *New York v. United States* that "the Constitution divides authority between Federal and State governments for the protection of individuals", and that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front". [3] She observed in her opinion that "federalism secures to citizens the liberties that derive from the diffusion of sovereign power", [4] so that "[i]n the tension between Federal and State power lies the promise of liberty". [5]

It is important not to underestimate the protection of rights offered by the functioning of a healthy federal system. Federalism implicitly protects individuals because it prevents an excessive accumulation of power in either level of government. In Australia, governmental power is divided among numerous governments, each of limited powers. Furthermore, the party holding a majority of seats in the Federal and State Lower Houses seldom dominates the Upper Houses. These institutional factors are powerful limitations upon arbitrary government.

Alexander Hamilton long ago recognised the potency of a federal division of powers in discouraging oppression. Commenting on the American Constitution before the introduction of its Bill of Rights by a series of amendments, he wrote that "the Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights". [6] Thus, for Hamilton, the absence of a Bill of Rights in the American Constitution did not matter because its careful federal division of powers in itself protected against governmental tyranny. A similar perception likely prompted the statement of Sir Harry Gibbs that:

> "[t]he most effective way to curb political power is to divide it. A Federal Constitution, which brings about a division of power in actual practice, is a more secure protection for basic political freedom than a bill of rights". [7]

Furthermore, federalism offers benefits in the economic and social spheres. Federalism permits social and economic experimentation by State governments without risk to the whole nation. [8] Federalism can enhance economic efficiency through competition between the States. [9]

While a great deal is at stake for the Australian States when appointments are made to the High Court in Australia, unlike many other federations, there is no constitutional acknowledgment of those interests.

3. **The existing minimalist model**

Existing involvement of the States in High Court appointments is minimal. There is no constitutional requirement that the States be involved in any way in appointments to the High Court. The Constitution provides that the Justices of the Court are appointed by the Governor-General in Council, [10] i.e. the Commonwealth executive.

For the first seventy-eight years of Federation there was no formal consultation whatsoever with the States concerning High Court appointments. Finally, in 1979 the new *High Court of Australia Act* created a formal process of consultation. [11] Section 6 of that Act stipulates that:

> "Where there is a vacancy in an office of Justice, the Attorney-General shall, before an appointment is made to the vacant office, consult with the Attorneys-General of the States in relation to the appointment".

The Act thus imposes on the Commonwealth Attorney-General an obligation "to consult" with the Attorneys-General of the States before making an appointment to the High Court.

The verb "to consult" is not defined in the Act. Until recently consultation was limited to asking State Attorneys-General for suggestions as to who might be appointed, followed by discussion of those persons. [12] More recently the Commonwealth Attorney-General consented to a State request to identify and to discuss prospective appointees that the Commonwealth was actively considering. [13]

The consequences of non-compliance with this statutory requirement would not necessarily invalidate an appointment. It has been argued that the statutory requirement would be construed as directory only, so that as long as the constitutional requirement of appointment by the Governor-General in Council was satisfied, an appointment would be valid. [14] Thus, provided the provisions of the Constitution with regard to the appointment of High Court judges are adhered to, the appointment would be validly made. The exceedingly frail nature of the existing consultation procedure is thus apparent.

4. **Procedures for appointing federal judges in other federations**

(i) The United States

Presidential nominations of prospective appointees to the United States Supreme Court and other federal courts are subject to the approval of the United States Senate. [15] The Senate consists of two Senators from each State. [16] Senators were originally chosen by State legislatures, [17] but since 1913 have been chosen by the people of each State. [18]

The influence of the individual States upon appointments to the United States Supreme Court is slight. Nonetheless, the general attitude of prospective appointees towards federalism is likely to be influential in Senate consideration of a nomination.

It is at the level of the lower federal judiciary that the influence of State interests is most apparent in the United States. This is due to the tradition of `senatorial courtesy'. By this tradition, to gain approval of his nominee to a federal District Court, the President must gain the approval of Senators from the State in which the District is located rather than the Senate as a whole. [19] So in practice Federal District judgeships are chosen by the Senators of the State in which the District is located. As John F Kennedy put it, in such cases, "it's senatorial appointment with the advice and consent of the President". [20]

Appointments to the federal Circuit Court of Appeals are also subject to strong regional influence because the Circuits are primarily groupings of contiguous States. [21] The influence exercised by the States here, however, is a regional influence, and the influence of individual States is accordingly diminished.

Given that the United States Senate has operated relatively effectively as a States House, the American model of Senate approval of appointment would not be an appropriate one for Australia to follow, because in Australia the Senate does not in any meaningful sense operate as a States House. [22] The prediction made by J M Macrossan at the Sydney Convention in 1891 that "[t]he influence of party will remain much the same as it is now, and instead of members of the Senate voting, as has been suggested, as States, they will vote as members of parties to which they belong" [23] has certainly been fulfilled. The Senate would be unlikely to provide more effective representation of State interests in this respect than it has in other respects.

(ii) Canada

By statute, at least three of the nine [24] judges [25] of the Canadian Supreme Court must be appointed from the judiciary or Bar of Quebec. [26] Similar statutory requirements apply even to the lower level of the federal judiciary. At least ten of the maximum of thirty-one [27] judges [28] of the Federal Court must also be appointed from the judiciary or Bar of Quebec. [29]

In recent years there have been proposals to enhance and to constitutionally entrench provincial involvement in appointments to, and representation on, the Canadian Supreme Court. These proposals, however, did not seek to constitutionally entrench provincial representation on, or participation in the making of appointments to, the Federal Court.

The first such proposal was the Meech Lake Accord. [30] It was struck in June,1987 between the Canadian Prime Minister and the Premiers of the ten Provinces. In the end the Accord lapsed, failing to be ratified by the requisite number of Provinces within the stipulated three year time limit. The Accord proposed to amend the *Constitution Act* 1867 [31] to greatly strengthen provincial influence upon appointments to the Supreme Court. The statutory requirement that at least three of the nine [32] judges of the Supreme Court be drawn from the judiciary or Bar of Quebec was to be constitutionally entrenched. [33]

Each provincial government was to be able to submit to the federal Minister of Justice the names of potential appointees who had been admitted to the Bar of its Province. [34] The actual appointment of Supreme Court judges was to be made by the Governor-General in Council. [35] However, except where the Chief Justice was appointed from among the sitting members of the

Court, the federal government would have to appoint a person from among those nominated by the Provinces who was also acceptable to the federal government. [36]

Where the appointment of a member of the Quebec judiciary or Bar was necessary to fulfil the requirement of three judges drawn from the Quebec judiciary or Bar, the federal government would have to appoint a person who had been nominated by the government of Quebec. [37] In the case of other vacancies, the federal government would have to appoint a person nominated by a provincial government other than that of Quebec. [38]

Under the Accord, these gains made by the Provinces in securing a provincial role in the making of appointments to the Supreme Court would have been subject to a very stringent amending procedure. Amendments to the new constitutional provisions dealing with the Supreme Court would have been contingent upon the approval of the Canadian Parliament and of each provincial legislative assembly. [39]

The Meech Lake Accord highlights an important lesson concerning the appropriate system for appointments to the Australian High Court. The Accord was one-sided because, excepting appointments of the Chief Justice from among sitting judges, no prospective appointees would be the suggestion of the federal government. [40] Both State and Federal governments must be available as credible countervailing influences balancing each other, precisely because it is "[i]n the tension between Federal and State power [that] lies the promise of liberty". [41] Even if the Australian States were to be given some form of veto over High Court appointments, that would not give them a power to propose names. Such a system, while a considerable improvement upon the current situation, would still preserve to one government only the power to suggest names.

Like the Meech Lake Accord, the second proposal, known as the Charlottetown Accord, was never adopted. It was rejected by 55 per cent of the population in a referendum. Under the Charlottetown Accord, the Constitution was to be amended to require the federal government to choose judges of the Supreme Court from lists submitted by the provincial governments. [42] Should no candidate submitted by the provincial governments be acceptable to the federal government, interim appointments were to be made. Interim appointments could also be made in the case of provincial delay in submitting lists of candidates. [43] Amendments to this system of appointment were to be made only with the agreement of seven Provinces, together representing 50 per cent of the population. [44]

The requirement that three of the nine members of the Supreme Court must come from the Quebec judiciary or Bar [45] could only be amended by unanimous agreements of the ten Provinces. [46] All provincial governments would take part in nominating the judges drawn from those admitted to the Quebec Bar. [47]

(iii) Germany

The involvement of the German Länder in the appointment of judges to the Federal Constitutional Court is very significant indeed. Half of the members of that Court are appointed by the *Bundesrat*, [48] which is much more truly a States' House than the Australian Senate. The *Bundesrat* is composed of members of the Land governments, appointed by and subject to recall by the Länder. [49] Through the *Bundesrat* the Länder participate in the legislative process and administration of the Federation. [50] Finally, Land Ministers participate in the selection of judges for other federal courts. [51]

While there is much to admire about the German federal system, the major difficulty is that there is no chance whatsoever of it being emulated in Australia. No federal government in Australia would ever propose, or be likely to secure the passage of, a referendum offering the States as much countervailing power as the German States possess in the *Bundesrat.*

(iv) Malaysia

The Malaysian Constitution provides for consideration of the views of the States in making appointments to federal courts. The judges of the Federal Court, [52] the Court of Appeal [53] and the High Courts [54] are appointed by the King, acting on the advice of the Prime Minister, after consulting the Conference of Rulers. [55] Each State of the Federation is represented in the Conference of Rulers. [56]

There are additional duties of consultation preceding appointments to the federal judiciary sitting in the States of Sabah and Sarawak. Before advising the King as to the appointment of the Chief Judge of the High Court in those States, the Prime Minister must consult the Chief Minister of each of those States. [57]

Like the Canadian Constitution, the Malaysian Constitution expressly accommodates specific regional interests. In each country there exist compelling reasons for this difference of treatment. In Australia there are no such compelling reasons for treating different States differently. Indeed the Australian Constitution evinces a strong disapproval of discrimination between the States. [58]

From the foregoing discussion of the methods of appointment of judges to the apex constitutional courts of other federations, it is clear that other federations tend to provide for rather greater accommodation of State interests in making such appointments than does the Commonwealth Constitution.

While the federations discussed provide to varying extents for representation of provincial interests in making appointments to lower federal courts, in Australia this would be much less urgent than is the case with High Court appointments. Hence the procedure which should be supported would be limited to High Court appointments and would not apply to the other federal courts.

5. **The Queensland remedy**

In Australia many suggestions have been made from time to time for giving the States a role in the appointment of High Court judges. These suggestions are found in the reports published by the Australian Constitutional Convention and its Judicature Sub-Committee, and the Constitutional Commission. These suggestions include, but are not limited to, a Victorian proposal that appointments should alternate between the Executive Council of a State and the Executive Council of the Commonwealth, with the Commonwealth filling every second vacancy and each State every twelfth, or that appointments be made on the recommendation of a judicial commission consisting of the Federal and State Attorneys-General.

However, the most workable and most easily adopted model for State involvement in appointments to the High Court is that proposed by the Queensland government in the 1980s because it accommodates both State and Federal interests, and is not open to the objections of one-sidedness that can be made to the Meech Lake proposals.

Under the Queensland proposal, upon a vacancy occurring on the High Court bench, the Commonwealth Attorney-General asks the State Attorneys-General for suggestions of possible appointees. The Commonwealth itself may then submit suggestions of potential appointees for the scrutiny of State Attorneys-General.

From this consultation the Commonwealth would gain a clear idea about which candidates met with State approval or disapproval. High Court vacancies could only be filled by prospective appointees of whom the Commonwealth government approved and of whom three (or more) State governments had expressed positive approval or had not expressed an opinion upon. [59]

Since this proposal did not require the positive approval of a majority of States, it would be workable in practice. It should not be an insurmountable obstacle for the Commonwealth to find

a prospective appointee acceptable to itself and approved, or at least not objected to, by three State governments.

Not surprisingly, the Constitutional Commission appointed by the then federal government dismissed the Queensland proposal. In doing so the Constitutional Commission said that it would "give undue prominence to a balancing of regional considerations" and would produce "compromise candidates". [60]

The Commission's objections are specious, for the following reasons. First, as for the charge that the Queensland proposal would "give undue prominence to a balancing of regional considerations", our survey of the practice of appointment in other federations shows that it is customary in a federal system to give due prominence to a balancing of regional considerations. Other federations do so through constitutionally-mandated State involvement in the making of appointments to federal courts. Australia does not, but should learn from the experience of its own and other federal systems and adopt a mechanism which is adapted to local political conditions.

Secondly, as for the allegation that the Queensland proposal would lead to the appointment of "compromise candidates", that is not necessarily a bad thing. After all, the idea of a federal system is to balance State and federal interests. In such a system, compromise ensures that neither State nor federal interests go wholly unsatisfied.

In contrast, the present system merely tends to produce appointees who are sympathetic to the claims of one level of government and who are frequently unacceptable to the other. Were the system of appointment skewed as broadly in favour of the States as the present system is in favour of the Commonwealth, those favouring the *status quo* on appointments might see how dubious a one-sided system of appointment is. After all, both levels of government have interests at stake in judicial appointments. It is just that at present the interests of only one level of government have been accommodated in appointments.

In a significant statement, the Constitutional Commission indicated that its disapproval of State involvement in the appointment of High Court judges rested upon a belief that only one level of government should be involved in the selection process:

> "[I]t should be for one government alone to take the responsibility for Court appointments, and this includes High Court appointments. There should be no shirking of the responsibility by the argument that the decision was in fact a joint decision and, therefore, that no one in particular can be called to account by either a legislature or the public." [61]

Why would objections be made to the involvement of more than one level of government in the making of appointments to the High Court? One does not need to look far to discover the reason. In his excellent paper *Reforming the High Court,* published last year by The Samuel Griffith Society, Professor Craven accurately identified the motivations of those rejecting State participation in the appointment process. He wrote:

> "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." [62]

Contrary to the Constitutional Commission's arguments, in my opinion the Queensland proposal would substantially enhance the workings of Australia's federal system by giving the States a meaningful role in the appointment of High Court Justices.

In order to guarantee such a role for the States, it would be necessary to entrench these procedures within the Constitution through constitutional amendment. An amendment to the *High Court of Australia Act* would not result in lasting benefits for Australia. Assuming its constitutional validity, a statutory modification to the procedure of appointment could be, and almost inevitably would be, removed by any incoming government unsympathetic to the preservation and improvement of the federal system. To attain the benefits of the Queensland proposal in a more assuredly permanent manner, the Constitution would have to be amended in accordance with s.128 of the Constitution.

Since such a proposed amendment would be aimed at curtailing rather than expanding central power, it would have far more favourable prospects for adoption than have many proposals submitted to referenda This is especially so given the special federally based majorities required for the passage of a referendum. The power of putting such a proposed amendment to the people lies in the Commonwealth Government. Never has there been a more opportune time (or greater need) for the making of such proposals to the people.

6. **Conclusion**

In Australia the urgency of constitutional change has been constantly pressed upon us for some years now. However, reform of the process of federal judicial appointments has not been part of the agenda of urgency. In my view, however, the Australian federal system could have no better anniversary present, as we near the centenary of Federation, than the reform of appointments to the High Court.

Endnotes :

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2. See Moens, G A, *The wrongs of a constitutionally entrenched Bill of Rights* , in M A Stephenson and Clive Turner (eds), *Australia: Republic or Monarchy? : Legal and Constitutional Issues* , University of Queensland Press, 1994, pp. 248Ä49.

3. *New York v. United States* (1992) 505 US 144 per O'Connor J, for the Court at 181Ä82.

4. *New York v. United States* (1992) 505 US 144 per O'Connor J, for the Court at 181Ä82, quoting *Coleman v. Thompson* (1991) 501 US 722 per Blackmun J, dissenting at 759. See also *Gregory v. Ashcroft* (1991) 501 US 452 per O'Connor J, for the Court at 458 and Madison, J., Federalist No. 51, *Federalist Papers* , ed. Clinton Rossiter (1961), p.323.

5. *Gregory v. Ashcroft* (1991) 501 US 452 per O'Connor J, for the Court at 459. See also *United States v. Lopez* (1995) 115 S Ct 1624 per Kennedy J, concurring at 1638. Contrast perhaps Toohey, J, *A government of laws, not of men ?* (1993), 4 Public Law Review 325, p.236.

6. The Federalist No. 84, in Benton, W (ed), *The Federalist* (Encyclopaedia Britannica, 1989), p.253.

7. Gibbs, Sir Harry, *Courage in constitutional interpretation and its consequences: one example* (1991) 14 University of New South Wales Law Journal 325Ä26.

8. E.g., *New State Ice Co v. Liebmann* (1932) 285 US 262 per Brandeis J, dissenting at 311.

9. 9. Kasper, W, *Competitive federalism : may the best State win*, in *Restoring the true republic* , Centre for Independent Studies (1993), pp.60Ä66.

10. *Constitution* , s.72(i). Constitutional questions concerning this section are canvassed by J A Thomson, *Appointing Australian High Court Justices: some constitutional conundrums* , in P H Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Law Book Company,

1992), p.251.

11. The procedure was earlier followed in considering the vacancy filled by Sir Ronald Wilson: see *Appointment of a Western Australian Justice of the High Court* (1979), 53 Australian Law Journal 471Ä72.

12. Constitutional Commission, *Australian Judicial System Advisory Committee Report* (1987), p.74; Appendix C to Judicature Sub-Committee, Second Report to Standing Committee, May, 1985, p.34, in *Proceedings of the Australian Constitutional Convention, Brisbane, 29 July Ä 1 August, 1985* (1985), vol.II; Judicature Sub-Committee, Second Report to Standing Committee, May, 1985, p.8, in *Proceedings of the Australian Constitutional Convention, Brisbane, 29 July Ä 1 August, 1985* (1985), vol.II.

13. Craven, G., *Reforming the High Court* in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 7 (1996), p.40.

14. Appendix B to Judicature Sub-Committee, Second Report to Standing Committee, May, 1985, p.31, in *Proceedings of the Australian Constitutional Convention, Brisbane, 29 July Ä 1 August, 1985* (1985), vol.II.

15. *US Constitution* , Art II s.2, cl.2.

16. *US Constitution* , Amendment XVII.

17. *US Constitution* , Art I s.3, cl.1.

18. *US Constitution* , Amendment XVII.

19. Beth, L P, *Politics, the Constitution and the Supreme Court* (Harper and Row, 1962), p.101.

20. Quoted in O'Brien, D M, *Storm Center: the Supreme Court in American Politics* (WW Norton, 1986), p.52.

21. The territory of each State is within the jurisdiction of one of eleven Circuit Courts of Appeal: see the map in Cohen, M L and Olsen, K C, *Legal Research* (5th ed.) (West, 1992), p.31.

22. See e.g., Sawer, G, *Federation under strain* (Melbourne University Press, 1977), pp.124, 128; Howard, C, *The Constitution, power and politics* (Fontana, 1985), p.166; Howard, C, *Australian federal constitutional law* (3rd ed.) (Law Book Company, 1985), p.96; Hamer, D J, *Towards a valuable Senate* , in *The Constitutional Challenge* (Centre for Independent Studies, 1982), p.60. Compare Galligan, B, *A Federal Republic* (Cambridge University Press, 1995), pp.68Ä69.

23. *Convention Debates, Sydney, 1891* , p.434, quoted by LaNauze, J, *The making of the Australian Constitution* (Melbourne University Press, 1972), p.44. There were other such predictions in the Debates: see e.g., *Convention Debates, Adelaide, 1897* , pp. 173Ä75, 297Ä98.

24. *Supreme Court Act* , s.4(1), Consolidated Statutes of Canada, c SÄ26.

25. `Judge' includes the Chief Justice: *Supreme Court Act* , s.2(1), Consolidated Statutes of Canada, c SÄ26.

26. *Supreme Court Act* , s.6, Consolidated Statutes of Canada, c SÄ26.

27. *Federal Court Act*, s.5(1), Consolidated Statutes of Canada, c FÄ7.

28. `Judge' includes the Chief Justice and Associate Chief Justice: *Supreme Court Act*, s.2 (1), Consolidated Statutes of Canada, c FÄ7.

29. *Federal Court Act*, s.5(6), Consolidated Statutes of Canada, c FÄ7.

30. The text of the Accord appears in Behiels, M D (ed), *The Meech Lake Primer* (University of Ottawa Press, 1989), pp.539Ä46 and in Blaustein, A P and Flanz, G H, *Constitutions of the countries of the world: Canada* (Oceana Publications, 1991), 217.

31. This Act was formerly known as the *British North America Act* 1867 (30 & 31 Vict c 3 (Imp), reprinted RSC 1985, App II No 5), the title being changed by the *Canada Act* 1982 (1982 c 16) (UK).

32. The number of Supreme Court judges (including the Chief Justice) was to be set at nine by s.101A(2), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

33. Section 101B(2), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

34. Section 101C(1), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

35. Section 101A(2), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

36. Section 101C(2), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

37. Section 101C(3), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

38. Section 101C(4), *Constitution Act* 1867, proposed to be added by *Constitutional Amendment* 1987, s.6.

39. Section 41, *Constitution Act* 1867, as proposed to be amended by *Constitutional Amendment* 1987, s.9.

40. McConnell, W H, *The Meech Lake Accord: laws or flaws ?* (1988), 52 Saskatchewan Law Review 115, p.132.

41. *Gregory v. Ashcroft* (1991), *op.cit.*

42. Consensus Report on the Constitution, Charlottetown, 28 August, 1992, para. 19.

43. *Ibid*.

44. *Ibid.*, para. 57.

45. *Ibid.*, para. 18.

46. *Ibid.*, para. 57.

47. *Ibid.*, para. 19.

48. *Basic Law of the Federal Republic of Germany*, Art. 94(1).

[48]. *Ibid* ., Art. 51(1).

[49]. *Ibid.* , Art. 50.

[50]. *Ibid* ., Art. 95(2). These courts are the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court, and the Federal Social Court: *ibid* ., Art. 95(1).

[51]. *Federal Constitution of Malaysia* , Art. 121(2), as amended by the *Constitution (Amendment) Act* 1994 (A885) s.13. The Federal Court was formerly called the Supreme Court of Malaysia. It was renamed in 1994.

[52]. *Federal Constitution of Malaysia* , Art. 121(1B), as amended by the *Constitution (Amendment) Act* 1994 (A885) s.13.

[53]. *Ibid* ., Art. 121(1).

[54]. *Ibid.* , Art. 122B(1).

[55]. *Ibid.* , Art. 38(1) and Fifth Schedule.

[56]. *Ibid.* , Art. 122B(3).

[57]. E.g., *Constitution* s.99; *Queensland Electricity Commission v. Commonwealth* (1985) 159 CLR 192.

[58]. Appendix C to Judicature Sub-Committee, Second Report to Standing Committee, May, 1985, pp.36Ä37, in *Proceedings of the Australian Constitutional Convention, Brisbane, 29 July Ä 1 August, 1985* (1985), vol.II.

[59]. *Final Report of the Constitutional Commission* (1988), Vol. I, p.401. See also Constitutional Commission, *Australian Judicial System Advisory Committee Report* (1987), p.74 and Appendix B to Judicature Sub-Committee, Second Report to Standing Committee, May, 1985, p.32, in *Proceedings of the Australian Constitutional Convention, Brisbane, 29 July Ä 1 August, 1985* (1985), vol.II.

[60]. *Final Report of the Constitutional Commission* (1988), Vol. I, p.402.

[61]. Craven, G., *Reforming the High Court* in *Upholding the Australian Constitution* , Proceedings of The Samuel Griffith Society, Volume 7 (1996), p.42.

Chapter Three

A Role for the States in Initiating Referendums

Dr Jeffrey Goldsworthy

1. The Dynamics of Constitutional Change

It is well known that, since 1920, the interpretation of the Constitution by the High Court has permitted a continuous and cumulatively massive expansion of the powers of the Commonwealth Parliament. In particular instances the change has been dramatic and, at least initially, a source of consternation in State circles: most notably, the use of the Commonwealth's taxation and financial grants powers to monopolise income taxation, and of its external affairs power to implement international treaties, whether or not their subject-matters would otherwise be within Commonwealth power. In the case of many other Commonwealth powers, such as the corporations and industrial relations powers, a similar story can be told.

During the same period, the people of Australia have almost always refused to grant the Commonwealth greater powers, when the Commonwealth has asked them to do so. Referendums to amend the Constitution are only held if the Commonwealth government advises the Governor-General to submit a proposed amendment to the people, and if the proposal has previously been passed by at least one House of the Commonwealth Parliament. Not surprisingly, therefore, of the forty-two proposals referred to the people to date, twenty-three - which is just over half of them - has sought to enlarge the powers of the Commonwealth. But only two of these have been approved. This has not been due to undiscriminating conservatism on the part of the people. Of the other nineteen proposals, six have been approved: in other words, they have been almost four times as successful. [1]

In a number of instances, the Court by interpretation has permitted the Commonwealth to exercise the very same powers which the people, voting in constitutional referendums, previously refused to give it. Of the surprisingly large number of examples, the most striking concerns the corporations power. On five different occasions, the Commonwealth attempted by formal amendment to acquire power to control the trading activities of corporations, or at least monopolies, and on every occasion the people refused to agree; yet in 1971 the High Court adopted a new interpretation of the corporations power which gave to the Commonwealth essentially what it had previously sought in that area. [2] Late last year, the Court held that the external affairs power enables the Commonwealth to exceed the limits inherent in its industrial relations power, despite the failure of four previous referendums to remove those limits. [3]

Many more attempts to expand Commonwealth powers by referendum were made before World War II than have been made since, and it has been conjectured that one reason for the decline in the number of requests put by the Commonwealth to the people is that the favourable decisions of the Court have made them largely redundant. [4]

But while the High Court has often been able to overcome the unwillingness of the people to expand Commonwealth powers, the people have not been able to overcome the Court's willingness to do so. This is because the people can only be asked to do so by the Commonwealth - which is the beneficiary of the Court's decisions. No Commonwealth government has ever sponsored a constitutional amendment to reduce Commonwealth powers, and none is ever likely to do so. Of the nineteen proposals which have not sought to expand

Commonwealth powers, none have sought to transfer them to the States or to limit them in any substantial way. [5]

We can summarise all this by saying, first, that there have been in Australia two main sources of constitutional change, one involving the High Court's interpretation of the Constitution, and the other, formal amendment by way of popular referendum; secondly, that the Court has consistently permitted the expansion of Commonwealth powers, while the people have almost always opposed it; and thirdly, that in practice the Court has sometimes been able to overcome the verdict of the people, but not *vice versa* . The outcome has been a kind of ratchet effect: Commonwealth powers have been continually expanded, but never subsequently contracted.

I do not intend these opening remarks to constitute a blanket condemnation of the High Court. I say this because I believe that Court bashing has recently been taken too far. A decision of the Court is not necessarily wrong just because it results in an expansion of Commonwealth power - not even when the people have previously refused to endorse that expansion themselves. Sometimes an expansion of power is the legitimate result of applying the original words of the Constitution to the very different circumstances of modern times. Moreover, the Court has a duty to decide what those original words, correctly interpreted, mean, and it may be that a previous referendum proceeded on the erroneous assumption that the Commonwealth did not already have some power which, in reality, it did have.

So my intention has not been to attack the Court, but simply to point out that there has long been an imbalance in the dynamics of constitutional change, and one which has denied to the people an explicit opportunity to decide whether or not they approve of the direction in which change has, for a very long time, proceeded. [6] If the Court is partly responsible for this, so too is s.128 of the Constitution, which controls formal amendment by referendum.

2. Section 128 and its History

Many of the delegates to the various Constitutional Conventions in the 1890s worried that the powers of a national government, no matter how narrowly they might initially be drawn, might gradually expand at the expense of the States, and they attempted to prevent this. As John Cockburn of South Australia said in 1891:

> "We know that the tendency is always to the centre, that the central authority constitutes a vortex which draws power to itself. Therefore, all the buttresses and all the ties should be the *other* way, to enable the States to withstand the destruction of their powers by such absorption." [7]

In 1901, when the Commonwealth Constitution came into effect, there were many reasons for confidence that it adequately protected the interests of all six States. One important reason was the design of the Senate, in which each original State was guaranteed equal representation. The Senators were expected to represent their respective States, and to vote on State lines whenever necessary to protect their State's interests. In this way, the Senate was expected to protect not only the interests of the States in general, but those of the less populous States in particular, given that the House of Representatives would be dominated by the representatives of New South Wales and Victoria. [8]

The Senate was expected to play this role with respect to proposed amendments of the Constitution as well as ordinary laws. Section 128 of the Constitution provides two methods for initiating referendums to amend the Constitution. [9] The first, ordinary method allows both Houses of the federal Parliament to do so. If both Houses pass a proposed amendment, by absolute majorities, s.128 says that the proposal "shall be submitted" to the people in a

referendum. Since a proposed amendment can be introduced in either House, the original intention was that the representatives of the States in the Senate would be able to initiate proposals, as well as to block any initiated in the House of Representatives which threatened State interests. On the other hand, the House of Representatives would also be able to block proposals originating in the States' House.

This method of initiating amendments was the only one that s.128 originally included, when it was put to voters in the first round of referendums in 1898. But that draft had to be renegotiated when the required majority of voters in New South Wales failed to endorse it. [10] At a Conference held in January, 1899 the Premier of New South Wales, Sir George Reid, obtained the agreement of the other Premiers to various changes, which he hoped would enable the required majority to be obtained in a second referendum (as indeed they did). One of these changes was the inclusion in s.128 of an alternative method of initiating referendums.

This alternative method seems to allow either House of the federal Parliament to initiate a referendum. If, on two separate occasions, either House of the federal Parliament passes a proposed amendment, by an absolute majority, and the other House rejects or fails to pass it, "the Governor-General may submit" the proposal to the people. On its face, in 1900 this would have appeared to enable the States' House - the Senate - to initiate a referendum even if a majority in the House of Representatives, and therefore the Government, were opposed to it.

This alternative method, inserted in 1899 at the insistence of New South Wales, had previously been discussed and rejected in the Constitutional Convention held in Melbourne in 1898. At that time, it was proposed by representatives from Victoria. Many other delegates at the Convention opposed it, because they saw it as an attempt to over-ride the Senate, to prevent Senators representing the less populous States from blocking proposed amendments passed in the House of Representatives. Victorian and New South Wales delegates replied that the alternative method, which they supported, was even-handed - it would enable either House to initiate a referendum without the assent of the other. At one point, when Alfred Deakin suggested that power might be given to the State Parliaments to initiate referendums, Isaac Isaacs replied that the Victorian proposal "will give the States power to do that through their accredited representatives, the Senators." [11]

Sir George Reid, the New South Wales Premier, added his eloquent support to the Victorian proposal, emphasising the opportunities it offered to the States:

> "The view I take is that, instead of degrading the Senate, it puts it in a position of absolute equality with the House of Representatives . . . The Senate will be a popular body springing from the people of the States; and surely the representatives of all the States, if they agree that a certain amendment of the Constitution should be proposed to the people, should not be blocked by the representatives of the nation in the House below.
>
> "... Surely the States, as represented by the Senate, have a right to take such a verdict with regard to the proposed change... [T]he States' House ... may well have occasion to ask for an amendment of this Constitution." [12]

But notwithstanding this argument, a majority of delegates rejected the proposal, and they did so partly because they suspected that it would enhance the power of the House of Representatives and diminish that of the Senate. [13] They were right to do so. The Premiers of the less populous States may have been duped, when Reid persuaded them to adopt much the same proposal at the Premiers' Conference in 1899. [14]

What the Premiers agreed to, and what s.128 now provides, is that if on two separate occasions either House passes a proposed amendment, and the other House rejects or fails to pass it, "the Governor-General *may* submit" the proposal to the people. The use of the word "may" is curious. In the case of the first, ordinary method of initiating referendums, the word "shall" is used: if both Houses have passed it, the proposed amendment " *shall* be submitted . . . to the electors". This difference in wording suggests that when one House only has passed the proposed amendment, the Governor-General has a discretion - he may submit it to the people, but is not bound to do so. (In fact, it has been generally assumed that this discretion exists even when both houses have passed the proposal. [15])

Given the constitutional convention that in exercising this kind of discretion, the Governor-General must act on the advice of Cabinet, and given that it is a majority in the lower House which determines the composition of Cabinet, it follows that Governors-General would almost automatically submit proposals passed only by the lower House to the people, but might well refuse to submit a proposal passed only by the Senate.

It follows from this that although s.128 appears on the surface to treat the two Houses even-handedly, "the Senate is in a position of distinct inferiority". [16] Although the Premiers in 1899 did not intend it, the effect of their compromise was to enable their precious States' House to be bypassed, without securing it the ability to initiate referendums itself. [17]

That this was indeed the case was demonstrated in 1914, when the Senate twice passed six proposed amendments to which the Government was opposed. The Prime Minister, Joseph Cook, refused to recommend that the Governor-General refer them to the people, stating that he did not "so misapprehend my responsibilities that I should be willing to recommend the Governor-General to submit to the country a set of proposals in which I do not believe!" [18] When the Senate then requested that the Governor-General submit the proposals, the Governor-General replied that, following "the established usage of responsible government", he had consulted his ministers, who were "unable to advise me to comply with the request contained in the Address of the Senate. I accept their advice, and am unable to grant the request of the Senate." [19]

It has been suggested that, notwithstanding this precedent, the Governor-General might be regarded as having a "reserve power" to act independently of ministerial advice in exercising this discretion. [20] But in the absence of an extraordinary constitutional crisis requiring urgent resolution, it is unlikely that any Governor-General would dare to do so. Moreover, a referendum is very expensive and no Governor-General is likely to set one in motion with no assurance that the Commonwealth Parliament will authorise the necessary appropriation of funds. As Reid and Forrest conclude:

> "... the initiation of constitutional amendments is confined not just to the [Commonwealth] Parliament, but in practice to the Executive Government, without whose advice the Governor-General is unlikely to sanction the holding of a referendum. Consequently, no measure has ever been put to the electors except at the behest of the Government." [21]

There is, moreover, a further problem. Even if s.128 did require the Governor-General, regardless of ministerial advice to the contrary, to submit to the people any amendments proposed by the Senate, it would not have greatly assisted the States. This is because the Senate has not fulfilled the Founders' expectation that it would represent the interests of the States. The Senate has functioned as a second party House, whose members' votes are determined by their parties' policies rather than Senate interests. [22] So even if the Senate were able to initiate referendums despite Government and lower House opposition, it would give the States no comfort.

2. Reforming Section 128

Many possible reforms favourable to the States might be proposed, for example, to limit some Commonwealth powers, to expand State powers, or to give the States a larger role in the appointment of High Court Justices. But at present none of these reforms, regardless of their merits, has any hope of being put to the people. Neither House of the Commonwealth Parliament is likely to co-operate, and in any event, the Commonwealth government is most unlikely to advise the Governor-General that a referendum should be held. For practical reasons, therefore, the initiating procedure is structurally biased against certain kinds of proposals being put to the people - even if they are meritorious. That bias can be cured only if s.128 is itself amended to include some other method of initiating referendums.

Empowering half or more of the State Parliaments to initiate referendums is a reform which was advocated at three sessions of the Australian Constitution Convention, attended by representatives of the Commonwealth and all six States, in 1973, 1975 and 1985, and was approved in 1985. Most recently, the Constitutional Commission which reported to the Commonwealth government in 1988 unanimously recommended it - even Gough Whitlam, a member of the Commission, endorsed it. [23] The Commission recommended that if, within a twelve month period, a proposed amendment were passed in identical terms by at least half the State Parliaments, representing a majority of Australians overall, it would have to be put to referendum within two to six months later. The Commonwealth government would be obliged to submit the proposal to the people, to provide funding for the referendum, and, if the proposal were approved, to recommend that the Royal Assent be given by the Governor-General.

One argument in favour of a reform along these lines is that it would rectify a mistake which has prevented the Constitution from fulfilling one of its original purposes. It would achieve something which the Premiers seem to have believed, albeit erroneously, that they had achieved: the inclusion in the Constitution of a mechanism enabling the States, in effect, to initiate referendums. They relied on the Senate, but it has failed them. A formal procedure permitting State-initiated referendums would simply remedy that failure, and restore a balance to the Constitution which it was originally intended to have.

A second argument is that the reform would be fairer to the States. The States created the Commonwealth, but now, like Dr Frankenstein, find themselves overpowered by their own creature. They are denied an advantage which the Commonwealth has: that of seeking a constitutional amendment to advance their distinctive perception of the national interest.

It has been argued that only the Commonwealth represents the nation as a whole, and that the States only represent parts of it. Since any amendment to the Constitution affects the nation as a whole, it is appropriate that it be initiated by the representatives of the nation. [24]

But although each State may represent only part of the nation, they are all very important parts, and together they constitute almost all of it. Moreover, the whole point of a federation is that its parts have constitutional standing, and guaranteed rights and powers. The parts no less than the whole are legitimate stakeholders in any federal Constitution. If a majority of those parts believe that the Constitution could be improved, why should they not be able to put their case directly to the people?

But the strongest argument in favour of such a reform is that it would enhance the right of the people to determine the content of their Constitution. Some process for initiating referendums is required, and for reasons of economy, it should be one which screens out proposals which are frivolous or have no chance of success. But the process should not be one which allows the initiators to exclude serious proposals with a genuine chance of success, simply because they

don't approve of them. The function of the initiating process should not be to prevent the people from making a decision which the initiators would not like. At least with respect to the Constitution, that kind of political guardianship is unacceptable. It is inconsistent with the rationale for s.128 in its current form, which is to enable the people to determine their own constitutional fate.

It would be naive to think that in initiating referendums, the Commonwealth necessarily acts as an impartial agent of the people. All organisations develop their own biases and interests, and seek to protect their own turf, and governments are no exception. What the Commonwealth believes is best for the nation is not necessarily best for the nation. If it were, the people wouldn't need to be consulted. The States as well as the Commonwealth make up the federal system, and have an equal stake in its proper functioning and an intimate knowledge of its day to day operations. They are as well placed as the Commonwealth to detect structural deficiencies which need reform, deficiencies which for reasons of its own the Commonwealth might not want to rectify. To prevent the people from rectifying such deficiencies is unfair to them even more than it is unfair to the States.

I have found it difficult to think of weighty objections to this proposal. It has been suggested that it might "increase strategic State manoeuvring", [25] but I can't see anything wrong with giving the States a bit more bargaining power in their negotiations with the Commonwealth. It might lead to an improvement in the success rate of referendums. Brian Galligan, a leading political scientist, has concluded that the failure rate so far is the fault not of the Australian people, but of "élites and federal Labor politicians who prefer a more centralised regime or change for its own sake", and often mount unnecessary and poorly argued campaigns. [26] Perhaps the threat of being bypassed by an alternative initiating process would galvanise the Commonwealth into paying more careful attention to the question of reform. Competition, after all, has its benefits.

Probably the weightiest objection is that the proposal would be an expensive waste of time, because just as Commonwealth-initiated referendums fail if they are strongly opposed by the States, so would State-initiated referendums fail if they were strongly opposed by the Commonwealth.

Conventional wisdom has it that proposed constitutional amendments have a genuine chance of being approved by the people only if they enjoy bipartisan support. All eight of the proposals which have met with success at referendums received bipartisan support. But bipartisan support at the federal level is only a necessary, and not a sufficient, condition for success, since five proposals which enjoyed it have failed.

A plausible hypothesis is that, in addition, it is necessary that State governments do not mount substantial opposition. [27] None of the eight successful proposals encountered any organised opposition at all, and in five of those cases, the Commonwealth and the States had agreed to them in advance. [28] As for rejected proposals, on the other hand, a 1983 analysis concluded that they "would all have wrought an appreciable change in the prevailing balance of power between the Commonwealth and the State Parliaments, either by extending Commonwealth power to affect an existing State jurisdiction or by altering the existing patterns of State influence." [29] (Of the six proposals which have failed since then, five either fell into the same categories or would have diminished the powers of State Parliaments.)

What should we make of this evidence? The first point to make is that, while it shows that Commonwealth proposals opposed by or perceived as detrimental to the States are unlikely to be approved, we do not yet have any evidence at all concerning State proposals opposed by or perceived as detrimental to the Commonwealth. So a possible conclusion is that, while it makes

no sense to allow the Commonwealth to initiate proposals opposed by the States - because the expense of a referendum campaign will inevitable be wasted - there is as yet no good reason not to allow the States to initiate proposals opposed by the Commonwealth.

But the truth, I suspect, is that any substantial opposition - whether mounted by political parties, State governments, or the Commonwealth - would be enough to deter the people, who naturally prefer the *status quo* if they have any doubts. If so, then any proposal supported by the States but vigorously opposed by the Commonwealth would probably be defeated. It might then be concluded that if State and Commonwealth consensus is needed, there is no point in allowing State Parliaments alone to initiate referendums without Commonwealth support.

But if that conclusion were really justified, there would also be no point in allowing the Commonwealth to initiate referendums without State support. If our over-riding concern were to save the wasted expense of doomed referendum campaigns, we should change the current system to require that, before being put to the people, proposals be passed both by a majority of State Parliaments and by the Commonwealth Parliament. I doubt that anyone would support that proposal. But if it is reasonable for the Commonwealth to be able to initiate referendums without formal State approval, why not *vice versa* ?

Apart from questions of fairness, we should not be so confident in predictions based on past experiences that we completely rule out the possibility of the people approving a proposal supported by either the Commonwealth or the States, and opposed by the other. The proposal might turn out to be a surprisingly popular one.

It is sometimes argued that the Commonwealth must initiate any constitutional amendment to enable the States to initiate referendums, and therefore that, regardless of the merits of the reform, "it seems impossible to contemplate the Commonwealth government doing anything voluntarily to waive its advantage in this respect." [30] In other words, the reform is likely to be frustrated by the very structura
l bias which it is needed to rectify.

Rather than an argument against the reform, this is an argument in its favour. The main obstacle in its path demonstrates the need for it. Of course, the obstacle is a formidable one. The Commonwealth is very unlikely to accede to a request from the States that this reform be put to the people. But it might find it more difficult to ignore a request made by the People's Convention. A People's Convention might provide the only real opportunity to persuade the Commonwealth to allow the people to decide.

Endnotes :

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1. E. Campbell, *Changing the Constitution Ä Past and Future* (1989), 17 Melbourne University Law Review 1, 3. The two successful proposals of this kind concerned legislative powers with respect to social services and Aborigines.

2. This and other examples are discussed by M. Coper, *The People and the Judges: Constitutional Referendums and Judicial Interpretation* , in G. Lindell, ed., *Future Directions in Australian Constitutional Law* (1994) 73, 78Ä80.

3. *Victoria v. Commonwealth* (1996) 138 ALR 129, at 210 per Dawson J.

4. Campbell, *op. cit.* , 4.

5. They have concerned "machinery of government" matters, relating to the internal structures or procedures of Commonwealth or State governments, local government, Commonwealth-State financial arrangements, the ability of the Commonwealth and the States voluntarily to transfer their powers, voters' rights, and other rights against State laws.

6. One could argue that the people have had many opportunities Ä namely, at every federal election. If the expansion of Commonwealth power was unpopular, surely some political party would have made an issue of it, and promised to submit suitable proposals to a referendum, in order to win office. But this ignores the common interest which all the major parties at the Commonwealth level have in maximising the powers which they all aspire to control. It also ignores the fact that federal elections are not decided by single issues, and especially not by constitutional issues, which are likely to be swamped by concerns perceived to be of more immediate practical importance.

[6]

. Quoted in L.F. Crisp, *The Parliamentary Government of the Commonwealth of Australia* (3rd ed., 1961), 25.

[7]

. Not all the founders entertained this expectation Ä some accurately predicted the future predominance of party allegiance: B. Galligan, *A Federal Republic* (1995), 81Ä4. But they did not persuade the majority: C. Howard and C. Saunders, *The Blocking of the Budget and Dismissal of the Government* , in G. Evans (ed), *Labor and the Constitution 1972Ä75* (1977) 251, 254Ä55.

[8]

. Note that the word "referendums" rather than "referenda" is generally used in this context.

[9]

. A majority of voters in New South Wales did endorse the proposed Constitution, but it fell short of the number required by State legislation: see J.A. La Nauze, *The Making of the Australian Constitution* (1972), 240.

[10]

. *Official Record of the Debate of the Australasian Federal Convention*, Melbourne, 9 February, 1898, vol. I, 730.

[11]

. *Ibid* , 735; see also 761 (Reid) and 748 (Kingston).

[12]

. *Ibid* , 717 (Glynn), 725 (Downer), 733Ä34 (Symon), 747 (Dobson), 752Ä3 (Solomon) and 755 (Howe). The only reason for opposition to the proposal was the belief that it was inconsistent with the nature of representative government, which involves decisionÄmaking by representatives chosen in order to exercise wise and informed judgment on behalf of the people.

[13]

. But see Endnote 17, below.

[14]

. See *Final Report of the Constitution Commission 1988* (1988), vol. 2, 883Ä85; E. Campbell, *op. cit.*, 2n.7. For an argument that the assumption is wrong, see C. Howard, *Australian Federal Constitutional Law* (3rd ed., 1985), 570Ä71.

[15]

16. The Hon. Justice Evatt, *Amending the Constitution* (1937) 1 *Res Gestae* , 264.

[16]

. That they did not intend it is indicated by the following paragraph from the joint statement released after their Conference:

> "The Premiers agreed that, where there is a difference of opinion between the two Houses as to whether the people should have the opportunity of deciding if any alteration should be made in the provisions of the Constitution, one House should not have the power to prevent the question being decided by the people." See J. Quick and R. Garran, *The Constitution of the Commonwealth of Australia Annotated* (1901), 220.

[17]

The unintended result was probably the result of oversight rather than cunning on Reid's part. The wording of the relevant paragraph in s.128 was obviously copied, with necessary modifications, from the first paragraph of s.57, which says that if the Senate refuses to pass

legislation passed on two occasions by the House of Representatives, "the Governor-General may dissolve" both Houses. The word "may" was carried over to s.128 along with much of the other wording of s.57.

18. *Commonwealth Parliamentary Debates*, 4 June, 1914, 2191, quoted in G.S. Reid and M. Forrest, *Australia's Commonwealth Parliament 1901Ä1988* (1989), 243.

19. *Journals of the Senate* (1914), 98, quoted in Reid and Forrest, *loc. cit.* Geoffrey Sawer pointed out that on this occasion, the requirements of s.128 had not been complied with, because the House of Representatives had neither rejected nor failed to pass the Senate's proposals. But he concedes that the Governor-General did not offer that as his reason for rejecting the Senate's request: G. Sawer, *Australian Federal Politics and Law 1901Ä1929* (1956), 124Ä25.

20. R.D. Lumb and G.A. Moens, *The Constitution of the Commonwealth of Australia Annotated* (5th ed., 1995), 569.

21. Reid and Forrest, *op. cit.*, 244.

22. There has been some debate on this score, but see Howard and Saunders, *op. cit.*, n.9,260Ä61, and G. Winterton, *Parliament, the Executive and the Governor-General* (1983), 8n.77. John Nethercote pointed out during discussion that the Senate's attempt in 1914 to initiate a referendum was itself an early example of the Senate failing to act as a States' House : the proposals the Senate wished to put to the people involved expanding Commonwealth powers in accordance with Labor Party policies.

23. *Final Report of the Constitutional Commission 1988* (1988),vol. 2, 856Ä61 and 883Ä85. The Commission's two-volume Report is an invaluable resource for anyone interested in the Constitution and its reform.

24. This view was expressed by Senator Tate, a Commonwealth representative at the 1985 session of the Australian Constitutional Convention : *Official Record of Debates etc., Australian Constitutional Convention* , Brisbane, 1985, p.288.

25. B. Galligan, *A Federal Republic, Australia's Constitutional System of Government* (1995), 116.

26. *Ibid.* , 131.

27. For these figures, and the hypothesis, see Campbell, *op. cit.*, 6.

28. J. McMillan, G. Evans and H. Storey, *Australia's Constitution, Time for Change?* (1983), 29.

29. *Ibid.* , 28Ä9.

Ibid. , 350.

Chapter Four

The People of any Race

Dr Colin Howard QC

On previous recent occasions I have 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 is s.51(xxvi) of the Constitution, the power of the Australian Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to the "people of any race for whom it is deemed necessary to make special laws". Until 1967 the power made an exception of people of "the aboriginal race in any State", but in that year the exception was removed by amendment.

The original wording remains interesting and important nevertheless, because it clearly reflects a belief, or at least an assumption, that Aboriginal Australians are demonstrably a different race from non-Aboriginal Australians. The 1967 amendment did not depart from this belief. On the contrary, it confirmed and reinforced it, for the effect of the amendment was to widen the power to enact laws which draw distinctions between different sections of the community on the basis of race.

There is considerable irony in this, because the large majority of the electorate who voted in favour of the 1967 amendment undoubtedly did so because they disapproved of racial bias, at all events as applied to Aborigines. That superficially self-contradictory position however proceeds from a much deeper difficulty: what exactly does the Constitution mean when it refers to the people of any race?

At the time of federation people had more robust and less confused ideas about race than we do nowadays. The propriety of racially discriminatory legislation was not in question. What exercised the minds of the framers of the Constitution was not the moral character of such laws, but who should have the power to enact them.

A demonstration of this, which led to the original exclusion of Aborigines from the race power, happened more or less by accident. Colonial Queensland made extensive use of Polynesian labourers, over whom it maintained close control to ensure that they departed on completion of their contracts. Possibly because Queensland did not altogether trust the other future States not to interfere in its internal affairs, Sir Samuel Griffith at the 1891 Convention proposed a clause to give the Commonwealth exclusive power to make special laws.

At that date New Zealand was showing tentative interest in the mooted federation and had sent a delegation of three. When Griffiths' clause came on for debate, one of the New Zealand delegation, a certain Captain Russell, objected that, should New Zealand join the federation, such a provision would mean that the Commonwealth could make special laws for the Maoris. Captain Russell's caution, incidentally, was clearly an inherited characteristic. His parents, not content with their son bearing the proud surname Russell, made doubly sure by christening him Russell as well.

The Australians were not going to buy into Maori problems, so the clause was altered to make clear that the Maori race was excepted from the special laws power. This intervention however

directed people's minds to the Australian Aborigines. There had never been any intention to remove legislative power over Aborigines from the States. So an exclusion for Aborigines went in as well. Then the Maori problem solved itself when New Zealand lost interest in federation, and the exception was removed. This left Aborigines in unduly conspicuous isolation to no purpose.

I say "to no purpose" because the entire race power question could and should have been avoided by relying on the immigration power, which follows immediately after the race power in s.51(xxvii) of the Constitution. It is clear that the race power was conceived of as a protection against outsiders. There seems to be no sound reason why the immigration power, the motivation for which centred on Chinese immigration, could not have accommodated Polynesians, Indians or aliens of any other description without adopting the elusive concept of race.

This was not done, and so we are left with the resulting problem. This I described earlier as being what the Constitution means when it refers to the people of any race. An alternative formulation would be to ask what meaning should be attributed to the Constitution by the High Court. However the problem is expressed, the difficulty remains that the framers of the Constitution gave no indication what are the criteria to be applied to decide whether an identified category of people is a race for the purpose in hand.

So far as the original intention is concerned, two things seem nevertheless to be clear: that the framers of the Constitution thought that identifying a different race was merely a statement of the obvious; and that Aborigines, Maoris, Polynesians, Chinese, Indians and Afghans were unambiguous examples. The assumption evidently was that, in common with most of the heads of legislative power in s.51 of the Constitution, the central content of the word "race" is reasonably self-explanatory and therefore, like tax, trade, commerce, banking, insurance and so on, brings its criteria of validity with it.

Unfortunately, that assumption has turned out to be not only mistaken, but also mistaken in a singularly embarrassing way. Whatever its precise content in any particular context, a central characteristic of the concept of race is that it emphasises difference, the differences which distinguish one race from another. It is true that it also emphasises the resemblance between the members of a race which makes them a separately identifiable group, but the differences from everyone else are necessarily implied because, if they were not there, the resemblances would have no significance.

The shortcoming of the concept of race applied by the framers of the Constitution is that it can be applied, in the relatively simple manner that they envisaged, only by adopting criteria which are likely to be seen nowadays as accurate but offensive. Such criteria would include colour, physique, cultural development, language and social standing, whether by conquest or otherwise.

The fact that the use of such criteria as these in order to distinguish between different peoples arouses such widespread disapproval nowadays brings to light another awkward circumstance. This is that, by implication, the critics are asserting that as far as human beings *(homo sapiens sapiens)* are concerned there is only one race, the human race. This standpoint has respectable anthropological support.

I do not need today to speculate how far back along the evolutionary trail we need go to see whether less successful species have a rational claim to be included in the concept of the human race. Nevertheless it is notable that *homo sapiens neanderthalensis* shares with us the identification *homo sapiens* , and that *homo habilis* and *homo erectus* also have the *homo* . All of which amply illustrates the unwisdom of including the nebulous concept of race in a Constitution.

Returning now to more familiar territory, until the *Native Title Act Case* [1] the High Court had had occasion only twice to consider the scope of the race power: in *Koowarta v. Bjelke Petersen* [2] and the *Tasmanian Dam Case* . [3]

In *Koowarta* the main question was whether ss.9 and 10 of the *Racial Discrimination Act* 1975, which prohibit racial discrimination, were within the external affairs power of s.51(xxix) of the Constitution. It was argued further that, alternatively or additionally, they were within the race power, as special laws for the benefit of Aborigines and Torres Strait Islanders. It was held by a 4:3 majority that they were within the external affairs power, but by a 5:1 majority that they were not within the race power.

The basis of the race power decision was that ss.9 and 10 were not limited in their application to the people of any particular race, but applied to everyone equally, and hence were not special laws for the people of any race. The contrast is with the later *Native Title Act Case* , in which it was held that the *Native Title Act* ("the *NTA* ") is a special law because it operates for the benefit of holders of native title, who by definition are persons of a particular race distinguishable from the rest of the population.

The main question in the *Tasmanian Dam Case* was whether Commonwealth conservation legislation, which was being relied on to prevent Tasmania from proceeding with the construction of a dam and associated works, was within the external affairs power. Certain provisions sought specifically to protect from damage certain sites, relics and artefacts of cultural significance to Aborigines. One question was whether these provisions were special laws within the race power.

By identical 4:3 majorities, each of the foregoing questions was answered in the affirmative. So far as the race power was concerned, it had been argued that a law about sites, relics and artefacts was not a law with respect to people. The majority held that there is nothing in s.51(xxvi) that requires a distinction to be drawn between the people of a race and objects of significance to them as part of their cultural heritage. The significance of this to the *Native Title Act Case* in due course was that it meant there was little point in arguing that the *NTA* is a law about native title and not a law about people.

You will have noted, no doubt, that nothing that I have said so far about *Koowarta* and the *Tasmanian Dam Case* bears on what is meant by "the people of any race". I am concealing almost nothing from you. It was a Hamlet without the Prince situation. The question central to s.51(xxvi) was almost entirely ignored. It can be conceded that, having regard to the ground of decision, it did not require the Court's attention in *Koowarta* , but that is certainly not true of *Tasmanian Dam* .

The only two members of the Court to mention the matter in *Tasmanian Dam* were Deane J and Brennan J. [4] The former did so only for the purpose of observing:

> "It is unnecessary, for the purposes of the present case, to consider the meaning to be given to the phrase `people of any race' in s.51(xxvi). Plainly, the words have a wide and non-technical meaning ...".

Brennan J was a little more discursive but achieved no greater precision, and similarly gives the impression of finding the concept of race difficult to come to grips with. None of which, with respect, is much help, although understandable.

The next opportunity to tackle the question was the *Native Title Act Case* in 1995. The opportunity was not taken, but the small attention given to it revealed an advance in the technique of evasion. The majority judgment (six Justices) picked up, and adopted, [5] a suggestion made by Stephen J in *Koowarta* . [6] He said:

> "Although it is the people of `any' race that are referred to, I regard the reference to special laws as confining what may be enacted under this paragraph to laws which are of their nature special to the people of a particular race. It must be because of their special needs or because of the special threat or problem which they present that the necessity for the law arises; without this particular necessity as the occasion for the law, it will not be a special law such as s.51(xxvi) speaks of."

I much admire the ingenuity of this technique. Hence I mean no disrespect when I say that it is a bootstrap operation. Consider the following Socratic exchange. Why must a race be identified? For the purpose of making a special law. Why do we need a special law? Because it has been deemed necessary for the identified race. But how do we identify the race? We look at the special law to find out what harm it remedies, for that must reveal the race at whom the law is directed. Who deems the special law to be necessary in the first place? Parliament, for that is a political decision and hence not for a court. So Parliament decides what is a race? Yes.

This may be a convenient way out of the race problem for the High Court for the time being, but it is hardly satisfactory as an exercise in constitutional interpretation. It cannot be the case that Parliament can define for itself whatever group of people it likes and declare that they are a race for the purpose in hand. In the *Native Title Act Case* the majority judgment refers [7] to the possibility of the Court retaining "some supervisory jurisdiction ... against the possibility of a manifest abuse of the races (sic) power", but that observation was directed at abuse of the requirement of necessity, not race identification.

The technique of seeking to by-pass the race problem by including in the special law a definition of the relevant race was resorted to in the *NTA* . One might have thought it elementary that such a definition should strive to achieve as much precision as possible, even though it might result in some people who identified with the race in question being excluded. The *NTA* definitions passed scrutiny by the High Court, notwithstanding that their most striking characteristic is that very vagueness which should have been avoided.

Indeed, with all respect to the High Court, their lack of precision is such as to raise a doubt whether they can be properly described as definitions at all. If not, the Court in the *Native Title Act Case* went even further in circumventing the race requirement of s.51(xxvi) than I have described already, for it went beyond effectively referring that requirement to Parliament and ignored it altogether. I say that because, if the so-called definitions do not make it possible to identify members of the relevant race by some objective criterion, the statute lacks an essential requirement for validity under s.51(xxvi).

The definitions to which I am referring are in s.253 of the *NTA* . The expression "Torres Strait Islander" is defined as "a descendant of an indigenous inhabitant of the Torres Strait Islands". The expression "Aboriginal peoples" is defined as "peoples of the Aboriginal race of Australia". For many purposes these expressions would no doubt sufficiently indicate two groupings of people distinct from the rest of the population. Even in the context of the race power, many individuals self-evidently fall within these general descriptions. The difficulty lies with people, particularly those of mixed ancestry, who do not follow a native way of life but nevertheless identify with one of the two races.

It should be noted that this problem is not necessarily confined to people of mixed ancestry, although clearly this is likely to be the usual situation. Nevertheless the possibility exists of a person who wishes to identify with a group to which he or she would not normally be regarded as belonging, but by whom he or she has been accepted. A simple example is marriage, or

cohabitation, between two people neither of whom is of mixed ancestry, one being an Aborigine and the other not. The non-Aborigine henceforth identifies as an Aborigine and is accepted.

The question arises whether, in terms of the *NTA* definition, such a person is part of the Aboriginal race of Australia. At the moment we do not know. It may be argued that this does not matter, because such a person cannot possibly maintain a native title claim. This is not necessarily the case. Aboriginal law or custom may provide that, in the case of death, the asserted title passes to the survivor. Whatever the outcome, the *NTA* definition of Aboriginal peoples does not assist.

The definition of Torres Strait Islander seems to avoid this problem by speaking in terms of being descended from an indigene. It shares with the Aboriginal definition however the greater deficiency of omitting to provide for people of mixed ancestry. No indication is given of how many generations of indigenous ancestors are required to attain the status of descendant. Similarly absent is any rule of residence or ancestry to determine whether an Islander is indigenous in the first place, an omission which not only reduces the so-called definition to incoherence, but also reflects the underlying problem about race in a different guise.

Further, the word "an" in the expression "an indigenous inhabitant" may or may not mean that a distant solitary ancestor turns someone a century later who has never been near the Torres Strait into a relevant descendant. If it can or does have any such effect, it becomes impossible without absurdity to describe the *NTA* , in its purported application to Torres Strait Islanders, as a law for the people of a race.

In one sense, the comparable problems in the case of Aborigines are simpler, because the so-called definition is not a definition at all but a tautology, which tells the reader nothing beyond the unsurprising likelihood that Aborigines are Aborigines. It totally lacks a criterion whereby one can determine whether a given person is a member of the relevant group or not. This means that there is no criterion whereby either the High Court or anyone else can rationally decide whether the *NTA* is within the race power of s.51(xxvi).

As a practical matter, this is an even more damaging defect in the case of Aborigines than Torres Strait Islanders, because it seems obvious that there are many more of the former of mixed ancestry, they are far more widespread, and a substantial proportion of them are indistinguishable from non-Aborigines. It becomes correspondingly more important to be able, as a matter of law, to distinguish between persons who are, and persons who are not, people of the Aboriginal race within the meaning of the *NTA* .

A further possibility (which I do not support, but mention in order to leave no stone unturned) is to take up again the suggestion made by Stephen J in *Koowarta* , discussed already, and apply it by analogy to the *NTA* instead of to s.51(xxvi). Section 223(1) of the *NTA* defines native title in terms of interests to which the holders are entitled under their own laws and customs. As a matter of statutory construction, it may be that the so-called definitions of race have to be read down to be co-extensive with the interests identified in s.223(1). In effect, only persons who have proved native title are people of the relevant races for the purposes of the Act.

The first weakness of this approach is that, even if it assists with the concept of the Aboriginal race, it cannot be applied to Torres Strait Islanders, because they are to be identified by ancestry, not by a general reference to race. If there is no sufficient ancestry, inferences to be drawn from native title cannot arise, because native title cannot be claimed. The numerous defects in the Islander definition, which I regard as fatal to its validity, remain.

Secondly, the suggested approach will not, on closer examination, overcome the difficulties of the Aboriginal definition either. What it in effect suggests is that, to find out whether a claimant

is an Aborigine, the assumption be made at the outset that he or she is. If the claim succeeds, the assumption is confirmed, and if it fails, it is not. But this takes us nowhere. The claim cannot succeed unless the claimant at some stage proves that he or she is an Aborigine. Nothing can be proved without evidence, and in the case of an Aborigine of mixed ancestry no-one knows what has to be proved.

Claims are of course proceeding, even though the success rate up to now has not been far above nil. They do not seem to have been failing however on racial grounds. The inference I draw from that is that the standard of proof of the race point is not exactly high. It may well be also that both judges and advocates are reluctant to rely on an argument which is unlikely to meet with favour in the present High Court. It may also be seen by some as not going to the heart of the matter. Needless to say, that latter point of view is not one with which I can agree because, for the reasons I have given already, I am entirely of the opposite opinion.

One last word about the possibility of seeking assistance from the definition of native title. It makes no allowance for the great variety of native laws, customs and languages across the country. One might have thought that, by failing to do so, s.223(1) endangered the *NTA* 's claimed character as a law with respect to any particular race, or indeed as a special law.

Lastly, it may be argued that all the foregoing is irrelevant, because the High Court has held the *NTA* to be a valid special law, and anyway native title is here to stay for the foreseeable future. That misses the point. The difficulties inherent in s.51(xxvi), and the ineffective manner in which the High Court has sought to dismiss them, remain and will come back to haunt us.

I have long held the view that an express power to make racially based laws should have no place in an Australian Constitution. The only remedy in this country for the harm done to our social and constitutional fabric by s.51(xxvi) is to complete the job of repealing it. It is ironical to reflect that such a step would undoubtedly attract the greatest opposition from people who conceive themselves to be opponents of racism.

Endnotes:

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1 . *Western Australia v. Commonwealth* (1995) 183 CLR 373.
2 . *Koowarta v. Bjelke Petersen* (1982) 153 CLR 168.
3 . *Commonwealth v. Tasmania* (1983) 158 CLR 1.
4 . At 158 CLR 273Ä4 and 243Ä4, respectively.
5 . At 183 CLR 460.
6 . At 153 CLR 210.
. At 183 CLR 461.

Chapter Five

The Engineers' Case: Time for a Change ?

Professor Greg Craven

1. Introduction

When first asked to contribute a paper to this conference, the subject assigned to me was *The Engineers' Case: Time for a Change?* In accepting this proffered task, it occurred to me that the answer to the question thus posed was a little obvious. It was like asking, "Bosnia: Is a solution desirable?"; or, "Dawkins: a disaster?"

Yet as I have considered the *Engineers' Case*, and the school of literal constitutional interpretation which it has engendered, it occurred to me that the general topic of *Engineers* is a little more complicated than is usually thought to be the case. In particular, it became obvious that the parallels between the High Court's cynical adoption of a centralising literalism in that case, and its equally cynical invention of implied rights pursuant to a subsequent change of fashion in judicial politics, have more than a little in common in terms of judicial method and interpretative ethics.

For this reason, a more accurate title for this paper might well be *Literalism and the High Court: The Changing of the Fraud*. What needs to be considered are not only the manifest deficiencies of *Engineers*-style literalism, but also its relationship with the Court's newest constitutional three-card-trick, implied rights theory.

Here, it has to be acknowledged that all of us, even constitutional lawyers, have our own pet hates. These are instinctive, intensely negative visceral reactions, which are not necessarily inconsistent with, but which certainly transcend rational thought. Such hates are usually focused on such corporeal objects as football teams , politicians and television announcers. My own father-in-law, an intensely mild man, has a loathing of this type for the late Bert Evatt, which is so pronounced that the mere mention of his name is enough to produce a nervous rash.

It is against this background that I must admit at the outset that my pet hate in constitutional terms has always been literalism. I have hated it from my first encounter with the *Engineers' Case* as a student. I have hated it with a growing passion as an academic, and the more I thought about it, the more I loathed it. I hated it when nearly every other legal academic in Australia thought it was little less than holy writ. And now, when many of its previous supporters have abandoned it in favour of implied rights theory, I find myself hating it just as much as ever, with a cold, dismissive detestation.

In short, I have always regarded literalism as intellectually bankrupt as a method of constitutional interpretation, and beyond this slight debility of admitted pre-judgment, would assert my utter objectivity in assessing its faults and virtues.

Nevertheless, I am intensely alive to the irony of my present position as a constitutional commentator. I have spent much of my academic life attacking literalism, and in my writings have whiningly urged the High Court to abandon it. But now that the Court is in the process of at least partially loosening the grip of literalism, I find its designated replacement to be even less palatable. The difficulty is that, if literalism is intellectually bankrupt as an interpretative method, then its mooted replacement - implied rights theory - is the constitutional equivalent of a South American economy which last turned a profit supplying Simon Bolivar's army.

What I intend to attempt in this paper is as follows. Firstly, I propose to define what is meant by literalism. Secondly, I will examine the deficiencies of literalism as a method of constitutional interpretation. Next, the paper will consider why the High Court adopted literalism as its chosen constitutional methodology in the first place. Following upon this will be an assessment of the place of literalism in contemporary Australian constitutional law. This will include a brief account of the challenge posed to literalism by emerging implied rights theory, and the inconsistency which has emerged in the High Court's treatment of rights cases and federalism cases as a result of this clash. Crucially, the paper will go on to consider the true nature of the Court's present implied rights theory, which it presently favours over literalism. Finally, the paper will consider the proper place of literalism within the wider context of Australian constitutional interpretation, conceding that such a place does indeed, to a limited extent, exist.

2. The Idea of Literalism

The essence of Australian constitutional literalism is that the words of the Constitution are to be given their ordinary - that is their literal - meaning. What this means in simplistic terms is that the Constitution means what it says. The document is to be read as an ordinary piece of English language, and the words to be ascribed their every day meaning. The essence of literalism is thus that the Constitution may be read in much the same way as a telephone directory or the instructions to a model aeroplane kit, with the assistance of a dictionary, but not much else.

Such a mode of constitutional interpretation is potentially attractive for a variety of reasons, and these reasons will be considered more fully when we examine why the High Court chose to adopt literalism as its anointed constitutional methodology. For present purposes, we may note that literalism has a variety of general advantages. These are that it is "objective", in the sense that there is no need to have resort to considerations extraneous to the document; it promotes certainty, in the sense that the Constitution may be applied simply as it is written and as it is read; and literalism is, as a method of interpreting the Constitution, profoundly easy, at least in the sense that it provides a self-contained, intensely narrow regime of constitutional construction. Thus, the basic appeal of literalism undoubtedly lies in an apparent objective simplicity.

However, the real problem for literalism in constitutional terms is that the Constitution has never been remotely like a telephone directory or a set of instructions for a model aeroplane. In fact, the Constitution is the product of a complex range of historic intentions, designed to produce a blue-print for an exceptionally evolved form of federal government. These intentions are those of the Founding Fathers, who haggled and wheedled for a decade over the exact type of Constitution which Australia was to possess. In this connection, what literalism inevitably means in practical terms is the de-emphasising of this historic constitutional intention. Literalism, with its exclusive emphasis upon the words as they appear in the text, must ultimately be destructive of any recourse in direct terms to notions lying at the heart of the Founders' vision, such as a broad concept of strongly decentralised federal government.

Of course, supporters of literalism have been quick to stigmatise recourse to such concepts as being productive of nothing more than rampant constitutional uncertainty. The difficulty here is that the asserted certainty of literalism itself vanishes upon application. Thus, at the heart of the idea of literalism is the notion that it is indeed possible to understand the Constitution unaided and unadorned by all extraneous considerations. The assumption is that the vast majority of the Constitution's provisions lie innocently open to human understanding, like so many shell-fish in a chowder.

In reality, however, nothing could be further from the truth. In many contexts, the terms of the Constitution are susceptible to more than one meaning, and any attempt to maintain that the text

is dispositive is at best misguided, and at worst positively misleading. In such contexts as the meaning of s.92, or of the term "excise" in s.90, it is impossible to make sense of the Constitution simply by having recourse to its words. In these connections, the only intellectually satisfying course is to seek to understand the Constitution in the broad context of its making, and by reference to the broad character of the government which it sought to ordain. This critical deficiency of literalism will be returned to presently.

Consistently with the comments previously made concerning the tendency of literalism to emphasise the words of the Constitution while down-playing any recourse to its essential character, the main practical effect of literalism in the course of Australian constitutional law has been to de-emphasise the concept of federalism as a controlling consideration in constitutional interpretation. This follows inexorably from the fact that federalism is part of the basic frame of the Constitution, and suffuses that entire document, underlying as it does virtually all the dispositions of the Founding Fathers. The effect of literalism's exclusive insistence on the primacy of the words has been to drastically limit the use which can be made of this controlling constitutional principle in the interpretation of the Constitution. Critically, it has meant that the use of implications from the nature of federalism for the purpose of curtailing the exercise by the Commonwealth Parliament of its enumerated powers has been greatly limited.

In fact, literalism has had precisely the opposite effect. As s.51 gives to the Parliament of the Commonwealth highly specific powers, the effect of literalism is to widen the ambit of these powers by insisting that no regard be had in their interpretation to the limiting effect of the over-arching federal character of the Constitution. In light of the fact that the States have unspecified residual powers, the consequence of this approach has been to expose the competencies of the States to ongoing reduction at the hands of the Commonwealth.

In light of this, it is unsurprising that the first High Court, composed of the Founders Griffith, O'Connor and Barton, adopted a decidedly non-literal approach to the Constitution, interpreting it - and particularly the powers of the Commonwealth Parliament - in light of a fundamental implied term of federalism. That implied term ran essentially to the effect that the powers of the Commonwealth were to be interpreted in as limited a fashion as possible, so as to minimise disturbance to the powers of the States. In essence, this doctrine of "reserved powers" posited that the Constitution was to be read, not literally, but subject to a fundamental historic vision on the part of those who wrote it.

As every law student knows, this approach was swept away in 1920 by the splenetic judgment of Sir Isaac Isaacs in the *Engineers' Case*. There, the doctrine of literalism was firmly established, with the High Court holding that the words of the Constitution were to be interpreted according to their natural meaning, and without regard to any notion of reserve powers. The basic effect of this was that it was only the words of the Constitution, and not the intention behind those words, which were to determine Australia's constitutional direction.

In practical terms, this resulted in a massive accretion of power to the Commonwealth. If this were all, the *dicta* contained in the *Engineers' Case* would have been a catastrophic blow both to the position of the States, and to the achievement of the federalism intended by the Founding Fathers. However, the literalism that was initiated in *Engineers'* came to have an even more insidious operation as it was developed and embroidered in later cases. This was because *Engineers'* literalism over time acquired a particularly savage twist. This was that in interpreting the legislative powers of the Commonwealth, they were to be given not only their literal meaning, but the widest possible literal meaning that their words could bear.

Thus, the proximate outcome of *Engineers'* was a proposition along the lines that, when interpreting a power contained in s.51, a Court was to construe it absolutely literally, and in doing so, the widest meaning which would be borne by the literal words was to be adopted.

It may immediately be seen that such an injunction amounts not to literalism *simpliciter*, but to a form of "ultra-literalism", which necessarily bears no relationship to the actual intention underlying any particular provision. Thus, the triumph of this ultra-literalism saw an enormous extension in the scope of Commonwealth power. Precisely why, in the context of a federal Constitution, one should invariably prefer any linguistically feasible interpretation of a phrase which involves an extension, rather than a confinement, of central power remains, along with the Bermuda Triangle, one of the great mysteries of our age.

Of course, it must be conceded that *Engineers'* was unable to stand in its full glory for long. As Sir Owen Dixon pointed out in the *Melbourne Corporation Case*, it is impossible to exclude the drawing of all implications from the process of constitutional interpretation; after all, as a governmental blue-print, a Constitution will be the legal document above all others that will require recourse to unstated assumptions for its interpretation. But the implications which emerged after the interpretative catastrophe of the *Engineers' Case* were but pale survivors of the reserve powers doctrine, and strictly limited in their scope. The basic rule remained that the Constitution was to be interpreted literally, and in the case of the powers of the Commonwealth Parliament, ultra-literally.

One basic thing which should be noted of literalism as it emerged after *Engineers'* is its virtual lack of any articulated theoretical basis. The High Court has consistently asserted literalism as the only safe rule of constitutional construction, but has never offered any extended explanation of why this should be so. The closest approach is in *Engineers'* itself, when literalism's claimed virtues of certainty, objectivity and grounding in British precedent were lauded. Thereafter, the Court largely has been content to cite the *Engineers' Case* itself as a sufficient justification for literalism. In fact, it is - ironically - possible to discern the inarticulate premise beneath literalism. This is that literalism, which has been resorted to in Australia precisely for the purpose of defeating the historical intention behind the Constitution, is itself in fact based upon a fundamental notion of intent.

The true claim of literalism, as a mandated constitutional approach within the Anglo-Australian tradition, is that the words of the Constitution themselves provide the best guide to the intent of those who wrote them. This has always been the underlying rationale of literalism as a phenomenon in the interpretation of statutes within the British legal tradition, as is discernible even in the judgments in *Engineers'*. Thus, when one probes to the heart of literalism, even it concedes that the ultimate search in constitutional interpretation is the search for intent.

3. Why Literalism?

There are two basic classes of reason underlying the High Court's adoption of literalism. The first class of reasons is political, while the second is legal in character.

Of the two, it cannot realistically be doubted that it has been the political, rather than the legal, which has rendered literalism so enduring a force in Australian constitutionalism.

The general point to be made concerning the political justifications for *Engineers'*-style literalism is obvious enough. Such justifications promoted the adoption of literalism as an interpretative methodology, not through an appeal to its legal plausibility, but rather by reference to the acceptability of its results in policy terms.

Thus, it is apparent from the merest reading of the joint judgment in *Engineers'* that far more than legal factors are at work. No one has ever doubted that Sir Isaac Isaacs and his brother

Justices were thoroughly motivated by a desire to augment the powers of the Commonwealth Parliament in adopting the stance they arrived at; nor has any serious commentator expressed doubt on the same point in relation to more modern Justices, such as Sir Anthony Mason, in decisions such as *Tasmanian Dams.*

Commentators and judges alike have been virtually unanimous in viewing literalism as having been the means by which the High Court has consciously conferred upon the Commonwealth the increased powers necessary to achieve what the Court has regarded as a desirable centralisation of responsibility within the Australian federation. So much has been more or less explicitly recognised by the Court itself for at least 30 years, as in the famous *dictum* of Windeyer J. in the *Payroll Tax Case*, where he argued that the *Engineers' Case* simply involved reading the Constitution in a new light, a light shed by national development and the need for more cohesive governmental power.

In fact, seen in this way, literalism is itself merely a reflection of a far broader constitutional phenomenon. This is the phenomenon of "progressivism", whereby judges will consciously discharge their interpretative role so as to judicially amend the Constitution in accordance with what they perceive to be the current demands, needs and desires of the Australian people. This phenomenon will be returned to later in this paper, but it may be noted for present purposes that it is entirely illegitimate as an incident of constitutional interpretation within a popular democracy.

In reality, the political character of literalism is so manifest that the real question is not whether it bears such a character, but rather the underlying issue of why the Justices of the High Court have taken up the cause of centralism with quite such relish. This is a broad issue, and too complex to be fully canvassed here, but a few very brief points may be made.

The first is that judges like Isaacs undoubtedly were deeply influenced by such scarring experiences as the First World War, and the corresponding perceived need for strong, directive government. Subsequent judges undoubtedly were similarly impressed by the Depression, the Second World War, the threat of international Communism, and the need for `globalisation'. To such judges, all of these factors went to suggest that the destiny of Australia would be best assured by the increased centralisation of power.

Secondly, such views were consistent with previously existing and very intense British biases in favour of centralising tendencies. The glories of British history had always been centralising glories, whereby remote ethnic minorities (preferably Celtic, best of all Celtic-Catholic) were decisively brought beneath the heel of Westminster. Such views were roundly expressed by commentators such as Dicey, and are still to be heard ringing down the corridors of Canberra today, many of their articulators being proud descendants of precisely those fierce and independent princes who found centralism to be so fatal an ailment. Consequently, the trend toward centralisation has always been attractive to many Australian lawyers. It is worth pausing to note that this tendency, much beloved of the Left, in fact represents one of the last remnants of truly imperial theology in Australian constitutional thought.

A similar impetus for centralism in the judicial mind has been the undeniable success of the Commonwealth as a vehicle of national identity in times of nationalism, a factor that undoubtedly has come into the minds of judges - as of other citizens - from at least the time of Isaacs. Coupled with this national success of the central government has been the political and economic decline of the States, with the result that our federal integers have for many years born a shabby and down-at-heel appearance, as unlikely to provoke loyalty as it is to engender sympathy.

Nor should it be forgotten that the High Court is, at the end of the day, a national institution appointed by the national government. However independent the Court may be, it is part of the central judiciary, and it can come as no great surprise that it is inclined to think of things central as being more important than those of State origin. This tendency has not been ameliorated in any sense by the recent tendency to appoint to the High Court Justices who have served previously on the Federal Court, and thus come to the Court with a pre-existing central focus. Nor has the preponderance of Victorian and New South Welsh appointees on the High Court bench done anything to mitigate its national focus. Finally, it must be remembered that the Court is nothing more itself than a particularly sophisticated microcosm of the national policy. The intellectual fashion in Australia has been, for a great many years, in favour of centralism over federalism, and to this extent the High Court is doing nothing more than reflecting its predominant milieu.

All of these reasons have combined to produce a Court highly inclined to the pursuit of centralism, and to the adoption of any constitutional mechanism which will achieve this end.

As has been indicated, however, there are also non-political, legal considerations underlying the acceptance by many judges of the *Engineers'* methodology. Chief among these has been an undeniable strand of traditional literalism in British statutory interpretation. To British judges, trained in a tradition of legal positivism and objectivity, the notion that statutes could be interpreted simply according to their tenor, and without the slightest recourse to extraneous considerations, has always been attractive. Indeed, it is this British tradition that provided much of the justification for the Isaacs' approach in *Engineers'*.

Indeed, the attractiveness of literalism as a politics-free, objective, legal means of interpreting a Constitution within the fundamental British tradition of judicial independence cannot be over-stated. To judges trained in the notion that their role was, by definition, apolitical, it was enormously comforting to be able to believe that the process of constitutional interpretation was nothing more than a mechanistic application of the written word.

Moreover, such a method of interpretation had the further undoubted virtue that it was, at least in theory, profoundly simple and easy. There was no need for a judge to be trained in the techniques of history or political economy: all that was required was a legal education, a dictionary, and a modicum of common sense. It has already been noted that literalism has, in reality, never operated in so straightforward a manner, but the appeal of such rhetoric to a judge raised in the British legal tradition is undeniable.

In summary, therefore, it may be accepted that different judges adopted literalism as their chosen methodology for different reasons, and for a mixture of different reasons.

However, it cannot be disputed that overwhelmingly the most important institutional reason for the High Court's adherence to literalism was its purely political desire to advance the centralisation of power within the Australian federation. To see literalism merely as an outcome of a British legal literalistic tradition is to lose sight of this primary objective. Of course, this agenda is articulated in overt terms far less often than sententious calls for "certainty" and "objectivity", though even here the Court's pretence has slipped more often of late. Nevertheless, in line with what has been said earlier concerning the origins of the *Engineers'* approach, the essentially political sub-structure of literalism cannot be seriously doubted.

4. Deficiencies of Literalism

It is already abundantly apparent from the general approach of this paper that the author is no supporter of literalism. However, it is appropriate at this point to dwell briefly and more

particularly upon the specific deficiencies of literalism as a methodology of constitution interpretation.

The first, and probably the greatest deficiency of literalism, has been its absence of any articulated theoretical justification. As has already been noted, the traditional judicial justification of literalism has simply been that it is the "best" or "safest" or "only" or only "objective" method of interpreting the Constitution. While *Engineers'* itself tended to be grounded most upon an appeal to British constitutional tradition, subsequent applications of literalism generally content themselves with citing that Case as having laid down incontrovertible principles of constitutional construction. Thus, it would be extremely difficult for anyone reading a case within which the Australian High Court has propounded and applied a literal technique to discern, in purely theoretical legal terms, precisely why such a technique was thought to be so intellectually compelling. In short, the premise behind literalism is less inarticulate, than mute.

As we have seen, that premise probably rests upon some notion that the words are the safest guide to the intent, but this has rarely (if ever) been acknowledged in an Australian constitutional context, for obvious reasons.

This leads on to the second deficiency of literalism. As employed in Australia, literalism has been used for the purpose of defeating precisely that intent to which the words supposedly are the safest guide. That is, literalism has been utilised by the High Court for the precise purpose of frustrating the intentions of the Founders that the Australian federation be fundamentally decentralised in character.

Thus, rather than the literalistic interpretation of constitutional language being used to implement the intentions of the Founders, it has been used to oppose and defeat them. This is profoundly true of the ultra-literalism that has ultimately emerged in the wake of *Engineers'*, according to which the powers of the Commonwealth Parliament set out in s.51 have consciously been given an ambit vastly beyond that intended by the Founders.

Indeed, in the context of the uneasy conjunction between Founders' intent and literalism, the Court has at times seemed to flirt with a bizarre notion of "objective" intention, this being the intention disclosed by a construction of words according to the *Engineers'* ultra-literalistic canon, regardless of whether the "objective" intention so produced bore any relationship to the actual intention upon which the words of the Constitution were founded. On such metaphysical inanities has literalism thriven.

Flowing inexorably from this intentional deficiency is a further failure of literalism: it is irredeemably unhistorical. No-one could seriously dispute that literalism has not promoted the historical purpose of the Constitution as devised by the Founders. Indeed, it cannot seriously be argued that literalism has operated in anything other than a manner which is in direct opposition to historical fidelity. It may be noted that this particular failure of literalism has become increasingly unattractive of recent years, as judicial pronouncements and academic writings on statutory interpretation consistently have stressed the virtues of a purposive approach to legislation in general.

A fundamental practical failure of literalism is its complete inability to deal with the interpretation of constitutional language which is ambiguous, or even with the elucidation of constitutional language which, while it may not be technically ambiguous, nevertheless cannot intelligently be understood in isolation from the circumstances surrounding its inception.

The difficulty with literalism as annunciated in the *Engineers' Case*, is that it turns upon a concept of `natural meaning'. While such a notion may be fully applicable to the more

mechanical provisions of a Constitution, there inevitably will be numerous fundamental aspects of a Constitution which simply cannot be understood merely as an abstract set of linguistic expressions. Good examples of these phenomena are the concept of "excise" in s.90, and "free trade" in s.92, but a similar analysis could be applied to many of the *placita* in s.51. To understand such provisions it is absolutely necessary to have regard to evidence of their historical purpose, and any attempt to comprehend them in documentary isolation would be doomed to abject failure.

What this means in practical terms for a literalist judge, is that whenever that judge is faced with a piece of constitutional language which is indeterminate in this sense, he or she will be forced to place their faith in improbable assertions that their own chosen `natural meaning' is the only one possible upon the face of the language, despite the fact that three or four of their equally learned brethren have found equally plausible, but divergent meanings. Once again, this fundamental problem with literalism has become increasingly apparent as Australian lawyers, under the influence of mainly North American jurisprudence, increasingly embrace notions of the indeterminacy of language.

A related problem has been the fact that literalism is more or less incapable of dealing with the concept of implications. In every day language, we all accept that implications are as much a part of speech and meaning as explicit expressions. Thus, for example, if I say, with my wallet in hand, "I am going to the bank", then it is a fair bet that I am about to deposit (or withdraw) money, and not to hurl myself to oblivion into the Yarra. Likewise, in a Constitution, the expression "external affairs" in s.51(xxix) almost certainly refers to aspects of foreign relations, and not to extra-marital relationships occurring overseas. Yet both these refinements of meaning flow not from the explicit language, but rather from the context in which that language has been used, revealing as it does the intention behind the words.

Obviously, the capacity of literalism - with its myopic insistence upon `natural meaning' - to deal with such refinements is exceedingly limited, with the obvious result that the intentional element embodied in the notion of implications is devalued within the process of constitutional interpretation. It is true that, in the years since the *Engineers' Case*, the High Court has made some attempt in a federal context to accommodate the concept of implications, but, absent the implied rights cases, no pervasive accommodation has been achieved.

There is, in addition, a whole bundle of highly contemporary reasons why literalism is finding it particularly difficult to cope with modern legal trends. It has already been noted that literalism is inherently unattractive to those committed to a purposive approach to interpretation, and to those who believe that language is characteristically indeterminate in character. There are, however, further difficulties.

The first is that literalism's blanket denial that it is in any way concerned with the achievement of political results, and its allied claim that it provides an apolitical means of interpreting the Constitution, appear increasingly threadbare at a time when judges and lawyers themselves are far more ready - rightly or wrongly - to admit that the process of interpretation contains an element of the political. Thus, to a judge like Justice Michael Kirby, the assertion that literalism is entirely free from the taint of politics must seem, on any historical understanding, bizarre.

Secondly, hand in hand with the willingness of lawyers and judges to admit that at least part of their task is political in character, has been a willingness on their part to admit into the process of legal interpretation perspectives from disciplines other than law. Such disciplines have included history, linguistics, and political science, and all have stressed the need for language to be

interpreted in context before it can intelligently be understood. Once again, such views are antithetical to the simplicities of literalism.

Finally, and crucially, literalism has been found to be deficient by Australia's ruling constitutional elite for the carrying forward of its great project of the waning years of the 20th Century. This project has been the creation of an Australian Bill of Rights by judicial fiat.

The difficulty with literalism in this context is that there quite simply is nothing in the words of the Constitution which gives the slightest comfort to any notion that it contains a cohesive series of human rights guarantees. Consequently, literalism - while it has given good service for the enthralment of the States - is useless for the purpose of creating a judicial Bill of Rights. Consequently, once it became apparent that the Australian legal elite was determined to follow international fashion and create a Bill of Rights, it equally was inescapable that its attachment to literalism, at least in this particular context, would wane.

This consideration inter-locks closely with the fact that literalism has, to some extent, become a victim of its own success. It has been used with great effectiveness to bring Australian federalism to its knees, but now that federalism is gasping in the mud, the need for literalism is less obvious. Like Alexander sighing for new fields to conquer, the High Court has set its eyes upon tantalising empires of human rights jurisprudence, and in so doing has left literalism in some respects like a middle-aged mistress, whose delights having been savoured to the full, may now safely be discarded - at least until the cudgels must be taken up against federalism once again.

5. Literalism Today - Decline in Triumph

In light of what has been said above concerning the deficiencies of literalism, it is clear that its decline as the High Court's chosen constitutional methodology was inevitable, at least from the point when the Court began its flirtation with human rights in the mid 1980s. It may be noted at this point that this comparatively recent flirtation, and the Court's long-standing commitment to literalism, in fact have one fundamental point in common. They are each examples of the phenomenon referred to earlier as `progressivism', whereby the Court determines to alter the meaning of the Constitution in order to give effect to what it believes to be the aspirations and desires of the contemporary community.

Thus, just as the Court has long believed that the Australian federation demanded a greater degree of centralisation, it now believes the nation demands constitutionally entrenched human rights, and that these boons should be provided, not via a democratic constitutional amendment under s.128, but rather through judicial `creativity'. As between literalism and implied rights, the essential thesis as to the right of the Court to unilaterally alter the Constitution is identical: only the direction which the relevant alterations are to take is different.

Consistently with what was said above about the nature of literalism, the High Court had no choice, once it had determined to embark upon a constitutional jurisprudence of human rights, but to modify its attachment to literalism. As has been noted, there quite simply was no possibility that the desired human rights could be discerned within the explicit words of the Constitution, construed literally according to the *dictum* of Isaacs.

Consequently, in the context of human rights, the High Court has adopted a jurisprudence of "implied rights", which will be fully considered in the next section of this paper. In particular, the question will be asked as to whether these "implied" rights have anything to do with actual "implications", but this is a matter which can be put off until then. For present purposes, the obvious point may be made that a pervasive notion of rights based upon implication is fundamentally inconsistent with any adherence to literalism.

Indeed, such a notion in essence bears strong similarities to the doctrine of reserved powers enunciated by the first High Court (and so savagely dismissed in *Engineers'*), in that it is based upon some notion of the fundamental features underlying the Constitution. In the case of the implied right of freedom of political communication, as it has emerged from decisions like *Theophanous*, this fundamental feature is the concept of representative democracy.

Here, it is true that the language of the Constitution may sometimes be broadly indicative, in the most nebulous terms, of the concept of `representative democracy' upon which the right to freedom of political speech is said to be based. Thus, the words of such provisions as s.24 certainly are consistent with some notion of representative democracy, although to argue that they say anything prescriptive about the content of that notion is highly dubious. Nevertheless, it has been upon "implications" drawn from the language of such provisions that the Court has based its jurisprudence of implied rights in decisions like *Theophanous*, *Leeth* and *Australian Capital Television*.

Critically for any assessment of the modern place of literalism, the most cursory reading of such cases will instantly reveal that the constitutional methodology employed there bears absolutely no resemblance to the mechanistic application of literalism within federalism cases. Instead of minutely construing the constitutional text, the Court is concerned rather to extrapolate sweeping generalisations concerning the character of the Australian polity from the merest and most unpromising hints in the Constitution itself.

The result of this has been that, in the area of constitutional interpretation which some members of the High Court clearly see as their monument to the passing of the millennium - the implied rights cases - literalism simply does not hold sway. Indeed, one of the most amusing experiences available to an Australian constitutional lawyer is to read the implied rights cases, to note their stylistic affinity to the reserved powers decisions of Sir Samuel Griffith, and to savour the fact that the rage of Sir Isaac Isaacs would have found as apt an object in Sir Anthony Mason in *Australian Capital Television* as ever it did in Sir Samuel Griffith in any of his more federalist decisions.

Bizarrely, however, the High Court's repudiation of literalism has stopped at the borders of the implied rights cases. Within the other main field of the Court's constitutional endeavours - federalism - there predictably has been no perceptible slackening in its enthusiasm for the literalistic approach laid down in *Engineers'*, and that approach continues to be used for the purpose of limiting State, and enhancing Commonwealth, powers.

Thus, for example, the majority in *Capital Duplicators* showed no tendency to have regard to the fundamentally federal character of the Constitution in construing the scope of the Commonwealth's exclusive powers over excise conferred by s.90, despite the fact that the document's fundamentally democratic character obviously was moving them deeply.

Again, in *Re Australian Education Union*, the majority of the Court followed a catholic literalist approach in construing a scope of the industrial relations power contained in s.51(xxxv), and were not remarkably more sympathetic to arguments based upon implications drawn from the federal character of the Constitution than previously.

Finally, in *Re Dingjan* the Court construed the corporations power (section 51(xx)) in accordance with its usual literalist methodology, with no apparent awareness that such an approach sat most oddly with the free-ranging interpretative method employed in the context of human rights.

At the most, it might be suggested, on the basis of its most recent federalism cases, that the Court has lost some of its enthusiasm for the more blood-curdling of its previous endorsements of

Engineers' literalism, but even this would probably be to overplay any signs of constitutional shame on the part of the High Court's membership.

The depressing conclusion, therefore, must be that the High Court's present constitutional jurisprudence is fundamentally unprincipled. By this is meant that the interpretative method to be employed by the Court in any particular case seems to be chosen, not by reference to constitutional principle, but rather according to the result which the Court desires to procure.

Thus, when dealing with issues of human rights, the Court will adopt a broad, implicatory approach, paying careful regard to the supposed central characteristics of the Australian Constitution. Yet when dealing with an issue of federal power, the Court will adopt the diametrically opposed approach of minutely construing the words of the Constitution according to the established canons of literalism. The contrast could not be starker, nor more revealing of the essentially political character of the Court's proceedings.

6. The High Court and Implied Rights

Introduction

It is now appropriate to consider the whole question of the High Court's recent jurisprudence of implied rights. This has been the Court's most prominent contribution to its own constitutional jurisprudence of the 1990s, and to such judges as Sir Anthony Mason and Sir William Deane, undoubtedly represents their constitutional legacy. Moreover, implied rights theory, to a very real extent, now reigns as the Court's dominant constitutional methodology, and partial successor to literalism, at least within its own, increasingly important sphere. For these reasons, it is critical to analyse the High Court's theory of implied rights, its basic plausibility and true character.

I should first of all make clear my general attitude to implied rights under the Australian Constitution. There is a great tradition of judicial respect in Australia. No matter what one thinks of a decision of a court, and particularly of the High Court, we never allow ourself any epithet more censorious than "puzzling", or "not fully thought out". The most extreme criticism imaginable is that the Court's decision seems "confused", by which we mean that the Chief Justice began to take off his clothes while delivering judgment.

However, when a constitutional court begins to re-write the Constitution in defiance of its mandated role, true judicial respect does not demand silence, but rather vociferous encouragement for the relevant court to revert to its constitutionally sanctioned path. Consistently with this approach, I find the High Court's endorsement of implied constitutional rights neither "puzzling" nor "confused", nor indeed any other polite euphemism. On the contrary, I call it for what it is worth: in Jeremy Bentham's immortal phrase, "nonsense on stilts", and without any defendable basis in historical or constitutional principle.

The Nature of Constitutional Implications

The first step on the way to this conclusion is to observe that the exact constitutional basis of the supposedly implied right to freedom of political communication is profoundly unclear. Of course, we all know that this right is said to derive from the fundamental implication in the Australian Constitution of "representative democracy". To this extent, the process by which the right is arrived at sounds reassuringly familiar, as we have always been used to the concept of constitutional implications, at least since the more bizarre excesses of the *Engineers' Case* were disavowed by the High Court.

More specifically, implications from the Australian Constitution typically have been derived via a two-step process. First, a primary implication is drawn from one of the more general characteristics of the constitutional settlement achieved by the Founding Fathers: for example, that the Australian polity is to be strongly federal in character. Secondly, a derivative implication

is then made from that primary implication: thus, in the present example, from the primary implication of strong federalism is drawn a consequent subsidiary implication that the Commonwealth may not discriminate against the States, nor inhibit the discharge of their essential functions (see the *Melbourne Corporation Case*).

However, this description of the usual two-step process for the drawing of implications says little about the nature of implications as such. Put simply, what is the true basis of a constitutional implication? How do implications arise from the Constitution?

To this crucial question, the High Court has given a bewildering array of answers in the context of its enunciated freedom of political communication. Sometimes, and with a degree of implausibility rivalled only by the wartime announcement of German victories on the Russian front by the late Josef Goebbels, certain Justices of the Court have attempted to base the existence of implied freedoms upon the intentions of the Founding Fathers. A theoretical alternative would be to rest the implied right directly upon the constitutional text, as has sometimes been done in respect of other implications, such as the separation of powers doctrine. However, even those Justices most committed to the implied freedom of political communication have hesitated to claim they discern its existence in, or at least out of, the very words of the Constitution.

Most commonly, therefore, the implied right is said to be "structural" in character. The idea here is that the implication arises mysteriously from the arrangement of the sections and subjects of the Constitution as a whole, and centres upon the immediately attractive, yet ultimately metaphysical, concept that the sum of the Constitution is greater than its parts: which might be rendered in mathematical terms by saying that when the High Court divides the Constitution by one, the answer is 473.5, or whichever Sir William Deane says is the greater.

Yet another possible foundation for the implied freedom has been said to lie in the supposed sovereignty of the Australian people, and so much was urged in argument by Counsel in the *Duck Shooters' Case*. In actual fact, the sovereignty of the Australian people, and whatever legal incidents it may engender, have all the obvious relevance to the implication of rights into the Constitution as saying that the United Nations oil embargo on Iraq is justified because the Amazon River is longer than the Nile.

Nevertheless, the implied rights reasoning based upon popular sovereignty does tend to shade into a final argument, that the implied right is justified as a constitutional phenomenon on the basis that it is the duty of the High Court to up-date the Australian Constitution in line with the aspirations of the Australian people, and that an appropriate vehicle for this process is the drawing of "constitutional implications". This argument, which will be considered below under the brand-name `progressivism', is rarely expressed overtly by the Court, but is present in all the implied rights cases.

It is appropriate to pause at this point to consider the basic question of the true foundation of constitutional implications, before going on to consider whether the implied freedom of political communication properly is referable to such a concept.

The general proposition which needs to be made here is that as a matter of linguistics, law, and constitutional interpretation, if one maintains that something is implied by a statement, one is indicating one's belief that the party making that statement intended to convey such a meaning, even in the absence of express words encapsulating it. Thus, to take a simple example, were I to say to this gathering, "All men stand up", then the implication would be that all women should remain seated, and your appreciation of this implication would be based upon your understanding of the intent behind my utterance.

This is as true in a non-constitutional legal context, as it is in the context of everyday speech. It has long been recognised that it is possible to draw implications from statutes of Parliament, and that these implications are to be based upon the presumed intention of Parliament. The usual test is that the courts will draw an implication from a statute where it is necessary to give effect to the intent of Parliament. Once again, the implication is clearly based upon the supposed intention of the author, in this case, the collective intent of the legislature.

Historically, the position in relation to constitutional implications has been essentially similar. Thus, for example, in the *Melbourne Corporation Case*, the implication that the Commonwealth could not utilise its power to inhibit the exercise of the essential functions of the States was based upon the presumed intention of the Founding Fathers to that effect, an intention the existence of which was plausible to the point of being self-evident. Much the same may be said of such doctrines as the separation of powers. It may be noted that neither of these implications are based directly upon the text of the Constitution, although it is equally true that they do the text no obvious violence. Rather, they are based squarely upon an understanding of the intentions of those who wrote the Constitution, and thus are clear kin to the everyday implications of ordinary life, as with the historically well-founded implications of statutory interpretation.

Consequently, our working hypothesis properly may be that constitutional implications, like any others, are based upon intention. The essential question in deriving them, therefore, must be whether they were intended outcomes of the constitutional settlement envisaged by the Australian Founders. Such an approach follows the general principle for the interpretation of legal documents, including contracts, statutes and Constitutions, that implications represent an attempt to divine the intention of the relevant authors.

Thus, in the present context, we may turn to the question of whether the Australian Founders did indeed intend to create a judicially enforceable right of political communication. When the question is framed in this way, as it necessarily must be in light of our understanding of the nature of implications, it virtually answers itself in the negative. Notwithstanding the fantastic attempts of Sir William Deane to outline an intentional pedigree for implied rights in cases like *Theophanous* and *Leeth*, largely on the basis of a determined misinterpretation of a few phrases in the work of Andrew Inglis Clark, the kindest thing that one can say of such a view is that it is wildly implausible: or, to put it in the language of Sir Humphrey Appleby, a constructive re-application of a modified form of the subjective truth in a re-synthesised format.

We do not merely surmise that the Founding Fathers did not intend to create judicially enforceable rights outside the explicit guarantees of the Constitution: we know that they had no such intention. Firstly, they had before them the compelling example of the United States Bill of Rights, which they consciously chose not to follow. Secondly, and even more importantly, they were absolutely and explicitly committed to Parliament and the common law as protectors of human rights, and frequently said as much. One may disagree with the position of the Founders on this crucial point, but they unquestionably put their faith in a self-regulating parliamentary democracy when it came to the vindication of human rights. In the event that one does wish to repudiate the wisdom or folly of the Founders, then the appropriate place for this repudiation is the ballot box at referendum, and not upon the bench of the High Court.

The result of this analysis must be that the `implied' freedom of political communication is, on any ordinary constitutional basis, simply bogus. As a purported implication it is not authorised by constitutional intention, and thus, unless one were to develop an entirely new, non-intentional basis for constitutional implications, the implied right must be dismissed as fundamentally anti-

constitutional. It is the possibility that there might exist some non-intentional means of justifying constitutional implications that this paper will now address.

Essentially, there are two lines of reasoning which might be relied upon to support the somewhat oxymoronic notion of non-intentional constitutional implications. One is comprised in the idea of structural implications, briefly referred to above. The second is embodied in the idea of "progressivism", which previously has been identified as maintaining that it is the role of the High Court to progressively up-date the Constitution in accordance with the demands posited by the passage of time.

Structural Implications

The concept of structural implications has been relied upon heavily in the context of implied rights by judges such as Sir Anthony Mason, in cases like *Australian Capital Television* and *Theophanous*, and is probably the most "respectable" alternative theory for the basis of constitutional implications. The central idea is that the provisions of the Constitution collectively imply such broad concepts as representative democracy, from which implication one can in turn derive a right to freedom of political communication.

It should be noted from the outset that, on the assumption that we do indeed regard intention as an indispensable element in any implicatory process, these `structural implications' are not `implications' in any sense that we ordinarily would understand: that is, they do not arise out of some over-arching intention of the Framers of the Constitution, running through and above its specific provisions.

Rather, structural implications are at best `implications' by courtesy, in the sense that they are perceived as arising mechanically from the inter-relationship between provisions of the Constitution, thus giving rise (in the minds of individual judges) to particular constitutional precepts, which exist quite independently of any intention behind the relevant provisions, or indeed behind the Constitution as a whole. So much is clearly seen in the *Australian Capital Television Case*, where Sir Anthony Mason strongly divorces structural implications from actual intent.

At this point, it is clear at the very least that so-called structural implications cannot be justified on the same basis as ordinary implications, given that they not only fail to base themselves on constitutional intent, but also (as in the specific case of the implied freedom of political communication) may be explicitly opposed to such intent. Structural implications are, in essence, founded upon random relationships between sections of the Constitution as subjectively perceived through the eyes of individual judges, without even the support of any specific interpretation to be ascribed to particular words, as McHugh J. has trenchantly observed.

However, this lack of any principled intentional base is far from being the only interpretative deficiency in the concept of structural implications. The first point which must be made here is one of basic intellectual honesty. Consistently with what has been argued above, structural implications - as entirely non-intentional phenomena - are not implications at all. As has been seen, this is a simple matter of definition. But if they are not implications, what are they?

My own view is that they would be better described as `extrapolations' or `evocations'. That is, according to the theory of structural implication, judges read the Constitution not to get its meaning, in the sense of the intent which underlies it, but to produce on their own part generalised reactions to it, which naturally will vary from judge to judge. From these generalised reactions, a judge will then deduce particular, and highly subjective constitutional principles, such as the implied freedom of political communication. With considerable accuracy, this could

be termed the `literary criticism' theory of constitutional interpretation, at least since that other branch of human learning has groaned beneath the burden of post-modernism.

According to this theory, the Constitution is read not so much as a law, but as a book. Judges say not what the Constitution means - as they would in the case of a statute - but what it is about, in much the same way as you or I might have very various views concerning what Jane Austen's *Pride and Prejudice* is about. Thus, just as one reader may believe that *Pride and Prejudice* is about forgiveness, while to another it may concern morality, so to a first judge the Constitution may be about representative democracy, while to a second it is a text on equality, and to a third a charter for the free investment of capital. Whatever, from such constitutional evocations as they choose to enjoy, judges are then free to derive such multifarious subsidiary principles as seem appropriate.

The chief problem with this intensely personally satisfying view of constitutional interpretation is that the Constitution is not, in point of fact, a book. It may be acknowledged that the author of a book is not, within certain limits, primarily concerned with evoking a particular and precise response from a reader: generally speaking, what the writer is looking for is some intelligent response. However, a Constitution - like any other law - is not about (or not primarily about) the emotional response of judges. On the contrary, it is about the securing of specified results. Obviously, the results to be secured by a Constitution will be rather more general than those to be produced by a Dog Act, but they will nevertheless be determinate and intended.

In essence, therefore, unlike a book, a Constitution is not evocative in character, but instructional. The Australian Constitution exists to effect the broad dispositions intended by those who wrote it, and endorsed by those who approved it at referendum. Consequently, constitutional extrapolations of the type represented by the so-called `structural implications' must be regarded as inherently illegitimate.

The second difficulty with structural implications is that they do not, in fact, impose the restraint upon judicial creativity sometimes envisaged by their supporters. Here, Sir Anthony Mason (and even Justice McHugh) sometimes display a fondness for structural implications, which apparently is based partly upon the perception that they allow the High Court to be bold, but not too bold. There is, after all, something reassuring about implications that are said to be `structural': they sound solid and concrete, and their potential deployment presumably is not unlimited.

Thus, the language of structure tends to be used as a riposte to those who would argue that such constitutional `implications' pave the road to unlimited judicial law-making. The argument is that there is a clear limit to the `structural' implications that may be made under the Constitution, in the sense that unless they are evident as part of the so-called `structure', they are inadmissible.

This is, however, a quite mistaken view of the nature of structural implications. In reality, there is virtually no limit to the implications which conceivably might be drawn from the perceived `structure' of the Constitution. The reason for this lies in the true character of structural implications as mere `extrapolations' from the Constitution. In this connection, it would not be unfair to say that the variety of the themes which might be structurally extrapolated from the Constitution is limited only by the imagination (or perhaps the psychology) of the Justices of the High Court themselves.

Thus, for example, we have already observed the concept of representative democracy, whose derivative freedom of political communication has grown exponentially during its short span of existence since the *Nationwide News* case. We also have seen the attempt by Justice Deane in *Leeth* to generate a free-standing right of equality, whose eventual boundaries are simply

unguessable. But there are almost innumerable other structural implications which could, with varying degrees of plausibility, be said to arise from the Constitution.

For example, can we not discern, lurking behind the text of s.92, a guarantee of a capitalistic, free market-society? Or, if this does not strike one's fancy, is it not possible to make out a procrustean requirement of redistributive social justice in the powers of the Commonwealth over trade and commerce, taxation and industrial relations? Or, if one's taste runs in more hawkish directions, why does not the defence power point to a high structural duty upon the Commonwealth to maintaining large and capable armed forces? Such examples may seem far-fetched, but to be perfectly frank, are no more obviously devoid of constitutional authority than the implied freedom of political communication so sententiously propounded by the Court.

Yet a further difficulty with structural implications is that, even if one accepts the plausibility of the particular head implication (for example, representative democracy), there frequently will be no necessary or even tenable link between that implication and the proximate constitutional principle being enunciated by the Court. In other words, even if the so-called structural implication seems reasonable, the secondary inference drawn from that implication will be highly tendentious.

A good example occurs in the case of the implied freedom of political communication. As has been seen, this freedom is derived from the more general implication of representative democracy. Let us accept for the moment that the Founders intended that representative democracy should suffuse our Constitution, or in the terminology of Sir Anthony Mason, that this institution arises from the structure of the Constitution. Let us further accept that representative democracy requires the existence of `free speech', whatever that is, for its effective operation. Yet even accepting all this, how can it be said necessarily to follow that there must exist a judicially enforceable right of freedom of political speech within every representative democracy?

As should be self-evident, there will be many other ways in which the necessary freedom of speech conceivably might be secured under the Constitution. To take merely one (and the most pertinent) example, free speech may be secured via the political process as encapsulated in the operations of free and representative Parliaments, which was precisely the course chosen by the Founding Fathers.

How, then, can it be said - whatever view one may take as to the wisdom of the Founders' choice - that either representative democracy or freedom of speech cannot exist in the absence of a judicially enforceable right? Were one seriously to attempt to argue so ludicrous a proposition, it presumably would follow that neither representative democracy nor freedom of speech existed in Australia prior to the free speech cases; in Canada prior to the enactment of the Charter of Rights; and in the United Kingdom to the present day. Consequently, even if one can go so far as to accept such primary implications as representative democracy, and such intrinsic manifestations of this phenomenon as freedom of speech, the further `implication' of a judicially enforceable right of political communication remains a logical nonsense.

A further difficulty with structural implications brings us back to the idea that the Constitution is not a literary text from which themes are to be generalised. It is a central feature of the interpretation of legal documents in the Anglo-Australian tradition that they are to be interpreted according to their author's intention, as manifested through their text and any necessary implications, rather than through the extrapolation out of the document of general values, followed by the distillation of specific principles based upon those values.

It is worth remembering that, were the recent approach of the High Court to constitutional implications to be adopted in relation to any other law, hysteria justly would reign throughout the legal community. Thus, one can only imagine what would occur were the *Income Tax Assessment Act* to be treated by the High Court as the legal equivalent of *Gone with the Wind*, and interpreted as disclosing a structural implication to the effect that matters not specifically dealt with under the Act were nevertheless to be dealt with according to a principle of `fair, just, socially distributive taxation'. Once again, the point must be that the Constitution, like a tax act, is basically instructional in character, and must depend for its effect upon its terms and its intent, not the values of the judges reading it.

This leads me to the final point concerning structural implications. The effect of the High Court's insistence that implied rights may not be trespassed upon by the legislature, in the absence of a finding that a law so intruding is reasonably and appropriately adapted to the achievement of legitimate ends, has had the undeniable effect that the High Court is now involved in the making of purely political and policy decisions, however fastidiously they may be cloaked in legal rhetoric. Whether or not a legislative measure is reasonably or appropriately adapted to the achievement of a legitimate end is not ordinarily a question of law, but a question of policy, involving as it does not only the identification of an end which is `legitimate', but even more problematically, the assessment by the Court of whether particular policy tools are appropriate to the achievement of that end.

To take the particular example presented by the present litigation in *Duck Shooters'*, the balancing of such policy interests as safety, order, and the right to protest is intrinsically a matter of political decision, yet the technique of structural implication as employed by the Court has enabled it to be subsumed within an essentially spurious legal construct.

There are two obvious questions to be asked here. The first is the old one, as to why judges and lawyers should be entrusted with the making of political decisions within an undoubted parliamentary democracy? The second is an even more practical question, which relies upon issues of competence rather than political theory for its sting. Even if one accepts that there is no democratic impropriety in judges assuming a political and legislative function, why would we believe that relatively elderly and cloistered male barristers, sequestered all their lives from the making of any policy decision larger than that concerning the purchase of office stationery, should upon elevation to the High Court bench become qualified for the taking of the most fundamental political decisions in our society?

Given, then, the utter logical implausibility of so-called structural implications as a basis for the implied freedom of political communication, is there some alternative, more ingenuous explanation for the High Court's most spectacular juridical experiment?

This question must be answered unequivocally in the affirmative. On any dispassionate analysis, the language of structural implication has been little more than a polite judicial camouflage for the real constitutional agenda of the Court. The true basis of the Court's rights jurisprudence is not any process of implication, structural or otherwise, but crude progressivism.

Progressivism

As has been noted before, `progressivism' is the view that the High Court, in interpreting the Constitution, should consciously mould it in line with perceived modern needs. It goes without saying that there is not the slightest constitutional warrant for this view, as the power of constitutional alteration resides exclusively in the organism contemplated in s.128 itself.

Thus, properly understood, progressivism is neither a legal nor a logical phenomenon, but rather a political position. This essentially is why it was necessary for the High Court to invent the

constitutional decency of structural implications, in order to cloak what was, in effect, the birth of a constitutional monstrosity of the first order.

Indeed, this is where the whole implied rights debate becomes decidedly irritating. Virtually everybody concerned in Australian constitutional discussion knows perfectly well that the supposed implied freedoms do not arise from the words of the Constitution, were not intended by the Founding Fathers, and cannot be implied out of the Constitution by any logically sustainable process.

Equally, it is universally understood (at least within the privacy of one's study) that the said rights were consciously invented by the High Court, and welcomed by many commentators, for much the same types of reasons: adherence to the current international fashion for constitutional guarantees of human rights, concern over the perceived expansion of executive power, and the pervasive influence of North American jurisprudence, to name just three. Consequently, almost everybody knows - but almost no-one is saying - that it is this highly élite desire for constitutional change, and not any genuine genuine interpretative process applied to the Constitution, that is the true foundation of implied freedoms. However, this uncomfortable reality must be clothed in the respectable robes of legal interpretation, and the language of constitutional implication, if it is to appear in any way consistent with conventional notions of parliamentary and constitutional democracy.

This is not the place for a sustained attack on the constitutionally and democratically illegitimate notion of progressivism, although some discussion of its possible justifications will occur below. However, it may be noted for present purposes that the desire for constitutional change embodied in that doctrine is not commonly encountered outside of the superior courts and law school common rooms. Indeed, far from being democratic in character, as is constantly suggested by the ringing appeals to representative democracy by the chief judicial proponents of progressivism in the implied rights cases, progressivism as a constitutional position is strikingly élite and aristocratic in nature. Thus, when last confronted with proposals for changes to the Constitution in the direction of entrenched human rights (in 1988), the Australian people voted resoundingly against them. The jurisprudence of implied rights is a sneering dismissal of this popular verdict, and far from representing a constitutional triumph for the population at large, rather represents their rejection as intellectual incompetents by a narrow legal élite.

One crucial point to emerge from all this is that, if we are to debate `implied' freedoms, then let us debate their reality, and not their sham justifications. Thus, in any genuine debate over the implied freedom of political communication, what we must be addressing is the phenomenon of judicial progressivism, not the mock implications within which that phenomenon is embodied as a matter of rhetoric. For obvious reasons, supporters of the implied freedoms tend not to enjoy this debate, but it is one upon which I will now touch briefly.

Essentially, there are three possible lines of reasoning to which resort might be had in order to justify progressivism. The first, and probably the least plausible, is that the Founders themselves intended that the High Court should consciously modify the Constitution in line with perceived and developing social needs. Some attempt seems to have been made by Sir William Deane to pursue this line of thought in *Leeth.*

The short answer, of course, is that there is absolutely no evidence that the Founders enjoyed any such hope. Obviously, they recognised that there was scope for judicial interpretation in the construction of the Constitution, as in any other legal document. However, it is clear beyond all argument that the Founders regarded the referendum process contained in s.128, and not a

reformist High Court, as the means by which the Constitution was to be adapted to changing social needs.

Another attempt to found progressivism, albeit in a somewhat indirect manner, has been resort to the developing theory of Australian popular sovereignty. The argument seems to be that as the Australian people are now sovereign, and in particular enjoy full constitutional competence, it follows that the High Court should progressively amend the Constitution via judicial interpretation to bring it into line with the developing needs of the populace - as perceived, of course, by the judiciary.

The exact logic of this curious argument is not immediately obvious, and need not be unravelled here. Suffice to say that, to the extent that emerging popular sovereignty does indeed bear upon particular constitutional dispositions, it might be thought that such a consideration would operate dramatically to underline the people's ownership of the intensely popular amendment process provided for under s.128, rather than its peremptory appropriation by the judicial arm of the Commonwealth.

The final argument in justification of progressivism is at once the least palatable and the most disingenuous. This is that the High Court has no choice but to alter the Constitution by a process of judicial interpretation, simply because the Australian people have proven themselves unequal to the task by their repeated record of voting against proposed constitutional amendments at referenda. This argument could aptly be encapsulated in the aphorism that "the High Court will save us from democracy", and is a sardonic counter-point to the Court's own rhetoric of representative democracy. Given its utter paucity of democratic legitimacy, it is not surprising that the Court itself has been loth to expose such a popularly repugnant justification for progressivism, although it occasionally is voiced in less discriminating academic circles.

In any event, the broader conclusion, in light of this assessment of the possible justifications for progressivism, must be that the approach enjoys no principled constitutional basis. Consequently, it is little wonder that the Court has been loth to expose progressivism as the true foundation of its so-called implied rights.

Judicial Opposition to Implied Rights

For the sake of completeness, it should be noted that, notwithstanding the intellectual bankruptcy of the High Court's jurisprudence of implied rights, judicial attempts to rein in this spurious process of implication have so far themselves proved pitifully unequal to the task, although this assessment may not survive the outcome of *Duck Shooters'*. The primary reason for this is that the opponents of the freewheeling use of constitutional "implications", such as Justices Dawson and McHugh, have tended to proceed on a false premise in attempting to invalidate the use of such implications. Thus, in *McGinty*, Justice McHugh argued that the deficiencies of Mason-style implications lay in the fact that they were based not upon the text or structure of the Constitution, but rather upon extraneous values, and (incredibly) upon the untextualised assumptions of the Founders.

In fact, such an approach reveals a basic misunderstanding of the drawing of implications from the Australian Constitution, both historically and theoretically. In reality, all implications into the Australian Constitution have to some extent been based upon extraneous considerations, at least in the sense that those implications cannot be said to have been derived exclusively from the explicit words of the Constitution. Thus, the federal implications expounded in the *Melbourne Corporation Case* cannot honestly be said to emerge merely from a reading of the words of the constitutional text, or from some geometric assessment of the Constitution's `structure'. Instead,

their existence necessarily is predicated upon some understanding of the intentional and historical realities which lie behind those words.

The real difference between `old' implications and `new' implications, and thus between legitimate and illegitimate implications, does not rest upon the extent of their textual or structural derivation, except incidentally and indirectly. Rather, as has been seen, the true point of delineation between valid and invalid implications is the extent to which any purported implication is based upon the intentions of those who formulated the Australian Constitution. Necessarily, therefore, this is the standard around which any attempt to repel the bogus implications now in favour must be centred. Fundamentally, Justice McHugh should be looking not for words or structures to justify implications, but for intent.

Moreover, given what was said previously in relation to the enormously broad potential for the deduction of structural implications from the Australian Constitution, it should clearly be recognised that any attempt to restrain High Court progressivism by insisting that implications be `structural' is doomed to failure. As was seen, almost any principle may be discovered in the structure of the unfortunate Australian Constitution, provided that the judge looking for it is determined enough to discern its existence. The result is that seeking to restrain the use of implications by insisting that they be structural is like attempting to reduce the use of water by saying that people should drink only when they are thirsty.

A new Framework for constitutional Implications

The question which therefore must be squarely faced, in light of the illegitimate character of the freedom of political communication, and the implication upon which it purportedly is based, concerns the correct approach to the drawing of implications under the Australian Constitution. Consistently with what has been argued throughout this paper, a principled approach to implications under the Australian Constitution would require the High Court to adopt a number of positions.

The first, and perhaps the most important, would be comprehensively to articulate the basis upon which implications are to be drawn from the Constitution. Clearly, and in line with what has been said above concerning constitutional and general interpretative principles, this would lead to the basic proposition that constitutional implications flow from constitutional intent. This intent might be manifested in a variety of ways: for example, where an implication arises inexorably from the text itself, that text would comprise virtually irrefutable evidence of the relevant intention. Non-textual implications, however, obviously would be based upon extra-textual historical sources, particularly such sources as the Convention Debates and the draft Constitution Bills.

Secondly, before an implication would be regarded as having been established, it would have to be `necessary'. `Necessary' in this context does not mean merely plausible, let alone not absolutely outrageous. What it means is that strong evidence would be required to exist supporting any claim that the Framers of the Australian Constitution intended a particular constitutional result. Once again, textual support for a mooted implication would be highly relevant, but in its absence, what would be required would be clear supporting evidence from available contemporary materials. In the event that such evidence was not available, the case for the suggested implication simply would not be made out.

Thirdly, an implication would need to be not merely necessary, but comprehensively necessary. By this is meant that not only would there be required for any implication strong evidence of intent supporting the general proposition upon which the particular implication was grounded (for example, representative democracy or federalism), but also a comprehensive demonstration

of intent supporting the drawing of the secondary or proximate implication being proposed (for example, non-discrimination against the States, or a judicially enforceable right of freedom of political communication). In the specific context of the drawing of a secondary or proximate implication, intention ordinarily would be shown either by reference to specific supporting material, or by demonstrating that once the primary implication were accepted, the secondary implication was logically inevitable. Again, by `inevitable' here is meant unavoidable, not merely possible.

Finally, the Court should expressly disavow for itself any role in the conscious up-dating of the Constitution. There is only one authority entitled to pursue a program of progressivism under the Australian Constitution, and that is the entity created under s.128.

7. The Future of Constitutional Literalism in Australia

What has come before in this paper has sought to illustrate the actual position of literalism in Australian constitutional interpretation: that is, that literalism has been a dominant methodology with a profoundly unsatisfactory theoretical basis, which is now under threat from an alternative methodology which is equally devoid of theoretical justification.

The question to be asked, therefore, is whether literalism has any legitimate future in the interpretation of the Australian Constitution. To this question, the answer must be a hesitant `yes', but on the strictly limited basis set out below.

The first step here must be to ask precisely what the High Court is doing when it interprets the Constitution. Only through posing this fundamental question, concerning the precise nature of the task facing the Court, can one assess the legitimacy or otherwise of any particular method of constitutional interpretation. Indeed, as has been noted elsewhere in this paper, it has been precisely the failure of judges to face this most basic of questions that has lain at the heart of the deficiencies of the High Court's entire approach to constitutional construction.

The issue, then, is to isolate and expose the inarticulate premise of constitutional interpretation in Australia: what does the High Court do when it "interprets the Constitution?" This is the theoretical bedrock that the Court itself has been loth to expose throughout its history. It is precisely because of this convenient reticence that the Court has been able for so long to persevere with such threadbare interpretative methodologies as literalism, and now, implied rights theory.

In my view, as was made clear in relation to constitutional implications, the fundamental starting point for the Court in interpreting the Constitution must be an acknowledgment that it is indeed seeking to elucidate the intention behind that document. This intentional approach is consistent with the underlying premise of the interpretation of all documents, including such legal documents as Acts of Parliament; with the essentially democratic character of the Australian Constitution, as embodying the intentions of the Founding Fathers, which were themselves ratified at popular referenda; and with the underlying rationale of both literalism and of true constitutional implications, properly understood.

The real question, therefore, is how the Court should set about finding the relevant intent. More particularly, the question of intent will most commonly resolve itself in practice into an issue of what evidence may be relied upon by the Court for the purpose of discerning this or that intent. It is in this context that "literalism" has some legitimate role to play.

This is because the lonely truth of Australian constitutional literalism has always been that the plain words will, not infrequently, prove a good guide to the intentions of those who wrote them. After all, within a variety of limitations that have already been considered, people use words precisely because they do believe that they accurately express their intention.

Thus, at least where the words of the Constitution are utterly clear and unambiguous, there can be no objection to their being given effect according to their ordinary tenor. Moreover, it can hardly be denied, as a matter of simple definition, that the starting point for the High Court in the interpretation of the Constitution should always be the written text of that document. Thus far, no serious controversy can arise over the legitimacy of a literal approach to the Constitution.

Consistently with what has been said previously, however, a difficulty immediately arises where the constitutional language in question is anything other than transparently clear, which arguably is the natural condition of such language. Consequently, even the blushing literalism outlined here must be subject to a series of qualifications.

The first operates even before any finding of ambiguity. Words must always be understood in context, and the critical context in case of the Constitution is the historical context. Words which may appear entirely clear on their face, may in fact bear a completely different meaning once they are understood within their historical setting. In these circumstances, the only sure way to ascertain the actual intention of the Founders will not be through a slavish recourse to the words, but by the consideration of those words in their full contemporary setting. Thus, to coin a paradox, it may be necessary to clarify clear constitutional words by the introduction of the haze of history.

Secondly, it has to be conceded that constitutional language is typically a good deal less than unambiguous in character. Large portions of the Constitution are susceptible of more than one meaning even in a textual sense, or at the very least, of more than one shade of meaning. Again, it will be necessary in these circumstances to sieve the bare language through the mesh of contemporary evidence in order to arrive at a true understanding of the intention that lies behind that language. To do anything less is to adopt a constitutional method which, in essence, randomly privileges the subjective semantic preferences of individual Justices at the expense of the legitimate constitutional intent. Naturally, the range of evidence that will need to be induced in circumstances of constitutional ambiguity may include the Convention Debates, draft constitutional bills and - potentially - a wide range of popular literature.

Thirdly, even the import of clear words must give way before genuine implications. It has been accepted in Australia at least since the *Melbourne Corporation Case* that constitutional language is no different from any other in giving way to - or perhaps absorbing - implications strongly founded upon intentions lying behind that language.

The best example of this in an Australian constitutional context undoubtedly lies in the implications drawn from federalism, and at least conceptually, the separation of powers cases. Consequently, even the qualified place conceded to literalism in this paper must be further adumbrated by the operation of any true implications to be drawn from the Constitution. Of course, it does not follow from this that literalism, within its properly conceded ambit, is in any way subject to the bogus implications involved in the implied rights cases.

The final point to be made here is that, to the extent that literalism does enjoy any legitimate place within Australian constitutional interpretation, it must enjoy that place in respect of the interpretation of all aspects of the Constitution equally. Thus, it simply is not possible for the High Court to apply a literal approach to constitutional interpretation in the context of federalism, while resorting to sweeping "implications" in the case of human rights. If literalism is a legitimate element of constitutional interpretation, then it must operate impartially across the entire Constitution.

Conclusion

The essence of this paper has been that literalism, as expounded by the Australian High Court, has always been an intellectual fraud.

It has been a fraud in the sense that it is in reality based upon political considerations, but has always asserted its independence of precisely such matters.

It has likewise been a fraud in the sense that it has sought to provide a methodology for the interpretation of the Constitution, without being able to offer a principled basis for that methodology. Now, literalism has been substantially replaced by implied rights theory, which is just as political in its genesis, and equally devoid of intellectual justification.

Literalism has its place within Australian constitutional interpretation, but that is a relatively humble place, as a servant of the search for constitutional intent, rather than as a substitute for that search.

Chapter Six

Federalism and the Role of the Senate

Harry Evans

The Theory of the Senate

The Senate was regarded by the framers of the Australian Constitution both as essential to the federal system and as the essentially federalist feature of the Constitution. It was an institution which defined the system of government as a federal system, and without it the system would not merit that description.

> "There are two essentials - equal representation in the Senate and for that body practically co-ordinate power with the House of Representatives. All those who recognise what are the essentials to a true union will admit these essentials." [1]

> ".... I venture to think that no one will dispute the fact that in a federation, properly so called, the federal Senate must be a powerful house .... We are to have two houses of Parliament each chosen by the same electors .... " [2]

The theory underlying the bicameral structure of the federal Parliament was that having two Houses, one representing the people voting as a whole, and one representing equally the people voting in their respective States, would require a double majority for the passage of laws. This arrangement applies to the passage of ordinary laws a similar formula as is applied to the passage of constitutional alterations in s.128 of the Constitution. A constitutional alteration requires a majority of the people as a whole, and majorities in a majority of States. An ordinary law requires a majority of the representatives of the people as a whole, and a majority of the representatives of the people of a majority of States. It is impossible for a majority to be formed from the representatives of only a minority of States.

This theory was explicitly stated by the Founders as the basis of the structure of the legislature:

> ".... it is accepted as a fundamental rule of the Federation that the law shall not be altered without the consent of the majority of the people, and also of a majority of the States, both speaking by their representatives..." [3]

> ".... the great principle which is an essential, I think, to Federation - that the two Houses should represent the people truly, and should have coordinate powers. They should represent the people in two groups. One should represent the people grouped as a whole, and the other should represent them as grouped in the States. Of course majorities must rule, for there would be no possible good government without majorities ruling, but I do not think the majority in South Australia should be governed by the majority in Victoria, or in New South Wales. .... If we wish to defend and perpetuate the doctrine of the rule of majorities, we must guard against the possibility of this occurring." [4]

The "fundamental rule" and "great principle" have not been substantively affected by the representation of the Territories in the Senate, which has only slightly complicated the mathematics. It is still impossible to form a majority from a minority of States.

This theory and this legislative structure were, of course, not inventions of the Australian Founders, but were adopted from the work of their American predecessors, which had emerged as a result of the great compromise at the Philadelphia Convention in 1787. That Convention had also invented the federal system as we now know it, its distinguishing feature being two levels of government, each directly representing the people, and each legislating with direct effect on the people in its own sphere of competence. It is understandable, therefore, that the Australian Founders should have regarded the federal system and equal representation of the States in the Senate as virtually synonymous.

The concept of federalism is associated with a geographical division of power, and this is the basis of American and Australian federalism. There are other possible bases for a federal system in the generic sense. For example, a federal arrangement could be based on different ethnic groups within a society. In such a system, the aim would still be to ensure that laws were not enacted without a double majority, but the second majority would be a majority of the ethnic groups rather than a majority of the geographical States.

This theoretical construction of federalism is important, because it illustrates the aim of a federal system: to ensure the formation of a distributed majority, that is, a majority distributed across the groups forming the units of the federation and not confined to a minority of those groups. It is not the aim of the system to have the constituent groups of the federation voting as blocs. In the case of a federation based on ethnic groups, that would clearly defeat the whole purpose of the federation, as the groups might as well form their own separate nation-states (but this is difficult where the ethnic groups are geographically mixed - the problem with which we have become so familiar since the collapse of the Soviet Union and Yugoslavia). On the contrary, it is desirable that any majority consist of a mix of the constituent groups, and the federal structure helps to ensure that there is a mix, and that the majority is distributed. [5]

In Australia the federation is on a geographical basis, and the aim of the federal structure is to ensure that a majority is geographically distributed, that it is not formed from the representatives of only a minority of States. It is not a violation of the federal principle that majorities are formed across State boundaries, and that each State does not vote as a bloc. Such a situation is no more desirable than ethnic groups voting as blocs in the other kind of federation.

This constitutional theory was well understood by the framers of the Constitution, but it is not well understood now. It provides an example of the way in which political thought applied to political practice has declined in the last century.

There is now an orthodox and facile treatment of federalism and the Senate, which is as follows. Because the constitutional framers used the expression "States' House" as a shorthand term to encapsulate the constitutional theory here expounded, it is assumed that they must have intended that all issues would be decided in the Senate on the basis of interests identifiable with particular States, and that Senators from each State would vote as a bloc. Because this has not happened, it is said that the constitutional theory of the Founders was obviously defective, and the federal system, and the Senate in particular, have not worked.

This pseudo-analysis is an insult to the intelligence of the Founders, while revealing a great deal about the intelligence of those who present it. It has no basis in history, much less political theory. The principle of the double majority and the distributed majority does not rest on any such unrealistic assumptions.

A proper appreciation of the constitutional theory of the framers also indicates that the powers of the Senate are of greater importance than is often currently supposed. For the double majority to work, a law must not be passed without the support of the required second majority, which

means that the Senate must have equal powers with the House of Representatives in disposing of proposed laws. This demonstrates as fatuous any comparisons with the House of Lords and proposals to limit the Senate's legislative powers, particularly by removing its power over "supply", whatever that term is taken to mean by those who use it so readily.

An understanding of the underlying principle of the federal structure also gives greater significance to the double dissolution provisions in s.57 of the Constitution. These provisions were innovative for their time; when they were drafted, no other comparable Constitution had provisions for resolving deadlocks between the Houses in a bicameral system. They are more than a mechanism for resolving deadlocks, however. They are a concession of federalism to democracy.

Provided that the whole process set out in s.57 is followed, the double majority for the passage of laws may be dispensed with, only for the legislation causing the deadlock, and laws may be passed in accordance with the wishes of the majority of the representatives of the people as a whole, if that majority is not too narrow. In cases of significant disagreement, democratic representation prevails over the geographically distributed representation of the people. It must be remembered that laws have been passed in this way only once, in 1974, when there occurred the only double dissolution followed by a joint sitting of the Houses.

It is a commonplace observation that the Founders sought to combine federalism with the British system of cabinet government, or so-called responsible government, whereby the composition of the lower House determines the composition of the Executive, and the Executive must resign or go to an election if it loses the support of a majority of the lower House.

The proponents of pure federalism at the constitutional Conventions saw cabinet government as a significant departure from the federal system, but were out-voted in their attempts to jettison it. It is not such a great departure in theory, however. In the American system, the Executive is elected by a body representing the people as a whole, as the electoral college gives the States representation in proportion to their population, with an additional geographical weighting.

The practical significance of cabinet government for Australia is that it has developed into a system whereby the Executive government controls one House of the legislature, and seeks to control the other by caucus discipline over its members. The interaction between the two Houses has thereby become an interaction between the Executive government and the non-government majority in the Senate.

The Senate in practice

Contrary to the orthodox non-analysis, the Senate has worked in practice in Australia in accordance with the theory on which it was founded. A double majority and a geographically distributed majority have been required for the passage of all laws. Except in the circumstance of laws passed at a joint sitting of the Houses after a double dissolution, laws have been passed only with the consent of a majority of the States speaking through their representatives. It has not been possible to form legislative majorities from a minority of States.

To put it more simply, governments have not been able to rely for long solely on the support of Sydney and Melbourne while ignoring the rest of the country. This has avoided extreme alienation of the outlying parts of the country, in accordance with the main aim of federalism. The fact that the people of the States have voted for the same political parties has not removed this federalist underpinning of the Constitution, although, as has been indicated, the rigidity of the party system has weakened its effect.

When the party system produced unbalanced party majorities in the Senate, proportional representation was adopted for Senate elections. It is well known that proportional representation

results in the party complexion of the Senate reflecting, more closely than that of the House of Representatives, the voting pattern of the electors. In spite of the great disparity in the sizes of the populations of the States, proportional representation awards seats in the Senate very nearly in proportion to shares of votes nationally. [6]

While thereby producing what might be called an ideological distribution of the legislative majority, proportional representation, paradoxically, has also bolstered the Senate's function of requiring a geographically distributed majority. Because the party numbers are always so close in the Senate, the parties are further discouraged from ignoring the less populous States. Because every Senate seat is vital, every State is also vital.

The way in which federalism has worked in practice in Australia has been obscured not only by the orthodox treatment of the matter and the party system, but also by its nature as a safeguard. Safeguards often work without appearing to do so. An old lawyer and member of Parliament from Alberta observed that he had practised law for 40 years without ever having applied for a writ of *habeas corpus* , but it would be rash to assume from this that the writ of *habeas corpus* is obsolete and should be abolished: it prevents arbitrary imprisonment because it is there. In the same way, federalism has prevented by its existence government solely by Sydney and Melbourne.

The reference to Canada is apposite, because the example of Canada demonstrates, by the effects of the absence of a federal structure, the effects of having such a structure in Australia.

Canada has several problems, some of which, such as the problem of Quebec nationalism, do not provide comparisons with Australia. One of those problems in recent times, however, has been the extreme alienation of the outlying Provinces, particularly the western Provinces, caused by the domination of government by the centres of population. So fed up did the western Provinces become with the domination of the federal government by Toronto and Montreal (cf. Sydney and Melbourne), that they spawned a new political party, the Reform Party, which was able virtually to wipe out one of the established major parties in a general election.

While this may be seen as a fresh breeze blowing, such a geographical division bodes ill for the unity of the country. Such serious alienation has not occurred in Australia, and a primary reason for this is that the federal structure of the legislature, unlike the non-federal structure of the legislature in Canada, has altered the representational system by forcing majorities to be geographically distributed.

It is significant that one of the demands of reformers in Canada is for a Senate like Australia's, representing the Provinces equally, and with real legislative powers. They refer to it as a "triple-E Senate", elected, equal and effective. [7] A disgruntled would-be politician from the western Provinces told me that he favoured those Provinces seceding from Canada and joining the United States. When asked why they would do such a thing, his first response was that they would each have two Senators in Washington, and therefore would not be ignored as they were ignored by Ottawa.

Political parties have helped to disguise the working of the federal system, but parties as such are not incompatible with that system. The Founders were not so naive as to imagine that the electors of the States would not vote for parties. The problem is the rigidity of the party system and the factionalisation of parties. The Founders did not envisage a situation whereby the leaders of the group which controls 51 per cent of the faction which controls 51 per cent of the parliamentary party which receives 40-odd per cent of the electorate's votes have absolute power to control the country.

The significant point is that this party system not only weakens the federal structure, but also tends to break down parliamentary and representative government as such. Its effect on the House of Representatives, and on so-called responsible government, has been more devastating that its effect on federalism and the Senate. It has resulted in Prime Ministers who behave like emperors, even bullying Speakers of the House of Representatives in public in sittings of the House, without people being aware that representative and parliamentary government as such has been repudiated.

The Senate, of course, performs parliamentary functions apart from its function of ensuring that legislative majorities are geographically distributed. It scrutinises proposed legislation and the activities of government, and inquires into matters of public concern. As governments make it their business to suppress these activities in lower Houses, it can be said without much exaggeration that only the Senate performs these functions. It does not perform them as well as they could and should be performed, but there is always the hope of gradual improvement. It is the purpose of true parliamentary reform to foster that improvement. Much of what is called "reform", however, is designed to complete the stranglehold of the Executive government over Parliament.

The future

In recent times there has been a good deal of discussion about reforming the federal system, mainly generated by dissatisfaction with over-centralisation and by the need to devolve more real responsibility to the States. As part of that discussion, "reform" of the Senate is occasionally mentioned. It is perceived that, if the federal system needs reforming, so does one of its distinguishing features, the Senate.

Unfortunately, proposals for such "reform" usually rest on the historical and theoretical misconception which has been mentioned: it is thought that the Senate was intended to represent State governments,and Senators were to vote in State blocs on the instructions of their State governments, and the system should be changed to make this occur. Therefore there arise proposals to change to a German-style upper House, in which the members are the delegates of the State governments. [8]

Such proposals dispense with the principle of Senators representing the *people* of the States as distinct from the governments of the States. They also ignore the fact that State governments are controlled by particular political parties, and the voting of their delegates on national questions would reflect the party lines of those governments rather than their interpretation of the interests of their States. Such delegates might vote in State blocs, but they would also vote in party blocs, and we would be no nearer to achieving the unhistorical will-o'-the-wisp of a "States' House" as that term is misunderstood.

Proposals for an appointed Senate are also part of the fear of democracy which appears to be occurring in recent times. Wherever we look, there is a distrust of the electorate. The orthodox republicans do not want the electors to have anything to do with selecting a replacement Head of State. So-called "People's Conventions" are to have members appointed by governments, in stark contrast to the fully-elected Convention (except for one State) of 1897-98. Suggestions for a return to an appointed upper House are of the same ilk.

Such proposals demonstrate that the current political élite are far less democratic than their predecessors of the l890s. It is sufficient to point out that the choice by the Founders of an elected Senate representing the people of the States was an advance in constitutional construction, anticipating the 17th amendment of the United States Constitution, and part of a

trend to greater democracy in all aspects of government. To reverse that choice would be a backward step.

In any event, as the foregoing has suggested, the real need for reform is not so much in the institutions of government as in the political parties. They have become narrowly based, factionalised, undemocratic oligarchies, apt to be controlled by too few people, closed to public view, but open to manipulation and outright corruption. Reforming them would make the institutions of government work better without changing those institutions, but without reforming them the institutions cannot work very much better than they do at present.

Endnotes :

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1. Mr John Gordon, Australasian Federal Convention, 30 March, 1897, p.326.

2. Sir Richard Baker, Australasian Federal Convention, 17 September, 1897, pp.784, 789.

3. Sir Samuel Griffith, quoted by Sir Richard Baker, Australasian Federal Convention, 23 March, 1897, p.28.

4. Dr John Cockburn, Australasian Federal Convention, 30 March, 1897, p.340.

5. Cf. the analysis in David Elazar, *Exploring Federalism* , 1987, pp.18Ä20.

6. See the figures in *Odgers' Australian Senate Practice* , 7th ed., electronic update to 30 September, 1996, Chapter 1, Table 1.

7. See R. White, *The Voice of Region: the long Journey to Senate Reform in Canada*, 1990; "Western separatism reviving", *Globe and Mail*, 29 July, 1994; *Preston Manning, Alexis de Tocqueville and Newt Gingrich: Assessing Reform's Blueprint for a new Canada* , Howard Cody, Middle Atlantic and New England Conference for Canadian Studies, Pennsylvania State University, 5 October, 1996.

8. State Premiers periodically float this proposal: "Labor Premiers push for inquiry on Senate's role", *The Australian*, 11 July, 1995. In the German Bundesrat, so admired by Messrs Carr and Goss, the members, who are members of State governments, change not only with changes of government but also with ministerial reshuffles.

Chapter Seven

One Vote, One Value : Electoral Fraud in Australia

Dr Amy McGrath

The phrase, `one vote, one value' was not a common catch-cry in Australia until this Century, being more appropriate once adult suffrage became universal. Its predecessor, `one man, one vote', implied a demand for adult suffrage to be universal; and, as such, was advanced by the London - born South Australian delegate, Dr Cockburn, at the 1891 Australasian Convention as an imperative for constitutional referenda and the federal franchise. His hope was realised in the Commonwealth Constitution by 1900.

Since 1900, the phrase `one vote, one value' has been given three common interpretations. The first was that the numbers of electors within electorates should be as nearly as possible equal, and thus deliver the nearest possible equality of voting. The second (in effect, a particular variant of the first) was that there should be no rural `zoned' electorates with a much smaller number of electors compared to urban areas, called `weighted' electorates by critics who considered them unfair. The third is that the Senate should not be weighted towards smaller States.

The desire to achieve `one vote, one value' was not exclusive to one side of politics. Perceived fair redistributions have been pursued by both sides. `Zoned' electorates have been created by both sides.

The phrase `one vote, one value' has never been given a fourth interpretation, which is worth consideration; namely, that if electoral fraud exists to the degree often either proved, or claimed, throughout this Century, then the value of votes cast is depreciated to the degree to which it occurs. If this is conceded, then the role of Courts of Disputed Returns, their viability and limitations in considering disputed elections and returns, and in exposing fraud and manipulation, become of considerable importance.

Parliaments as Courts of Disputed Returns

Our electoral history astonishes us today, in that legal courts were not the preferred means of deciding disputes in parliamentary elections for at least half the constitutional life of our major States; the last of the alternative forums for resolution of such disputes only disappearing in 1961. Provision for parliamentary resolution of electoral disputes was written into the Colonies' original Constitutions, following then current practice in the Mother Parliament. In each, a non-party Committee of Parliament, an Elections and Qualifications Committee, nominated by the Speaker of the House with each new Parliament, sat on all such matters, acting in commonsense and good conscience without legal technicalities to deliver `real justice'.

These Committees, surprisingly, seem to have done so, judging by the many testimonies from eminent politicians scattered through Hansard, opposing occasional moves to remit this `right and privilege' to sole judges of legal courts, as the British House of Commons had done in 1868, and then two judges in concert in 1879. They argued that courts might be too narrow, too costly, too orthodox as to onus of proof, too lacking in the experience of the subtleties and perplexities of political life, and too partisan from the close associations inevitable in colonial life.

Sir Samuel Griffith on Judges as Courts of Disputed Returns

When Sir Samuel Griffith rose in the Queensland Parliament as Premier on July 20, 1886, to introduce a Bill to transform its existing Elections and Qualifications Committee into what he

now called an Election Tribunal, he was firmly opposed to legal courts acting as Courts of Disputed Returns, instead of Parliament.

> "One reason why I have argued against the appointment of a judge to try disputed elections is that judges naturally determine a case according to the strict rules of law; technical rules which would be extremely inconvenient, or might be extremely inconvenient, in regard to matters of this kind, where to get strict legal proof may involve enormous expense. At the present time, the rule is that the Elections and Qualifications Committee `shall be guided by the real justice and good conscience of the case without regard to legal forms and solemnities, and shall direct itself by the best evidence it can procure, or which is laid before it, whether the same is such evidence as the law would require, or admit in other cases, or not.'" [1]

What was meant by best evidence? First, Sir Samuel Griffith considered, as in the law of Scotland, that it would be a `proper thing to receive hearsay evidence as to the matter in dispute so long as it did not affect the character or rights of any man'; this to be left to the discretion of the tribunal assisted by the judge, `the limited wisdom of one judge alone being no substitute for the rough justice and common sense of political experience.' [2]

Secondly, Griffith believed that an election judge should have the right to report to the Speaker `as to any matters arising in the course of the trial of which, in his judgement, an account ought to be submitted to the Assembly', including any corrupt practice which has, or has not been, proved to have been committed by, or with `the knowledge and consent of any candidate', or where `corrupt practices have, or where there is reason to believe that corrupt practices have, extensively prevailed at the election to which the petition relates.' [3]

Griffith devised his world-first model Election Tribunal not only, in his words, `to meet attacks so frequently made' upon the existing Committee, there having been two elections voided over `ballot-stuffings', but also because he thought it could be improved. His explanation was not merely that its members would be from a larger panel of twelve nominees, advanced by the Speaker, than before, but that it would be:

> ".... a Committee of this House, chosen impartially, constituted as a jury and presided over by a judge. It is not exactly a judge or a jury, but it is a Committee of the House presided over by a Judge. It is, in fact, an attempt to combine the systems of a Parliamentary Committee, and of a judge and jury, the judge deciding questions of law and the jury deciding questions of fact."

It would conduct public hearings during parliamentary sessions only.

Sir Henry Parkes on Judges as Courts of Disputed Returns

Unlike Griffith, Sir Henry Parkes, as Premier of New South Wales, had not responded to criticism in 1880 with any reform, when a Bill to refer all disputes hitherto determined at the Bar of the Parliament to legal courts in the future was before the House. He was adamant that there was no evidence the Committee had `inflicted an injustice on any man.' [4] Furthermore:

> "I think it is clear beyond doubt, that if we send election petitions to the Supreme Court a much longer time will be consumed, and a much larger expense imposed on disputants than that to which they are at present subjected; and, if that be the case, it seems to me that the person who can spend the most money, and resort to the forms of law in the most ingenious way by the assistance of eminent barristers, will have the best chance of winning the seat." [5]

Election and Qualification Committees in Federation Debates

The continued existence of Election and Qualification Committees in all State Parliaments but Tasmania was reflected in decisions taken in the 1891 and 1897-98 Australasian Conventions on federation.

In the first Convention, both Sir Samuel Griffith and Sir Henry Parkes played dominant roles, the former as Vice-President; but by the time the second Convention met, Griffith was ineligible, as Chief Justice of Queensland, and Parkes was dead.

In the second Convention, Edmund Barton, one-time Speaker of the NSW Assembly, became a dominating figure,although one of the few delegates who had been neither Premier, nor Minister, in his own Parliament. This was not simply due to the fact that Sir Henry Parkes had insisted that leadership of the federal movement must devolve on Barton, nor even Barton's `proverbial patience' when Speaker of `no calm and decorous house' in New South Wales, but also because of `the breadth and power of his intellect and excellent memory'. [6]

In the first Convention, no case for vacating the powers of these Committees to Courts was argued; in the second, it was not only argued, but a potential or specific vacation of such powers to a future High Court was advanced in two conflicting clauses of the 1897 draft Constitution, Clauses 43 and 50. This was by means of a provisional option for the declared *status quo* in Clause 43, `until the Commonwealth otherwise provides'. But an immediate vacation of powers was projected in Clause 50, in what Barton called, `on the face of it, a very proper provision'.

> "Until the Parliament otherwise provides, all questions of disputed elections arising in the Senate or the House of Representatives shall be determined by a federal court, or a court exercising federal jurisdiction." [7]

According to Barton's fellow delegate from New South Wales, Mr Wise, a deliberate distinction, made between disputed elections and qualifications and vacancies, was seen as one between issues where the rights of the electors were in any way infringed, or any conflict arose as to the claims of any members to represent a particular constituency, and one where the rights and privileges of members were affected.

Barton was backed by the delegates from Tasmania, which had never had such a Committee, but not all from those States which had. However, the Tasmanian delegates were forced to concede that, if Clause 50 were adopted, there would be no body in the first Parliament which could decide any question of a disputed election pending the appointment of a High Court. The clause went back to the Constitution Committee, and emerged, after `very considerable discussion' as a reshaped Clause 43, to become Clause 47 of the Constitution, allowing the future Parliament to decide. [8]

> "Until the Parliament otherwise provides, any question respecting the qualifications of a Senator or a Member of the House of Representatives, or respecting a vacancy in either House of Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises."

Sir George Reid objected that the intent of the original Clause 50 should have prevailed, as Election and Qualification Committees had been discredited in the US Congress and Senate by scandals and outrages; protesting perhaps because hostilities between himself and Barton at that time had degenerated to the level where Barton was standing against Reid in his own seat. To what degree such clashes of personalities affected the Constitution can never be known, including intense dislike between Isaacs on the one hand and Barton and Griffith on the other. But one thing seems clear: Barton's decided preference was for the forthcoming High Court to be sole arbiter of disputed returns.

The `Parliament of Kings' passes the *Commonwealth Electoral Act* 1902

Sir Edmund Barton's presence on the drafting Committee of the first *Commonwealth Electoral Act* , and the fact that he was Prime Minister when it was introduced in the House of Representatives in July, 1902, was undoubtedly reflected in the fact that its Clause 197 read as follows:

> "The validity of any election or return may be disputed by petition, addressed to the Court of Disputed Returns and not otherwise." [9]

The presumption, that there was an implicit definition of the Court of Disputed Returns as being the High Court, was made by Mr Mahon (WA), supported by Mr Solomon (SA) when he moved an amendment to interpret the definition of such a court in favour of an Elections and Qualifications Committee:

> "That the words `court of disputed returns' be omitted, with a view to insert in lieu thereof the words `Clerk of the House affected by such returns'."
>
> Mr Solomon argued that:
>
> "I doubt whether the cause of substantial justice, or the interests of the ordinary candidate who is returned to Parliament, would be served by referring disputes to the High Court instead of to the court of Parliament. I have a very lively recollection of the heavy costs which litigants have been compelled to pay in order to secure justice in the law courts. The law's delays and the law's expense are bywords, and anybody who has once resorted to law will never do so again.
>
> "The fairest tribunal to decide whether an honourable member has been properly elected is one consisting of his fellow-members in the House to which he has been returned. Justice will be more readily and less expensively obtained from such a court than from one composed of men who will view everything from a narrow legal standpoint." [10]

W M Hughes (West Sydney), rising Labor leader, agreed with Mr Solomon:

> "I remember not one case in the NSW Parliament in which an injustice was done, though I remember many petitions of the kind. In one case a colleague of the Minister for Home Affairs, a man brimming over with bias and prejudice, was a member of an Elections and Qualifications Committee, and yet, in spite of all the vehement declamations of that gentleman outside the Chamber as to what he would do to this unfortunate candidate, it was by his casting vote that justice was done to that particular candidate in opposition to the interests of his own party.
>
> "Let a man be as partisan as he may be on the floor of the Chamber, when he is clothed with responsibility as a member of a Parliamentary committee he will put aside bias, and will do his very best to secure justice." [11]

Mr Thomson (North Sydney) agreed with Hughes, saying that he had favoured the remission of such disputes to a non-parliamentary tribunal, until he visited England after a general election there and learned the scandalous cost of such appeals. But the Irish barrister H. Higgins (North Melbourne) did not, saying that House of Commons experience proved it was "an unbearable position to have such disputes settled by a Committee of Parliament." [12]

Sir John Quick (Victoria), legal veteran of all the constitutional Conventions, saw no rationale in slavish emulation of the House of Commons:

> "I do not think the time has arrived in the history of the Commonwealth when the Federal Parliament should surrender the power vested in it by the Constitution to deal with questions of this kind. It may be that, during the very worst periods of English history, the power vested in the House of Commons, mentioned by the member for North Melbourne, was grossly abused and led to the legislation referred to. But what has the Parliament of the Commonwealth done to forfeit its right, and the confidence reposed in it by the Constitution, that it should be deprived of that power? No cause for complaint has arisen in connection with the first few cases dealt with by this Parliament.
>
> "The Court will be called upon to deal mainly with questions of fact. As a matter of practice, very few questions of law arise, and the proposed tribunal is not to decide according to the law, but according to the substantial merits of the case and good conscience.
>
> "A Parliament constituted as this is, of men representing different communities and different interests, presents a panel for a jury the like of which cannot be excelled in any part of the world." [13]

Mr Isaacs (Indi) was of the same mind:

> "The time has not arrived, and the circumstances have not arisen, when we have a right to declare our incapacity, from any cause whatever, to discharge the high function of maintaining the purity of this House." [14]

Thus battle lines were quickly drawn, with Labor men such as King O'Malley and Billy Hughes less disposed to the resolution of election disputes by a future High Court than conservatives, owing to their traditional distrust of courts and lawyers; and, in O'Malley's case, his knowledge of two cases of the kind in Tasmania, which had ruined the applicants.

The upshot was that those in favour of the High Court were victorious in the House of Representatives, where Barton presided as Prime Minister, but not in the Senate, where an Elections and Qualifications Committee, appointed immediately the first Parliament sat, served as a Court of Disputed Returns comparable to those then still current in most State Parliaments.

Challenge to the Electoral Bill in the second Commonwealth Parliament

Both in the second and third Parliaments, the Member for Riverina, Mr Chanter, sought to restore an Elections and Qualifications Committee to the machinery of the House, owing to his experience of the High Court in *Chanter v. Blackwood* . [15] In introducing his first *Electoral (Disputed Returns) Bill* to the House in 1905, he claimed as justification that members on both sides of the House had confessed they had been beguiled in 1902 into believing the High Court would observe the intent of s.199 of the Act, namely that it should sit as a court of equity rather than a court of law, and that it would not be slow, costly or legalistic in its conduct of such cases, as it had been in his case. [16] He had found the High Court Justices to have been unable to divest themselves of their legal training, or disregard the forms of law. Mr Chanter's Bill was destined to founder owing to coincident events, related below, arising out of a Senate vacancy in South Australia.

Mr Chanter's disparagement of the High Court is of particular interest in that Sir Samuel Griffith was now its first Chief Justice, appointed by Barton immediately before his resignation as Prime

Minister on 23 September, 1903 from ill-health, when he himself could have been a candidate for that high office. "That he deliberately chose to sit under a man whom he regarded as a greater lawyer than himself, was considered a rare act of self-abnegation." [17] Thus Barton's swearing-in as a Justice of the original High Court of Australia with Griffith and Richard O'Connor was a great sentimental occasion, Griffith being his great mentor, and O'Connor his intimate friend back to school days.

In Chanter's criticism of Griffith J, he was not being altogether fair. As the latter pointed out in his judgment, the High Court had no jurisdiction to determine the leading issue in Chanter's petition, on whether candidates, guilty of an illegal practice as defined by the Act, could be disqualified from election. The *Electoral Act* had deliberately omitted any such provision, and had given him no jurisdiction as to acts amounting to bribery at common law committed by, or on behalf of, the candidate.

Problems arising in the Senate and High Court over the 1907

Senate Election in South Australia

(i) *Blundell v. Vardon* in the High Court

During 1907, a bizarre Dickensian story unfolded in the High Court, the South Australian Parliament and the Senate over the election of three Senators in South Australia on December 12, 1906. Seven candidates had nominated. At first count, Dugald Crosby won third place by a handful of votes, Joseph Vardon was fourth and Reginald Blundell fifth. But on a recount, the positions of Blundell and Vardon were reversed. Crosby meantime being on his death-bed, Blundell filed a petition in the High Court against Vardon, seeking that either Crosby or himself be declared elected, or the election of Vardon be declared void.

Blundell's petition called for a second full recount, citing 19 issues of irregularity. Not least of these was the existence of discrepancies in the tally in 66 counting centres out of 95 noted during the first recount, and the reported burning of 9,000 votes (later found) out of 70,000 in one Division. Barton J. granted a recount on the following ground:

> "The position of a petitioner applying to the Court of Disputed Returns may be thus described. It is on him to prove the allegations of the petition so far as they are not admitted. As to all things in connection with the ballot except matters of open conduct, it is manifestly difficult, if not impossible, for him to prove a case for a recount, except by a judicial examination of the ballot papers." [18]

The recount ended up with Vardon in the lead by just two votes, Barton J. having followed *Chanter v. Blackwood* on irregularities in the initialling of absentee votes by returning officers. Therefore he found that Vardon's election must be declared `absolutely void' (although he had already been sworn in as a Senator and taken his seat in the Senate), on the grounds that:

> " .... while Mr Vardon's vote was still in a majority, a number of ballot papers, if admissible, would have given Mr Crosby, now dead, a majority but were rendered invalid by the default of a returning officer in not initialling the papers."

This decision consequently left a vacancy to be filled.

(ii) The South Australian Parliament appoints a Senator

The next act in the drama was played out by the Parliament of South Australia. A copy of the High Court decision was sent to the Governor of South Australia On the advice of three South Australian constitutional lawyers, Messrs Murray, Glynn and Dashwood, he sent a message to

both Houses on July 2, 1907, informing them that they must fill the vacancy that had arisen, by a joint sitting of both Houses.
Before the Parliament, then led by a minority Labor government and Premier, could respond to the Governor, Mr. Vardon - on contrary legal advice, that s.15 of the Constitution was only intended to apply to Senators duly elected,and had no relation to a void election - asked the Governor to fill the vacancy by issuing a writ for an election at large. The Governor refused. The two Houses sat in a joint sitting on July 11, 1907, and elected Major J. O'Loghlin to fill the vacancy.

(iii) *The King v. the Governor of South Australia*

On July 12, 1907 Joseph Vardon challenged the election of Major J. O'Loghlin by applying to the High Court for a writ of *mandamus* commanding the Governor of South Australia to cause a writ to be issued for the election of a Senator for the State of South Australia, on the ground that, the election of Senators having been declared `absolutely void' in respect of the return of Mr. Vardon, a new election must be held, and therefore it was his duty to do so.
This action was heard before the Full Bench in August, 1907 which held that:

> " .... a *mandamus* will not lie to the Governor of a State to compel him to do an act in his capacity of Governor; and the question whether, under the circumstances, there was, or was not, a vacancy in the representation of South Australia in the Senate was a question to be decided by the Senate under Sec.47 of the Constitution.
>
> "It seems to be clear that the question whether there is, or is not, now a vacancy in the representation of South Australia in the Senate is one of the questions to be decided by the Senate under Sec.47 unless the Parliament otherwise provides. Parliament can, no doubt, confer authority to decide such a question upon this Court, whether as a Court of Disputed Returns or otherwise. But until the question is regularly raised for decision we reserve our opinion on it." [19]

This judgment threw the ball squarely back to the Senate, with a clear intimation that the Senate might be advised to accord the High Court the power, which it then lacked, to determine it.

(iv) Vardon's Petition to the Senate Elections and

Qualifications Committee

Vardon now petitioned the Senate to declare the `choice' of Major O'Loghlin by the South Australian Houses of Parliament to hold the place of one Senator for the State, null and void. The Senate referred it to its Elections and Qualifications Committee, comprising five conservatives and two liberals. It was unfortunately chaired by the South Australian constitutional lawyer, Sir Josiah Symon, despite a clear conflict of interest. He had initially been elected in 1903 with Labor support; but, not re-endorsed in 1906, he had run instead on a conservative ticket he had and, therefore, campaigned with fellow-candidate Joseph Vardon.
Not surprisingly, that Committee reported, for the Petitioner, that Major O'Loghlin had been improperly elected, and called for a popular election to fill the seat, on the grounds that the essential principle of democracy, embodied in the Constitution, was that the people, and not the South Australian Parliament, should `choose' their third Senator. This provoked one Senator to say that it was strange to hear conservatives advocating populism; and two Labor/Liberal Senators, one South Australian, the other a Queenslander, to resort to an irregular addendum to urge that such difficult questions of law were involved that the matter should be referred to the High Court for decision.

The latter view prevailed. A *Disputed Elections and Qualifications Bill* was introduced into the Senate in November, 1907 to empower the High Court to hear Vardon's petition, and any future petitions. It passed by a mere 19 votes to 17 after a heated debate as to whether the surrender should only occur `by resolution' or be automatic, taunts hurled across the chamber, and caustic criticism by opposing members like King O'Malley, who called it `a panic bill', or like those, including the Chairman of Committees, Senator Pearce, who accused Sir Josiah Symon roundly of misquoting the High Court judgment for his own ends.

(vi) The High Court Decision on the Vardon Petition

The Full Bench of the High Court - Griffith CJ, Isaacs J, Barton J and Higgins J - in December, 1907 reached the same conclusion as the Senate Committee had.

> "The Houses of Parliament had no power to choose a Senator in the events that happened and the choice of the respondent was void. Sec. 108 of the *Commonwealth Electoral Act* 1902 affords the Governor sufficient authority, if any express authority be necessary, for the issue of a supplementary writ. As the election itself was void nothing can be founded upon it, or upon any act of the person who wrongly assumed to act as a Senator."

Therefore, if the Senate had adopted its own Committee's report, instead of bowing to party pressure over a State squabble, it need not have rushed into a qualified surrender of its judicial independence to the High Court without an overwhelming majority, for no greater cause than to secure an interpretation of s.47 of the Constitution. Neither Vardon nor O'Loghlin lost their careers, as both subsequently served lengthy terms in the Senate.

Disappearance of Elections and Qualifications Committees

The Senate Committee disappeared in early November, 1918, a week before the Armistice, repealed in a consolidation of all existing Acts, in a debate dominated by the introduction of preferential voting and postal ballots. Senator O'Loghlin, now a Lieutenant-Colonel, was a lone voice in complaint that it would be an invitation to those engaged in an election to ignore all restrictions, and indulge in illegal practices.

The New South Wales Committee was abolished in 1928 by the conservative Government of Sir Thomas Bavin, Barton's secretary in 1901, in the face of strong criticisms from the Leader of the Opposition, Jack Lang, and other Labor members that it was advanced without reasons given, or complaint against the record of the Committee, to justify abandonment of this ancient privilege of Parliament. Its decisions, they said, had always given satisfaction. The Queensland Election Tribunal followed in 1936. The Victorian Legislative Committee disappeared at some time between 1939 and 1961.

Failure of Courts of Disputed Returns

Today, the only recourse for candidates, parties and electors is to legal courts sitting as Courts of Disputed Returns. Complaints about them are common - that they have become prohibitive in cost, in onus of proof, the nature of proof that can be offered, and the time limit for collecting proof, and therefore prohibitive of opportunity to establish proof of fraud. They must legally exclude interrogation of the electoral roll or ballot papers. They habitually exclude recounts of ballot papers, and witness or hearsay evidence. They are not hospitable arenas for petitioners to advance irregularities in the conduct of elections, despite the fact that the *Electoral Act* allows them a wider discretionary role than common law courts. They have justified early criticisms against them.

(i) Issue of Corrupt Practices

In legislating against corrupt practices, the original British and Australian Acts were targeting those committed by, or with the knowledge and consent of, any candidate. This limitation led Sir

Samuel Griffith to provide in his 1886 *Election Tribunal Act* for an election judge's report to the Speaker, which would `include not only those corrupt practices which had been committed without the knowledge and consent of any candidate, but those which have, or where there is reason to believe have, extensively prevailed at the election to which the petition relates'. [20]
W M Hughes stressed the wisdom of such a liberal view during the debate on clause 191 of the first *Commonwealth Electoral Bill* in July, 1902, as to whether a candidate should be liable for an illegal practice committed directly or indirectly by himself or by any other person on his behalf.

> "Here is an attempt to make every person liable for illegal acts committed with the candidate's knowledge and authority. I ask any honourable member who has experience of mankind, whether, when a person is obtained capable of committing illegal acts, and sufficient money be given him for that purpose, that is the sort of man to say he has proceeded with the knowledge and authority of the candidate? Is it common sense to suppose that a man who will commit such acts will admit them, and thus make it possible to sheet home a charge against him? One would imagine we were legislating for Utopia, whereas we are legislating for flesh and blood candidates. *Bribery is carried on to a greater or lesser extent at every election, in every State in the Commonwealth* .
>
> "If any other person than an agent acts, it will be absurd to make a candidate responsible for that done without his knowledge or authority." [21] (Emphasis added)

He concluded that "authority and knowledge has to be proved, and if a person be the candidate, I do not hesitate to say that proof will be absolutely impossible in 99 cases out of 100." [22]
Certain judges in federal Industrial Courts under the *Industrial Relations Act* have in practice taken a more liberal view in union election challenges than the High Court. Wilcox J., for example, found in *Johnston v. the N.S.W. Branch of the Australian Public Service Association* [23] that circumstances existed that created a "real and distinct possibility the result was affected", and voided the election. However, even those courts remain adversarial and inadequate to investigate or prevent fraud, their decisions often less liberal than his.

(ii) Voiding of Elections only if Fraud affected the Result

In the case of *Chanter v. Blackwood* already cited, Griffith CJ. ruled that the High Court had power to void an election if the number of persons entitled to vote, who have been prevented from voting, is greater than the difference between the number of votes cast for the candidate declared by the District Returning Officer to have been elected, and of votes cast for the candidate declared to have the next highest number.
In 1920, Griffith's decision was invoked by the Commonwealth Chief Electoral Officer, R.C. Oldham, in defence of his returning officers, whose official errors in the 1919 federal election had caused Isaacs J. to void the election for the Bendigo seat (won by one vote). Oldham said that "Chief Justice Griffith had adhered to British precedent". If Mr Justice Isaacs had followed Griffith's *dictum* in *Chanter v. Blackwood* , as Mr Justice Barton did in *Blundell v. Vardon* , he would have declared the Bendigo election void, on conclusive evidence that two or more persons entitled to vote had been improperly prevented from voting at the election by reason of error. [24]
Today, the 1904 ruling of Sir Samuel Griffith has become a fixed principle guiding the High Court. When linked to the clause in the 1918 *Electoral Act* , whereby the onus of proving corrupt practice, when occurring without a candidate's knowledge, is on the applicant, the law has

become a straitjacket. Fraud is now almost impossible to expose, and challenges on grounds of irregularities and manipulation extremely infrequent.

The *dictum* is also the fixed principle guiding the Australian Electoral Commission, to judge by its submission to the Joint Standing Committee on Electoral Matters:

> "Petitions must set out the facts relied on to invalidate the election, and, if alleging illegal practices, must show how these could have affected the election results." [25]

The chosen stance of the Commission is adversarial rather than facilitative, which is a frequent cause of criticism.

(iii) Courts of Disputed Returns closed to Interrogation of Rolls or Papers

Section 198 of the *Commonwealth Electoral Act* 1902 read as follows:

> "The Court shall inquire whether or not the petition is duly signed, and so far as rolls and voting are concerned may inquire into the identity of persons and whether their votes were properly admitted or rejected assuming the roll to be correct, but the Court shall not inquire into the correctness of the Roll."

Such a provision was already entrenched in the Victorian *Constitution Act Amendment Act* of 1890, and was related to the existence of revision courts. It was written into the 1902 *Electoral Act* as Commonwealth revision courts were envisaged. However, when they were dropped, the provision persisted. Senator Vardon's 1909 move to have it revoked as an anomaly failed. [26] It is still in the Act.

(iv) Ballot Recounts

Ballot recounts in the High Court, such as in *Blundell v. Vardon* in 1907, are now virtually unknown, despite the case in favour argued by Barton J. in that judgment that the Court should `open the sources of proof ' to a petitioner. [27]

> "In all things in connection with the ballot except matters of open conduct, it is manifestly difficult, if not impossible, for him to prove a case for a recount, except by a judicial examination of the ballot papers. He is in such circumstances almost, if not entirely confined, to this means of proving that enough valid votes to give him a seat, or to entitle him to have been declared elected, have been cast in his favour.
>
> "The order for a recount is thus the means adopted by the Court to open the sources of proof to him, by enabling him to adduce the only, or almost the only, attainable evidence." [28]

In the foregoing assertion, Barton J. exposed the inherent injustice in requiring a petitioner to prove the allegations made in his petition.

The criticisms of Marshall Cooke QC, after a two year investigation of seven Queensland unions, have relevance. He found that a private individual was at a great disadvantage in trying to investigate ballot fraud:

> "Under the present provisions of the Commonwealth Act, the Federal Court conducts the inquiry as an adversarial proceeding, relying on the opposing parties to produce evidence one way or the other before it. It does not perform any inquisitorial role other than perhaps to examine the ballot papers.... An examination of the many reported cases in the Federal Court on election inquiries demonstrates the inadequacy of the remedy provided by present legislation. A Federal Court inquiry has not proved an effective method either to detect, or deter, ballot irregularities."

(v) Mistakes of Returning Officers

As Mr Palmer (Echuca) said in the 1907 debate , he had originally supported adjudication by the High Court, but after his own case he adopted the contrary view:

> "Why should a man, who has been as careful as possible to observe the law, be called upon, owing to the fault of a government official invalidating an election, to fight for his rights in the law courts and put his hand in his pocket to meet heavy expenses in upholding his claim?" [29]

(vi) Comment

Given the foregoing, how can the Australian Electoral Commission continually insist that little or no fraud exists, when the deterrents to action or proof are so great, and when it, itself, has the power to enable recounts, but rarely exercises it?

One Vote, One Value Today

(i) *Constitutional Alteration (Democratic Elections) Bill*

Until the 1970s, the pursuit of equality of voting power in the Commonwealth remained largely a political, rather than a constitutional objective. This shift occurred when successive Labor Governments persisted with a *Constitution Alteration (Democratic Elections) Bill* five times from 1973 to 1987. This pursuit was endorsed in principle by a majority report of the 1987 Joint Standing Committee on Electoral Matters, and its achievement by Constitutional referendum. [30] However, a dissenting minority report of four - Senators Harradine and Short, Members Shack and Blunt (Deputy Chairman) - condemned it vehemently, saying that it was an unwarranted intrusion on the rights of sovereign States, in an attempt to alter the Constitution to force change in the relationship between the States and Commonwealth as a first step in dissolving the federal system. It ignored the fact that electoral laws of the States were an integral part of their Constitutions:

> "The proposal to incorporate provisions affecting State electoral laws in the Commonwealth Constitution will inevitably result in the High Court becoming involved in disputes over these issues. These disputes are invariably party political in character. This will politicise the Court. Additionally, there are some limits through Section 24 of the Constitution on the right of the Commonwealth to draw electoral boundaries." [31]

An even more disturbing aspect of this proposal was that the Joint Standing Committee on Electoral Matters seriously considered submissions urging the Commonwealth to legislate for equality of voting by invoking its power to enforce treaties to which it was a signatory under s.51 (xxix), the treaty in question being the *International Covenant on Civil and Political Rights* . [32] However, fortunately, a restraining factor appeared to be that the parties responsible for the drafting of that treaty had specifically *not* meant the words `equal suffrage' to mean `one vote, one value', since some potential signatories had indicated at that time that they would not sign the *International Covenant on Civil and Political Rights* if anything relating to an insistence on `one vote, one value' was put in. [33]

(ii) *McGinty and Others v. State of Western Australia*

This case, heard in the High Court, by members of the Legislative Assembly and Legislative Council of Western Australia in September, 1995, objected to disparities between the number of enrolled voters in city and rural districts. They argued that the Constitutions of both the Commonwealth and Western Australia incorporated representative democracy as the central principle of government, and that equality of voting power was mandated by the Commonwealth

Constitution. The defendants submitted that neither required equality of voting power, and were upheld by four of the six judges in a brilliantly argued judgment (Toohey and Gaudron JJ. dissenting).

Dawson J. (Gummow J. concurring) ruled that there can be no implication that a particular electoral system, of the many available, is required by the Constitution, and the Constitution does not contain by implication the principle expressed in the words `one vote, one value'. [34]

(iii) Redistributions

Redistributions have always been a political battleground on several fronts over whether they deliver `one vote, one value', due to margins of variation (20 per cent in 1900); forecasts of population growth; principles adopted (once electoral subdivisions); manipulation by redistributors; and potential for swinging the vote, and results thus incremented or neutralised irrespective of the wishes of the voter.

Democracy is then perceived as resting not on `one vote, one value', but on the decisions of just three people on redistribution panels. Further distortions in the value of results can occur through non-voters (6 per cent or more), fraudulent enrolments (largely undetected for want of means or staff to do so), dead wood on the roll, and other factors making arguments of equality by `one vote, one value' difficult to sustain.

Conclusion

Last century, colonial Parliaments (except for Tasmania) retained their Elections and Qualifications Committees on British lines, rejecting the British shift to judicial courts in 1879 as unnecessary and unsuitable, as did the 1890s Conventions which ensured the principle became entrenched in the Constitution. Certain conservative lawyers caused the early Commonwealth shift to courts, largely opposed by Labor, but the Constitution remained unchanged, so it is arguable that it could, and should, be reversed. It can also be contended that the record of courts in electoral jurisdiction have more than fully justified the forebodings of Sir Samuel Griffith in 1888 that they could not deliver electoral justice.

Endnotes :

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1 . Queensland *Hansard* , 12 August, 1886, p.356.
2 . *Ibid.*
3 . *Ibid* , p.357.
4 . New South Wales *Hansard* , 1880, Vol. III, p.2224.
5 . *Ibid* , p.2221.
6 . *Edmund Barton* , Reynolds, J; pp.21, 43Ä4, 84.
7 . *Hansard* , 1897 Convention Debates, Vol. 2, 13 September, 1897, pp.464Ä5.
8 . *Op.cit.* , p.680.
9 . Commonwealth *Hansard* , 29 July, 1902, p.14664.
10 . *Ibid.*
11 . *Op.cit.* , p.14673.
12 . *Op.cit.* , p.14669.
13 . *Op.cit.* , pp.14673Ä4.
14 . *Op.cit.* , pp.14684Ä5.
15 . No. 1 (1904) 1 CLR 39.
16 . *Hansard*, 30 November Ä 21 December, 1905.
17 . *Edmund Barton, op.cit.* , p.190.
18 . (1907) 4 CLR 1469.

19 . (1907) 4 CLR 1497.
20 . Queensland *Hansard* , *op.cit.* .
21 . Commonwealth *Hansard,* 1902, p.14657.
22 . *Ibid.* , p.14658.
23 . (1989) ALR 134.
24 . Commonwealth *Parliamentary Papers,* 14 June, 1920.
25 . Joint Standing Committee on Electoral Matters, *Report,* 1993, Submission S.0843.
26 . Commonwealth *Hansard* , 1909, p.4009.
27 . (1907) 4 CLR 1469.
28 . *Ibid* .
29 . Commonwealth *Hansard* , 1907, p.6378.
30 . Joint Standing Committee on Electoral Matters, *Report* , 1987, Clause 1.14.
31 . *Op.cit.* , Minority Report, Point 8.
32 . *Op.cit.* , *Report* , Clauses 5. 24Ä26.
33 . *Op.cit.* , Clause 5. 31.
34 . 4 ALR 289.

Chapter Eight

The Role of the Governor-General

Sir David Smith, KCVO, AO

My brief is to speak about the role of the Governor-General, as we know that office today. I shall speak about the history of the office, about the duties of the office, and about current proposals to alter the Australian Constitution by changing its provisions relating to the office.

Foremost among the reasons given for constitutional change is the claim that the republic will give us an Australian Head of State. This claim is as mischievous as it is dishonest. Its success is dependent on the notorious ignorance of the vast majority of Australians about their Constitution. [1] The truth is that Australia has two Heads of State. The Queen is our symbolic Head of State, the Governor-General is our constitutional Head of State, and we have had Australians in the office of Governor-General since Lord Casey's appointment in 1965.

The claim that the Governor-General is our constitutional Head of State is not some bizarre theory dreamed up for the purposes of the current debate, for it has been so since the beginning of federation, and there is much supporting evidence, both anecdotal and legal.

A Canadian Governor-General, Lord Dufferin, described a Governor-General as a constitutional Head of State in a speech given in 1873. [2] Even Paul Keating referred to the Governor-General as our Head of State in the very speech in which he announced in Parliament on 7 June, 1995 his Government's proposals for the republic. [3] Current scholars such as Brian Galligan, [4] Professor of Political Science at the University of Melbourne, and Stuart Macintyre, [5] the Ernest Scott Professor of History at the University of Melbourne and Chairman of the Keating-appointed Civics Expert Group, also use the description.

Even the media, so intent on pushing for the republic, use the description. After Mr Bill Hayden's speech to the Royal Australasian College of Physicians in 1995, *The Australian* published an edited version under the heading, "The Governor-General has made one of the most controversial speeches ever delivered by an Australian Head of State." [6] The next day's editorial in the same newspaper said that "it is perfectly appropriate at this stage of our constitutional development that the Head of State address important issues of social policy." [7] More recently, the same newspaper referred to the present Governor-General, Sir William Deane, as Head of State. [8] And twenty years ago the opening sentence of an editorial in *The Canberra Times* was, "We shall have today a new Governor-General, Sir Zelman Cowen, as our Head of State." [9]

Just in case this anecdotal evidence isn't convincing enough, let me also cite the legal evidence. During 1900 Queen Victoria signed a number of constitutional documents relating to the future Commonwealth of Australia, including Letters Patent constituting the Office of Governor-General, [10] and Instructions to the Governor-General on the manner in which he was to perform certain of his constitutional duties. [11]

Two distinguished Australian constitutional scholars -- A Inglis Clark, [12] who had worked with Samuel Griffith on his drafts of the Constitution, and who later became Senior Judge of the Supreme Court of Tasmania, and W Harrison (later Sir Harrison) Moore, [13] who had worked on the first draft of the Constitution that went to the 1897 Adelaide Convention, and who later became Professor of Law at the University of Melbourne -- expressed the view that the Letters Patent and the Instructions were superfluous, or even of doubtful legality. This was on the

grounds that the Governor-General's authority stemmed from the Australian Constitution, and that not even the Sovereign could direct him in the performance of his constitutional duties.

As Inglis Clark pointed out, *The British North America Act* 1867 did not contain any provisions relating to the appointment of the Governor-General of Canada, or to the exercise of executive authority in that Dominion, that were in any way similar to the provisions contained in sections 2 and 61 of the Australian Constitution relating to the powers and functions of our Governor-General; [14] nor did the Constitutions of any of the Australian States contain any similar provisions relating to the State Governors. These provisions were peculiar to the Australian Constitution, and they conferred upon our Governor-General a statutory position which the Imperial Parliament had not conferred upon any other Governor or Governor-General in any other part of the British Empire. [15]

Unfortunately, British Ministers advising Queen Victoria failed to appreciate the unique features of the Australian Constitution, and Australian Ministers failed to appreciate the significance of the Letters Patent and the Instructions which Queen Victoria had issued to the Governor-General. Just as unfortunate was the fact that no notice was taken of the views of Clark and Moore, neither in Britain nor in Australia, and between 1902 and 1920, King Edward VII and King George V were to issue further Instructions, [16] while in 1958 Queen Elizabeth II amended the Letters Patent and issued further Instructions. [17]

In 1922, during the hearing of an application by the State Governments for special leave to appeal to the Privy Council from the High Court's decision in the *Engineers' Case* , Lord Haldane asked, with reference to s.61, "does it not put the Sovereign in the position of having parted, so far as the affairs of the Commonwealth are concerned, with every shadow of active intervention in their affairs and handing them over, unlike the case of Canada, to the Governor-General?" [18] It would seem that Lord Haldane was indicating that he, too, was inclined to the view of our constitutional arrangements in respect of the Governor-General's powers which had been expressed earlier by Clark and Moore.

At the 1926 Imperial Conference, the Empire's Prime Ministers declared that the Governor-General of a Dominion was no longer to be the representative of His Majesty's Government in Britain, and that it was no longer in accordance with a Governor-General's constitutional position for him to remain as the formal channel of communication between the two Governments. The Conference further resolved that, henceforth, a Governor-General would stand in the same constitutional relationship with his Dominion Government, and hold the same position in relation to the administration of public affairs in the Dominion, as did the King with the British Government and in relation to public affairs in Great Britain. It was also decided that a Governor-General should be provided by his Dominion Government with copies of all important documents, and should be kept as fully informed of Cabinet business and public affairs in the Dominion as was the King in Great Britain. [19]

The 1930 Imperial Conference decided that, henceforth, recommendations to the King for the appointment of a Governor-General would be made by the Prime Minister of the Dominion concerned, and not by British Ministers as had been the case until then. This decision further strengthened the constitutional role of Governors-General and their relationships with their Dominion Government. [20]

The Conference decision was taken at the height of, and in support of, action which had been initiated earlier that year by Australia's Prime Minister, J.H. Scullin, in insisting on advising the King on the appointment of Australia's next Governor-General. Thus, Scullin's insistence on the right to recommend the appointment of Sir Isaac Isaacs as Australia's first Australian-born

Governor-General became the genesis of the new rule for the appointment of Governors-General throughout the Empire.

Our early Governors-General were British. They were appointed by the Sovereign on the advice of British Ministers and were in reality British civil servants. Their role was to represent British interests in Australia. Their principal duties and responsibilities were to the British Government. The 1926 and the 1930 Imperial Conference decisions changed the status of the Vice-Regal office and established a new relationship between the Governor-General and the Australian Government. What we did was alter our constitutional arrangements to meet evolving constitutional needs, but without having to alter one word of the Constitution itself. These changes are perfect examples of the far-sightedness of our Founding Fathers, and evidence of the adaptability and flexibility of our allegedly horse-and-buggy and inflexible Constitution.

In 1953, in the course of preparing for the 1954 Royal visit to Australia, Prime Minister Menzies wanted to involve the Queen in some of the formal processes of government, in addition to the inevitable public appearances and social occasions. But the Government's legal advisers suddenly discovered what had been apparent to Clark and Moore at the time of federation. They pointed out that the Constitution placed all constitutional powers, other than the power to appoint the Governor-General, in the hands of the Governor-General; that he exercised these constitutional powers in his own right, and not as a representative or surrogate of the Sovereign; and that no-one, not even the Sovereign, could instruct or direct him in the exercise of those powers. It was further pointed out that the Governor-General's statutory powers were also conferred on him in his own right and could be exercised by no one else - not even the Sovereign.

Nothing could be done, except by recourse to s.128 of the Constitution, to delegate the Governor-General's constitutional powers to the Sovereign, but by means of the *Royal Powers Act* 1953, Parliament empowered The Queen, when she was personally present in Australia, to exercise any power under an Act of Parliament that was exercisable by the Governor-General. The Act further provided that the Governor-General could continue to exercise any of his statutory powers even while The Queen was in Australia, and in practice Governors-General have continued to do so.

In 1975 the Commonwealth Solicitor-General, Mr (later Sir) Maurice Byers, gave Prime Minister Gough Whitlam a legal opinion that the Governor-General's constitutional powers could not properly be the subject of Instructions, thus again echoing the views expressed at the time of federation by Clark and Moore, and confirming that all Head of State powers and functions, except the power to appoint or remove the Governor-General, had been given to the Governor-General by the Constitution on 1 January, 1901.

The dismissal of the Whitlam Government later that year was to provide concrete evidence of the correctness of all the legal opinions which had been given over the previous seventy-four years. Writing after the event, Sir John Kerr said:

> "I did not tell the Queen in advance that I intended to exercise these powers on 11 November. I did not ask her approval. The decisions I took were without the Queen's advance knowledge. The reason for this was that I believed, if dismissal action were to be taken, that it could be taken only by me and that it must be done on my sole responsibility. My view was that to inform Her Majesty in advance of what I intended to do, and when, would be to risk involving her in an Australian political and constitutional crisis in relation to which she had no legal powers; and I must not take such a risk." [21]

After the Governor-General had withdrawn the Prime Minister's Commission, the Speaker of the House of Representatives wrote to the Queen to ask her to restore Whitlam to office as Prime Minister. In the reply from Buckingham Palace, Mr Speaker was told:

> "As we understand the situation here, the Australian Constitution firmly places the prerogative powers of the Crown in the hands of the Governor-General as the representative of the Queen of Australia. The only person competent to commission an Australian Prime Minister is the Governor-General, and The Queen has no part in the decisions which the Governor-General must take in accordance with the Constitution. Her Majesty, as Queen of Australia, is watching events in Canberra with close interest and attention, but it would not be proper for her to intervene in person in matters which are so clearly placed within the jurisdiction of the Governor-General by the Constitution Act." [22]

That reply confirmed, if confirmation were needed, that the Governor-General is indeed Australia's constitutional Head of State. Even so, it took another nine years before the matter was resolved.

On 21 August, 1984, on the advice of Prime Minister Hawke, the Queen revoked Queen Victoria's Letters Patent and the Instructions to the Governor-General, and issued new Letters Patent which, in the words of the Prime Minister, would "achieve the objective of modernising the administrative arrangements of the Office of Governor-General and, at the same time, clarify His Excellency's position under the Constitution." [23]

Four years later, in its Final Report, the Constitutional Commission said:

> "Although the Governor-General is the Queen's representative in Australia, the Governor-General is in no sense a delegate of the Queen. The independence of the office is highlighted by changes which have been made in recent years to the Royal instruments relating to it." [24]

If there should still be any doubt about the fact that the Governor-General is indeed our constitutional Head of State, let me clinch the argument by returning to Prime Minister Keating's statement to Parliament on the republic.

In order to avoid the problem of a powerful President, republicans had said that the reserve powers of the Crown, and the conventions associated with their use by the Governor-General, should be codified; but finally Mr Keating had to tell Parliament that it was not possible to foresee all the possibilities that might arise. His Government had therefore concluded that:

> ".... it would not be desirable to attempt to codify the reserve powers; and that the design, processes and conventions at present governing their exercise by the Governor-General should be transferred to the [president] without alteration." [25]

At last we see the delusion that lies behind the push for a republic. We are told that we lack an Australian Head of State - that we must get rid of the Governor-General and replace him with a President in order to achieve full independence and national sovereignty. But then we are told that the President would have exactly the same powers and exactly the same duties as the Governor-General has now - nothing would be added, and nothing would be subtracted. One Australian would replace another Australian and do exactly the same job. All that would be changed would be the title on the letter-head. If such a President would be an Australian Head of State, then that is precisely what the Governor-General is now.

Having established, I trust, that the Governor-General is indeed the constitutional Head of State, I turn now to an examination of the job itself. Professor L.F. Crisp, a former Professor of Political Science at the Australian National University, described it as the "keystone to the

constitutional arch." [26] Sir Paul Hasluck, a former Governor-General, saw it as the highest office in the land [27] and as the apex of Australian society. [28] Sir Zelman Cowen, another former Governor-General, described it as the most exciting and the most challenging of all of his appointments in a lifetime of exciting and challenging appointments. [29] And former Senator and Minister of the Crown, Peter Walsh, has said that many members of the Australian Labor Party regard Bill Hayden's outstanding record of service and leadership to the Party as having been tainted by his acceptance of the appointment as Governor-General. [30] I find that a rather sad, if revealing, commentary.

The Constitution requires the Governor-General to appoint a Federal Executive Council to advise him in the government of the Commonwealth; to establish departments of State and to appoint Ministers of State to administer them; to summon, prorogue and dissolve Parliament; to give the Royal assent to a Bill which has been passed by both Houses of the Parliament; and to exercise the command-in-chief of the Defence Force of the Commonwealth. All of these actions are taken on ministerial advice.

The Constitution also sets out many other powers, as part of the machinery of government, that are to be exercised either by the Governor-General, acting on the advice of a Minister, or by the Governor-General in Council, i.e., the Governor-General acting with the advice of the Federal Executive Council. It is the Governor-General who issues the writs for general elections of members of the House of Representatives; [31] informs the Parliament of the purpose of every appropriation of revenue or moneys (for without such a message from the Governor-General a proposed appropriation may not be passed by the Parliament); appoints the Justices of the High Court of Australia and of the other courts created by the Parliament, such as the Federal Court and the Family Court; appoints deputies to carry out such powers and functions as he may assign to them; and submits to the electors such proposals for the alteration of the Constitution as have been passed by the Houses of the Parliament in accordance with the provisions of the Constitution.

But by far the majority of the Governor-General's powers and duties are imposed upon him by statute. Virtually every Act passed by the Australian Parliament empowers the Governor-General to perform some executive function, such as to make and amend regulations, or to issue orders which amplify the legislative provisions; to issue proclamations; to make and terminate appointments to public office; to approve treaties with foreign governments; to appoint Ambassadors and High Commissioners; or to issue commissions to officers of the Defence Force. These are the kinds of executive actions which the Parliament has judged ought not to be left solely to the Minister of State who is responsible for the administration of the particular Act of Parliament, and which therefore require the Minister to seek the approval of the Governor-General in Council.

In discharging his constitutional and statutory functions, the Governor-General acts on the advice of his Ministers. As former Governor-General Sir Paul Hasluck put it, in a lecture given when he was still in office:

> "[The Governor-General] has the responsibility to weigh and evaluate the advice and has the opportunity of discussion with his advisers. It would be precipitate and probably out of keeping with the nature of his office for him to reject advice outright but he is under no compulsion to accept it unquestioningly. He has a responsibility for seeing that the system works as required by the law and conventions of the Constitution but he does not try to do the work of Ministers. For him to take part in political argument would both be overstepping the boundaries of his office and lessening his own influence. He can himself question a

> conclusion, seek to know the reason for it, draw attention to relevant considerations to ensure they are taken into account, and satisfy himself that the proposal does express the single mind of his advisers, but he himself, while influencing the outcome of discussion in this way, needs to be careful not to be an advocate of any partisan cause. In doing this he has two dominant interests - the stability of government (no matter from which political party it is drawn) and regard for the total and non-partisan overall interests of the people and the nation." [32]

It would be very easy to conclude that a Governor-General who is required to act on the advice of his Ministers has no power at all, or that Ministers whose advice has to be taken have no restraints placed on their use of executive power, but to do that would be to misunderstand the basic principle which underlies our system of constitutional government. For their part, Ministers are not able to carry into effect, on their own, all of the executive powers conferred on them by the legislation which they administer without first obtaining the approval of their fellow Executive Councillors and the Governor-General. So the real question is not at all how much power does the Governor-General himself have or exercise, but rather how much absolute power does his presence in our system of government deny to those who are in Government, and who must first seek to advise and persuade him.

In the words of another former Governor-General, Sir Zelman Cowen:

> "By a due attendance to the business of his office, by the exercise of functions and influence within the limits described by Bagehot [to be consulted, to encourage, and to warn], a Governor-General can, in appropriate cases, exercise an effective influence on the processes of government." [33]

The powers and functions which are assigned to the Governor-General by the Constitution and by Acts of Parliament are the legal basis for his statutory duties, and they are the reason for having such a person in our system of government. On the other hand, for the vast majority of his fellow Australians, their contact with, or knowledge of, the Governor-General is through his public duties - both ceremonial and non-ceremonial.

His ceremonial duties include opening Parliament; swearing-in Prime Ministers and Ministers; receiving the credentials of foreign diplomats; holding investitures; reviewing military parades; receiving and entertaining foreign Heads of State and heads of government in accordance with the accepted standards of international diplomacy and protocol; and representing Australia on State and official visits to foreign countries, made at the invitation of foreign governments and with the advice and approval of his own Government.

His non-ceremonial duties include speaking at, and opening, national and international conferences; presenting awards at major public gatherings ranging from exhibitions and sports meetings to university graduations, or at meetings of learned societies and professional institutes; attending functions held by all kinds of community organisations, and particularly those of which he is patron or principal office-bearer; and making official visits to the States and Territories or to regions or localities. In addition, the Governor-General, and the Governor-General's spouse, receive what are known as "courtesy calls" by office bearers and other representatives of national, regional and, occasionally, international organisations; and give dinners, lunches and receptions to which they invite guests from all sections of the Australian community.

Given the vastness of Australia and its Territories, the task of moving about in the Australian community has loomed large in the duties of every Governor-General. Again to quote Sir Zelman Cowen:

> "From the earliest days of the Commonwealth of Australia [they] have recognised the importance of travelling throughout Australia and have been clear about the reasons. Lord Hopetoun, the first Governor-General, saw this as providing a needed national focus in the early days of Australian federation. In an early speech he promised to demonstrate `to the many that they are living under one central government'. Right up to the present day his successors have followed this course, and for the same reasons of national identification." [34]

In carrying out his public duties, the Governor-General uses the status and prestige which the community attaches to his position to acknowledge the vast number of organisations, institutions and individuals who contribute to the well-being of our society. By his presence and by his interest in their work, the Governor-General plays a vital role in encouraging the continuation of activities which make a constructive contribution to the life of the community.

Again to quote Sir Paul Hasluck, in a comment made some years after he had left Vice-Regal office, he remained:

> ".... convinced of the importance of the office of Governor-General in its influence, either for good or ill, on the structure of Australian society and the outlook of the Australian community. Many people engaged in public affairs in Australia take politics and their daily occupations far too seriously and make foes of neighbours quite unnecessarily. Facing such a lack of urbanity I believe that one of the highly useful roles a Governor-General can play is in ignoring divisions and trying to set up an idea that we are all Australians even if we differ in our views on economic policy, wage fixing, the relative merits of private enterprise and state socialism and many similar issues. The office of the Governor-General as the representative of the Queen is the highest single expression in the Australian governmental structure of the idea that Australians of all parties and all walks of life belong to the same nation. In affairs of state the Governor-General takes his advice from those Executive Councillors whose party has a majority in Parliament, no matter which party it is, but in his public engagements, in his own guest lists and in moving about in the Australian community he is careful to make it plain that he is not the possession of any section, social group or political faction but is in the service of the whole nation." [35]

The only way in which the Governor-General is able to influence the structure of Australian society and the outlook of the Australian community is by the speeches he makes as he moves about in the community. Sir Zelman Cowen, who followed Sir John Kerr and who set himself the task of bringing a touch of healing to the office, judged the speeches to be the most important element of his work. [36] To him they were the vehicle by which he conveyed the point that, as Governor-General, he was concerned with the affairs, the concerns and the problems of *all* Australians. [37] (The emphasis is Sir Zelman's.)

Because it is in the nature of the media today to wring every drop of controversy out of any Vice-Regal speech that presents a target, and because many journalists know not and care not what happened before they took up the pen, a casual observer might conclude that each Governor-General who makes a newsworthy speech has done something that none of his predecessors ever did. The breathless reporting of such occasions might do something for circulations and ratings, but it does nothing for the notion of truth in reporting.

Every Governor-General in recent times, and no doubt most if not all of the earlier ones, has made speeches of substance that pricked the conscience, or posed a question, or exposed a need, or pointed a direction. That so little is known, and even less is understood, about this important aspect of Vice-regal public duty is due to the persistent failure of the media to take any interest in

it unless it presents an opportunity to whip up controversy and startling headlines. If Vice-Regal speeches nowadays seem to have more drama and more impact than those of earlier years, it is because many of the issues of public concern and public debate today are more dramatic and more pressing than those of earlier years. And if Vice-Regal speeches nowadays seem to receive more media coverage than those of earlier years, this is due, in some measure at least, to their being brought to the notice of the media by methods not previously thought appropriate to be employed by Government House.

Sir Paul Hasluck expressed the hope that we will never have the misfortune to have an inactive Governor-General, [38] and no-one would want a Governor-General who had no interest in, or influence on, community issues. On the other hand, there will always be matters with which a Governor-General should not become involved, and lines beyond which a Governor-General should not go. And views will differ about just where these points of demarcation should lie along the continuum of public debate. In the final analysis, a Governor-General's words are effective only so long as those who are able to influence the course of events are still listening to what he has to say. It is not easy to be consulted, to encourage and to warn when you are out on a limb all by yourself.

Endnotes :

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1. See *Final Report of the Constitutional Commission,* Australian Government Publishing Service, Canberra, 1988, p.43; and *Whereas the people...Report of the Civics Expert Group,* Australian Government Publishing Service, Canberra, 1994, pp.18Ä19. The former found that almost 50 per cent of all Australians were unaware that Australia has a written Constitution, and that in the 18Ä24 year age group the level of ignorance rose to nearly 70 per cent; the latter found that 82 per cent of Australians knew nothing about the content of the Constitution.

2. Lord Dufferin, then Governor-General of Canada, in a speech delivered at Halifax, Nova Scotia, in August, 1873, described the Governor-General as "the head of a constitutional State, engaged in the administration of parliamentary government". Quoted by John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth,* Angus and Robertson, Sydney, 1901, p.700, and by L.F. Crisp, *Australian National Government,* Longman Cheshire Pty. Limited, Melbourne, 1978, p.400.

3. *Parliamentary Debates,* Vol. H. of R. 201, 7 June, 1995, pp.1434Ä41.

4. Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* , Cambridge University Press, Cambridge, 1995, pp.21Ä2 and 245Ä7.

5. Stuart Macintyre, *A Federal Commonwealth, An Australian Citizenship* , a lecture in The Australian Senate Occasional Lecture Series, 14 February, 1997, p.3.

6. *The Australian,* 23 June, 1995.

7. *The Weekend Australian,* 24Ä25 June, 1995.

8. *The Australian,* 6 September, 1996.

9. *The Canberra Times* , 8 December, 1977.

10. *Commonwealth Statutory Rules* 1901Ä1956, Vol. V, pp.5301Ä3.

11. *Ibid.* , pp.5310Ä12.

12. A Inglis Clark, *Studies in Australian Constitutional Law,* Charles F Maxwell (G Partridge & Co., Melbourne, 1901), pp.54Ä7.

1. W Harrison Moore, *The Constitution of the Commonwealth of Australia,* Charles F Maxwell

3 (G Partridge & Co., Melbourne, 1910), 2nd. Edition, p.162.

14. "2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as 1 Her Majesty may be pleased to assign to him."

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"61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

1 5 . A Inglis Clark, *op.cit.* , pp.52Ä3.

1 6 . *Commonwealth Statutory Rules 1901Ä1956* , pp.5312Ä14.

1 7 . *Commonwealth Statutory Rules*, 1958, pp.494Ä5.

1 8 . Transcript of argument, pp.22Ä3. Quoted in H.V.Evatt, *The King and his Dominion Governors*, Frank Cass and Company Limited, London, 1967, p.311.

1 9 . Christopher Cunneen, *Kings' Men: Australia's Governors-General from Hopetoun to Isaacs* , George Allen & Unwin, Sydney, 1983, p.168; and (Sir) Zelman Cowen, *Isaac Isaacs*, Oxford University Press, Melbourne, 1967, p.191.

2 0 . Cunneen, *op.cit.* , p.179; and Cowen, *op.cit.* , pp.197Ä8.

2 1 . Sir John Kerr, *Matters for Judgement*, The Macmillan Company of Australia Pty.Ltd., South Melbourne and Artarmon, 1978, p.330.

2 2 . *Ibid.* , pp.374Ä5.

2 3 . Statement by the Prime Minister to the House of Representatives, *Parliamentary Debates*, Vol. H of R. 138, 24 August, 1984, p.380. The Prime Minister tabled a copy of the amended Letters Patent relating to the office of Governor-General, together with the text of a statement relating to the document, but for some unknown reason he did not read the statement to the House, nor did he seek leave to have it incorporated in Hansard. The statement was later issued by the Prime Minister's Press Office.

2 4 . *Final Report of the Constitutional Commission* , p.313, para.5.17.

2 5 . *Parliamentary Debates*, Vol. H of R. 201, 7 June, 1995, p.1438.

2 6 . L.F. Crisp, *Australian National Government*, Longman Australia Pty.Limited, Hawthorn, 1975, p.415. The description appeared in all editions and reprints from 1965 to 1975, but was omitted from the fourth edition published in 1978, its place being taken by an account of the 1975 constitutional crisis and criticism of the actions of Governor-General Sir John Kerr.

2 7 . Sir Paul Hasluck, *The Office of Governor-General* (originally given as The William Queale Memorial Lecture, Adelaide, 1972), Melbourne University Press, Carlton, 1979, p.30.

2 8 . *Ibid.* , p.46.

2 9 . Sir Zelman Cowen, Australia Day Address, Canberra, 26 January, 1982; and National Press Club Address, Canberra, 21 July, 1982.

3 . Peter Walsh, *Confessions of a Failed Finance Minister*, Random House Australia Pty.Ltd.,

30 Sydney, 1995, p.193.

31. Writs for the election of Senators are issued by the respective State Governors.

32. Hasluck, *op.cit.* , p.20.

33. Sir Zelman Cowen, *The Crown and its Representatives in the Commonwealth* , an address given at the annual conference of the Law Society of Scotland, Gleneagles, 1985, p.21.

34. *Ibid.* , p.25.

35. Hasluck, *op.cit.* , pp.29Ä30.

36. Sir Zelman Cowen, *Leadership in Australia: the Role of the Head of State* , The Williamson Community Leadership Lecture, Melbourne, 31 May, 1995, p.2.

37. *Ibid.* , p.12.

38. Hasluck, *op.cit.* , p.22.

Chapter Nine

Federalism : One of Democracy's Best Friends

Hon. John Wheeldon

John Stone and I have been friends ever since we first arrived at Perth Modern School, when the Australian Constitution was much less than half as old as it is now. Towards the end of last year, when we were both back in our former home town for a gathering of our old class mates, I happened to mention to him my affection for the federal system, particularly as a guardian of democracy, and my belief that our Constitution, although like all human institutions imperfect, was at least as good a Constitution as any in the world.

It seemed to surprise him that I, as a lapsed Labor politician and one of the few surviving unreconstructed socialists, should hold these views, He was so astonished that he invited me to speak to you tonight on this topic.

After I had gladly accepted his invitation, he told me that I would be expected to give you no less than 5,000 words on the subject.

I do not think that I shall be able to reach that target, primarily because I believe it is so obvious as to be self-evident that even the strongest democracy with a unitary system of government would be stronger with a federal system, that very little needs to be said in order to make the point without offending against the largely unenforced parliamentary proscription of tedious repetition.

When, in an orderly society, governmental power is divided, it stands to reason that the citizen is less likely to be at the mercy of arbitrary rule than when that power is concentrated in one institution. It is in recognition of this principle that, in democracies, it has long been regarded as essential that the judiciary should be independent of executive government and the legislature, and it is why the United States Constitution and the Constitutions of the individual States go so far (too far, according to our tradition) as to separate rigidly the executive from the legislature.

The geographical division of powers in a federal system, according to which some legislative and executive functions are the responsibility of the national government and legislature, and others belong to the States, Provinces or Cantons of the federation, self-evidently limits and decreases the ability of office holders to oppress the citizens. In Australia the existence of State Premiers diminishes the authority of the Prime Minister, while the existence of the federal government similarly places limits on what even the most reckless State Premier might try to do.

In principle there seems to be little more that can be said.

Some years ago an Israeli Ambassador to Australia told me how a visit to Adelaide had converted him to an enthusiast for our federal system, which he had thitherto regarded as an expensive and time wasting encumbrance.

He had offered this opinion to Don Dunstan, the then Labor Premier of South Australia, who had retorted that Adelaide was a long way from Canberra; that a lot of decisions of importance to South Australians would necessarily be made in Adelaide; and that it was clearly to the advantage of the South Australians that these decisions should be made by locally elected politicians, who depended for their survival on the good will of the local people, rather than by civil service functionaries acting at the behest of their superiors in the Australian Capital Territory.

Those who believe that the citizenry should not be remote from the making of decisions about the way in which their society is being run should find Don Dunstan's argument near enough to irrefutable.

The Ambassador, a sensible person, found it to be convincing, although it has to be recognised that, if the government in Adelaide were subject to the control of, and liable to be dismissed by, the government in Canberra, this would not be a federal system and would offer protection to the people of Adelaide only if tolerated by the government in Canberra.

This anecdote might seem to have at most a parochial Australian appeal, but the virtues of federalism are intrinsic. It is not only to countries like Australia with a large territory and a scattered population that federalism brings rewards.

There is plenty of evidence that democratic countries, whatever their size, with a federal system tend not only to have particularly strong democratic institutions but also, notwithstanding the division of powers characteristic of a federal system, to be particularly able to maintain their national unity and national security under conditions which could well have brought undone a country also governed democratically, but in which executive and legislative power is concentrated in one national government and one national Parliament.

Although it is sometimes forgotten in our happy isolation, the survival of a democratic nation's democracy is not dependent solely on its domestic institutions, but also on its ability to resist successfully any assault on its own security.

If a country, however enlightened its domestic policies, is endangered by the ambitions of foreign powers, or by internal tensions resulting from ethnic, linguistic, cultural or religious differences dividing its population, its ability to remain intact and to defend itself is obviously lessened. The massive movements of population over the past few decades have meant that many previously homogeneous countries could face difficulties of this kind. Multiculturalism is not always an undiluted blessing.

It might seem that two of the qualities essential to the safeguarding of democracy - national cohesion, which is not the same as national unanimity, and national independence from undesirable foreign interference - can best be promoted by a "strong" central government, unhindered by cantankerous States or Provinces with autonomous powers of their own. The evidence does not bear this out.

Switzerland and the United States of America, two of the world's longest continuously existing democracies, have shown that a federal system of democratic government is a reliable guardian of democratic institutions in very small, as well as very big, countries.

According to Graham Greene's Harry Lime, all that Switzerland had managed to produce after centuries of democracy was the cuckoo clock. Even if this were true, which it is not, cuckoo clocks have more to commend them than Auschwitzes, Gulags, mass executions of political and religious heretics, and *coups d'état*.

Despite its long-lasting reluctance to give its women citizens the vote, Switzerland is generally, and correctly, recognised as one of the world's most firmly established democracies. This feat is all the more remarkable when its geographical situation is taken into account. While the opposing sides in this Century's two World Wars both undoubtably derived some benefit from Switzerland's neutral independence, there is also little doubt that Switzerland would not have been an easy country to invade. But Switzerland's security is not solely the result of its formidable alpine terrain. Without the ability of Switzerland's democratically elected governments to rely on the patriotism and unity of Switzerland's citizens, it is highly unlikely that Switzerland's independence would have survived the two World Wars.

This unity has not been achieved through the linguistic, religious or political unanimity of those citizens. On the contrary, Switzerland has four official languages, French, German, Italian and Romansch; it is almost evenly divided, at least nominally, between Protestants and Roman Catholics; its political parties cover a wide spectrum from right to left.

But, most significantly, although Switzerland's relatively tiny area contains a population considerably less than half that of Australia, this confederation, as it describes itself, is divided into 26 Cantons having, among other powers, the right to impose income tax, and even the responsibility for the naturalisation of those aliens aspiring to become Swiss citizens. This latter power is, in other countries, regarded as an essential function of the national government. And, sadly, in Australia it seems that only a politician with suicidal tendencies would publicly suggest that the Australian States should reclaim their rights to income tax.

Although the American Civil War of 1861 to 1865 was to some extent the result of a genuine dispute about States' rights as well as a struggle about the abolition or survival of slavery, for well over a century since that war the United States, with a population coming from a multiplicity of backgrounds, including many citizens who remain conscious of their descent from slaves, has become, and has remained, the most powerful nation in the world.

Its rigorous division of powers between the executive, the legislature and the judiciary, on the one hand, and, on the other, the coexistence of a national government with 50 sovereign States, all able to raise income tax, not only provides a convincing rebuttal to those who tell us that politicians and lawyers have not done much for human happiness, but also offers a pretty strong suggestion that the United States' strength has been enhanced by its federal system.

As the examples of Switzerland and the United States of America have shown, the least that can be claimed on behalf of the federal system is that it has been able to maintain for centuries unity amid diversity in two countries with far from homogeneous populations, and that in neither nation have the limitations on the central government imposed by a strong federal system weakened them in their relations with other countries.

It would be overstating the case for federalism to claim on its behalf that it is either a necessary condition or a sufficient condition for the maintenance of a democratic system of government. The United Kingdom, the Scandinavian nations, the Netherlands and New Zealand are not the only countries with long democratic histories which maintain a unitary form of government, whereas neither Germany nor Austria, which instituted democratic, federal constitutions after World War I, was unable to resist the rise of fascism for little more than a decade. But opponents of federalism cannot derive much encouragement from the fact that Italy's post-1918 non-federal parliamentary democracy succumbed to Mussolini even more quickly.

It is, however, worth noting that after World War II the German Federal Republic (but not the former East Germany) and Austria were re-established with federal Constitutions, and both have lasted for nearly half a century as peaceful and relatively very prosperous democracies.

It might perhaps be useful to consider the ways in which democratic countries with rather similar problems but with different constitutional principles deal with these difficulties.

Canada, with a federal Constitution, has at both the national level and the provincial level a Westminster form of parliamentary government. It is possible, if not highly probable, that, had it not been for its federal Constitution, Canada's unity would not have stood the strain of the tension between its large French minority and its English-speaking majority. However, the fact that most of the French Canadians are concentrated in the province of Quebec, which has similar but somewhat greater political autonomy to that of the Australian States, has made much easier

the task of the present French Canadian Prime Minister, Mr Chrétien, of holding the country together.

If Canada had not had a federal system which enabled the present secessionist-inclined Quebec government to enact provincial laws in accord with the aspirations of most French Canadians, particularly in regard to the encouragement of use of the French language, a unitary Canada may well have become ungovernable.

For the past several decades, the once peaceful (except when invaded by the Germans) Belgium has been unpleasantly divided by the hostility between Dutch-speaking Flemings and French-speaking Walloons, two peoples with few, if any, distinguishing differences other than in their respective languages, even though most of them are bilingual.

After several decades of fruitless efforts to reconcile the representatives of the two language groups, including the establishment of regional authorities with delegated powers, in 1993 the Constitution was radically amended in order to create a federal system containing three Provinces, one for the Brussels area, one for Flanders and one for the Walloons.

Possibly, this has happened too late to prevent Belgium from disintegrating, but no other prescription could have had a better chance of holding the country together.

Even in these multicultural times, when Australians are being told to look to our north for our spiritual, as well as our material, sustenance, there are some of us who still look to the United Kingdom for a model of (albeit unwritten) constitutional government.

During more than a century and a half, without any formal Constitution, Great Britain gradually, but radically, widened the franchise for the House of Commons until there was a universal adult franchise, reduced the powers of the monarchy and the House of Lords, and was one of the pioneers of the development of the modern democratic party system.

Since the Glorious Revolution of 1688 the political structures of England, Wales and Scotland have evolved peacefully and within the broad framework of long established institutions.

However, it may not be entirely idle speculation to wonder whether, if Grattan's Parliament had been constituted within a federal relationship with the other parts of the United Kingdom, or, if Gladstone had been able to achieve Irish home rule within (something which he does not appear to have contemplated) a federated United Kingdom, most of the unpleasantness related to Ireland's status might have been avoided, at the price of only a little inconvenience.

It now seems that at least some further measure of Scottish and Welsh devolution is unavoidable, and the British Labour Party has undertaken that, if it wins this year's general election, it will create a "Scottish Parliament" and a "Welsh Assembly." These promises will probably have electoral appeal in Scotland and Wales, although apparently neither of the proposed entities will have either the autonomy, or the constitutionally guaranteed legislative and administrative powers, of the States or Provinces of a country with a federal Constitution.

The Scottish Parliament and the Welsh Assembly, apparently, would be, if Labour wins the election, creatures of the United Kingdom Parliament in Westminster, which will retain the power to abolish what it has created.

As India's experience has shown, for example during the period of semi-dictatorship under Mrs Indira Gandhi, State governments and Parliaments which are denied sovereignty, even in the fields of activity for which they are purported to be responsible, have neither the stability nor the independence to be found in a properly constituted federal democracy.

If Mr Blair's Scottish Parliament and Welsh Assembly do come into being, their members should bear in mind what happened in 1972 to the Parliament of Northern Ireland, which was also

created, without any constitutional guarantees, in Westminster, and was dismissed by the government in Westminster.

Notwithstanding its many virtues, the British Constitution was unable to save a democratically elected government in Stormont when the British cabinet decided it was time for it to go.

Devolution of administrative and legislative powers, albeit in a democracy, but a democracy without a federal Constitution, can survive only if the national government agrees to let it survive.

Under a federal Constitution, as exemplified by our Constitution, the prescribed powers of the constituent States or Provinces cannot be abrogated or diminished by the central government or Parliament, however displeased it may be with those local politicians.

One of the disadvantages of Australia's contemporary obsession with multiculturalism is that it has created a climate in which it is regarded as offensive to suggest that some cultures are superior to others, and even more ill-mannered to wonder out loud whether Australia might have a fairer and more enlightened social and political structure than some of our neighbours.

We used to be told that we were victims of a cultural cringe towards the United Kingdom, but our relationship with Britain was positively insubordinate when compared with our efforts to ingratiate ourselves, to take but one example, with Indonesia, where, apparently, some thousands of its citizens have recently died in race riots, but to whom we feel obliged to apologise for our racism because of some silly remarks by a newly elected independent member of the federal Parliament.

This lack of confidence in our institutions has had the complementary effect that few Australians seem to take an interest in the changes -- and some change is unavoidable -- in the way our political system works.

Specific events, such as recent High Court decisions on Aboriginal land rights, can arouse some excitement, but generally produce nothing more helpful than the sort of response that one has come to expect from Premiers of Queensland. But there are at least two developments which have occurred since 1901 which are seriously damaging to the federal system.

The more recent arises from those decisions of the High Court which seem to have interpreted the external affairs power of the Commonwealth in such a way as to enable the federal government to extend its powers over other matters, by relying on the provisions of international conventions to which it is a party and on treaties with foreign governments.

Some years ago my former parliamentary colleague, Dr Dick Klugman, asked whether this meant that, if the Australian Government entered into a treaty with the Government of Libya to encourage the proliferation of one-party states, this would allow our Prime Minister to follow the example of Colonel Kadhafi and make Australia a one-party state. I do not believe that he has yet received an answer.

It is likely that, had our Constitution's founding fathers been warned of this prevailing interpretation of the external affairs power, the six Australian colonies would still be unfederated.

This is one issue about which it seems that only a change in the membership of the High Court would bring redress.

The other principle in force which damages, and could be ultimately destructive of, our federal system is the uniform taxation agreement. Although the States still exist more than half a century after this anti-federalist fiscal agreement was entered into, their dependence on Commonwealth funding, and their incapacity to raise substantial revenue on their own, has made them increasingly redundant or, rather, into elected branch offices of the government in Canberra, a

situation which could well lead to a public belief that the States should be put out of their misery and got rid of altogether.

If the Swiss demicanton of Appenzell Inner-Rhoden, with a population of 15,000, can raise its own income tax, one must wonder why New South Wales cannot do the same.

The answer is that the Swiss are serious about their federal Constitution while Australians have dangerously little regard for theirs.

Chapter Ten

Amending the Native Title Act

John Forbes

This is the third time I have been privileged to address the Society, and on every occasion the goal posts have been moving. If you haven't read the morning paper, your native title news is apt to be out of date. We now have *Mabo* , *Wik* , the *Native Title Act* (" *NTA* "), and a prospect of amendments to that complex law which defines neither native title nor the natives who may enjoy it.

How did we arrive at this point? By sleight of language, a vital tool of social engineers. There is a precedent in the Gilbert and Sullivan repertoire. In *Iolanthe* all the fairies are bound by a law that if they marry a mortal the penalty is death. But there comes a time when Queen Iolanthe and all her subjects yearn to marry mortals, despite the fact that they are members of Parliament. Plainly the law must change. Judicial legislation is not yet fashionable, but the Lord Chancellor, the judge of all the judges, rather fancies a fairy himself, and his decision does not take six months or more:

> "Allow *me* , as an old Equity draftsman, to make a suggestion. The subtleties of the legal mind are equal to the emergency ... The insertion of a single word will do it. Let it stand that every fairy shall die who *doesn't* marry a mortal, and there you are out of your difficulty at once."

The Lord Chancellor's word-conjuring skills have a grander sweep these days. The essence of *Mabo* lies in changing "Crown title" to "potential Crown title", [1] and *Wik* works by saying that a pastoral lease is not a lease. [2]

Ever since *Mabo* was criticized as a judicial legislation, contrary to the separation of powers which the High Court otherwise enforces, there has been a refrain that judicial law-making has always been with us. But surely it's a matter of degree. The current defence of judicial activism sounds rather like a police court barrister's defence of a man who drove at 120 kph past a hospital: "Why, if Your Worship pleases, everyone uses cars these days. Speed is an irrelevant detail".

In November last Mr Stone asked me to consider mooted amendments to the *Native Title Act* . Four weeks later, on Christmas eve the High Court, by a majority of 4 to 3, gave us the *Wik* decision. [3] By that time many citizens were at the beach or in a final frenzy of Christmas shopping. (According to a colleague with friends at Court, it was "known" three months before the decision came down that it would arrive on Christmas eve.)

Last year's amendments are now back in the melting-pot and a new draft is promised by Easter. [4] At the time of writing I can only glean from last year's parliamentary papers and this year's press items some proposals which are likely to reappear. If I could predict their prospects of success I would not be paying my own fare to Canberra.

Last year's proposals were based on the hope that Mr Keating was right when he assured us in 1993 that pastoral leases extinguish native title. But that promise, and Mr Keating, are gone.

At the Society's Adelaide Conference last June I was less optimistic than Mr Keating. I suggested -- a trifle bravely, perhaps, when there were learned opinions to the contrary -- that the

High Court would not stunt the growth of its child, but would strike some obscure compromise. While asking whether it was "time for the Streaker's Defence?", I predicted that the majority in *Wik* would be slimmer than in *Mabo* . And so it came to pass. Just one more repentant judicial legislator and *Wik* would not be with us. The *Wik* majority was led by a former Northern Territory land rights Commissioner, while the minority was headed by a principal assistant at the birth of *Mabo* . Chief Justice Brennan may now be contemplating an old lesson: It is easier to start a revolution than to stop it. The Mason legacy is not without its embarrassments. Another ex-Commissioner of the Northern Territory tribunal is now hearing the Yorta Yorta claim to choice portions of New South Wales and Victoria. [5] Land claims under the 1976 Northern Territory Act (which is not based on common law) seldom if ever fail. It was designed by a barrister (soon to be a Federal Court judge) who lost an early land rights case in 1971. [6] The identity of his junior in that case is interesting.

Validation of Post-1994 Grants

Wik poses two main questions: (1) What to do about Crown concessions granted over pastoral leases since 1993; and (2) how will the High Court's vision of co-existing pastoral leases and native titles turn out in reality?

Several State governments issued post-1993 mining leases and licences over pastoral properties without following the rituals of the *NTA* . They did so in reliance on Mr Keating's promises and on legal advice that native title could not survive the grant of a pastoral lease. But now it transpires that government grants and actions by grantees which are not strictly within the terms of the relevant lease may be invalid "future acts" (in *NTA* jargon) if there is a native title in the area. Pastoralists who have sought to alleviate hard times by catering for tourists could find themselves liable to compensate yet-to-be-discovered holders of yet-to-be-defined native titles. In Queensland alone hundreds of mining titles may be affected. [7]

The simplest solution, in legal terms, is to amend the *NTA* to enable the Commonwealth and the States to validate titles issued in good faith between 1 January, 1994 and December, 1996 -- when the *Wik* dispensation was revealed -- and face the compensation bills if and when they arrive (a risk which native title enthusiasts may be exaggerating). The existing NTA validated numerous titles which *Mabo* put in doubt, and between 1994 and 1996 the well-funded Aboriginal corporations did not issue a single court challenge to Crown grants which relied on the Keating version.

Western Australia has adopted the alternative of re-issuing Crown leases and approvals after complying with the "negotiation" sections of the *NTA* [8] and the Northern Territory is doing likewise. [9] The catch is that, if native title hopefuls claim the "right to negotiate", delays of a year or much more may ensue. However, it is reported that many mining titles in the West are re-emerging without native title complications. The Queensland Mining Council is less optimistic.

A third possibility -- in areas where native title claims are unlikely -- is to use the non-claimant procedures which now exist. [10] If there are no objections, the mining title can be confirmed two months later, subject to compensation if Aboriginal rights subsequently appear.

Narrowing the Floodgates: New entry Rules

As the *NTA* stands, anyone can lodge a native title claim purporting to be an Aborigine who represents a kindred group large or small. Provided that some not very demanding procedures are followed, the applicant is entitled [11] to have the claim registered. (In deference to the High Court's *Brandy* decision, [12] future applications will go to the Federal Court instead of the Native Title Tribunal.)

Immediately upon registration, the claimants gain a *de facto* injunction against any dealings with the subject land while they exercise a "right to negotiate", which the *NTA* (not *Mabo*) confers upon them. If negotiations fail to produce an agreement within 6 months (4 months in the case of a mineral exploration licence), the Native Title Tribunal may be asked to arbitrate. The Tribunal must "take all reasonable steps" to reach its decision within a further 6 or 4 months, as the case may be. [13] There may be multiple and conflicting claims over the same tract of land. Thus, with little effort or expense, native title claimants acquire a bargaining counter to play against Crown lessees or developers. The latter may then be induced by fear of legal expenses or costly delays to pay the claimants to go away -- hoping that no others will subsequently appear. While compensation ordered by the Tribunal has certain limits, [14] and is held in trust pending proof of the title claim, [15] "negotiated" compensation can be pocketed forthwith and may include a share of income or profits. There can be a valid contract to settle a legal claim, however dubious or unsound it may be. [16] Father Frank Brennan, a noted admirer of native title, would actually extend the "right to negotiate". Pending proof of a claim, he would allow the claimants to have access to any part of a subject pastoral lease, other than an area within one kilometre of a homestead. [17] Such access would extend to hunting, fishing, camping, visiting sites and conducting ceremonies. This comes close to treating a mere claim as already established. How would the claimants react if the claim eventually failed? How would the pastoralist control entry by people who were not members of the claimant group? Would the grazier or the State be entitled to compensation for land-use by people not really entitled to use it?

So potent is the "right to negotiate" that it tends to be forgotten that those who hold it are not yet holders of native title and may never be. However, native title brokers and compliant journalists influence public opinion by regularly referring to native title hopefuls as "traditional owners". This is often accompanied by fanciful underestimates of the claimants' adherence to non-traditional customs, lifestyles, or amenities, even in remote areas.

Critics of the *NTA* complain that it is far too easy to gain the potentially oppressive "right to negotiate" and that it imposes intolerable delays. If there are several claimants, the process of negotiation is likely to be delayed, complicated and rendered more expensive by internecine warfare -- the Century Zinc imbroglio is a classic example. An inherent weakness of the system is that, after tortuous negotiations and generous compensation, someone else may emerge and claim to be the one true holder of native title.

The first priority of the reformers is to make it more difficult to register a claim and thus gain a "right to negotiate". A new s.190A would try to strike a better balance of rights, so that governments and developers do not have to waste time and money negotiating with people who lack a properly researched and genuinely arguable claim. There appears to be some support for such a change among Aboriginal bureaucrats who are embarrassed by blatant `ambit claims'.

According to the 1996 scheme, the new tests for registration would be these:

- The Registrar would have to be satisfied that there is a *prima facie* case;
- Applicants would have to particularise the rights claimed, with facts showing a continuing connection with the area, and that all persons joined in the application have a common interest;
- Applicants would be obliged to make additional title searches at the Registrar's discretion; and
- The Registrar could not register a claim if he had knowledge -- from any source -- of any incompatible title [18] in the area claimed. (This would overcome a ruling in the *Waanyi Case* [19] that only claimants may offer evidence at the registration stage.)

An applicant refused registration would have a right of appeal to a Federal Court judge.

I am not confident that these changes would make a great deal of difference in practice. According to the amendments proposed last year, an unregistered claim would still be able to proceed, albeit without a "right to negotiate". But the very existence of a claim would tend to discourage the seeking or granting of the approval in question. Besides, a career as court clerk or registrar is unlikely to attract an over-supply of decisive and independent spirits. I doubt whether the average registrar would be keen to accept the responsibility of refusing registration (and the attendant abuse) in any but the most frivolous case. This amendment should be re-drafted to give any party who may be affected by a native title claim a right to appeal against a decision to *grant* registration if it seems that the Registrar has been too permissive.

The opponents of change are promoting "negotiations" as a panacea. Aboriginal and Torres Strait Islander Commission (ATSIC) officials and Aboriginal politicians are desperate to secure

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1. By abolishing the rule that the British Crown became notional owner of the "waste lands" of Australia at the time of settlement, and substituting a retrospective rule that settlement merely gave the Crown the *opportunity* to become the owner. According to the retrospective rule, the Crown has to take further steps to become owner (free from native title). Oblivious to native title, past governments sometimes (probably often) omitted to take those steps. If so, then after the High Court spoke in June, 1992 it was too late.

2. Because it doesn't confer mineral rights, and there are various conditions, including limited third-party rights to enter. But even freeholds do not include mineral rights, and many undoubted leases limit activities to a particular occupation (e.g. a florist's shop).

3. *Wik Peoples & Ors v. Queensland* (1996) 141 ALR 129.

4. *Sydney Morning Herald*, 15 February, 1997 : `*Whingeing Black' Jibe Over Wik* .

5. Howard Olney, judge of the Federal Court since 1988 and Northern Territory Aboriginal Land Commissioner 1988Ä1991: *Australian Lawyer* , July, 1994, p.10 (announcing his appointment as a part time member of the Native Title Tribunal).

6. *Milirrpum v. Nabalco Limited* (1971) 17 FLR 141.

7. *Courier Mail* , 3 January 1997 : *Wik Win Threatens 800 Mining Leases* . At the time of writing a 6 weeks'"freeze" of Queensland mining title applications seemed to be entering a partial thaw, subject to the possibility that the government would require indemnities against claims for "native" compensation in certain areas where native title claims are likely to arise.

8. *Courier Mail* , 18 January, 1997 : *State Facing Huge Native Title Settlements* .

9. *The Australian* , 20 February,1997 : *NT to Protect Mine Rights on Pastoral Leases* .

10. *Native Title Act* 1993 (" *NTA* "), ss.24,67,253.

11. *North Ganalanja Aboriginal Corporation (on behalf of the Waanyi People) v. Queensland* (1996) 135 ALR 225.

12. *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

13. *NTA* , ss. 35Ä36.

14. *NTA* , s.51.

1. *NTA* , s.52.

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. *Hercules Motors Pty Ltd v. Schubert* (1953) 53 SR (NSW) 301.

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. *The Australian* , 28 February, 1997 : *How to Share the Land, Not Divide It* .

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. i.e. freehold, or residential or commercial leases from the Crown.

. (1996) 135 ALR 225.

a belated settlement of claims over the Century Zinc mine in far north Queensland. Six months of official negotiations, and years of prior discussions, might then be forgotten while "voluntary (sic) agreements" rescue an ailing *NTA* . (Does that tautologous buzz-phrase imply that non-voluntary agreements are on the cards?)

Implicit in the present promotion of "voluntary agreements" is an admission that the Act, and the judge-made law behind it, are too complex and vague to work in any other way. But if compromise were so sure a path to justice, we could dispense with the *NTA* and many other laws as well. In reality, free and fair settlements are often unattainable even when the relevant law is very much clearer than the *Mabo-Wik* regime. The vaguer a law, the more difficult it is to settle a claim based on it. The President of the National Native Title Tribunal (NNTT) argues that there have always been property disputes. What he omits to say is that the property laws which are not race-based are very much more accessible and precise than the innuendos of native title.

In one form or another, a stricter entry test is likely to pass the Parliament. Senior members of the Opposition seem to agree that the present rules need tightening. They cherish a hope that a requirement to show a "continuing association with the land" at the outset will confine successful claims to remote areas and small numbers. [1] We shall see; the High Court was *very* vague about "connection" in *Mabo* , and federal judges could play all manner of variations on this theme in due course.

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The very concept of the "right to negotiate" should be reconsidered. Abolition of it would not be `discriminatory', because it is a privilege not enjoyed by any other property owner. It makes claimants more equal than other citizens with *established* property rights. As against parties who will suffer heavy losses through delay, it gives undue strength to the bargaining power of people whose competing rights, if they have any, are a windfall. Resistance to a claim is costly, the native title bargaining counter is not. Doubtful as the claim may be, it can so jeopardise a costly or urgent project that a settlement far in excess of its likely value may be exacted. The slower the *NTA* process -- and to date it has been glacially slow -- the greater the pressure to settle.

However, "negotiations" offer careers to "mediators" attached to the Native Title Tribunal; indeed, their fashionable ministrations are the main rationale for its existence. A mediation *ipso facto* suggests that a claim has "something in it", and that no claimant will go empty-handed away. But there is not always something to be said on each side, and mediation may bring delay and expense instead of sweetness and light. This will be recognised if a new s.86A is inserted. It would allow the Court to dispense with mediation if it is likely to be useless considering the number of parties involved, the time it would take, or the extent of non-native titles in the area.

The *Wik* decision has made native title and the right to negotiate much more pervasive. While *Mabo* brought native title to Australia from an islet near New Guinea, *Wik* greatly increases

the area of our continent which is open to native title claims. The Queensland Government estimates that the area of its State open to claims and mandatory "negotiations" has been increased from 8 per cent to more than 70 per cent. [2] Most of the State's mineral resources are under pastoral leases. Only freehold is now immune from native title claims. (The logic of this is doubtful; freehold is not absolute ownership. Minerals in freehold land usually belong to the Crown, which may authorise a third party to prospect on the property and to mine it.)

Just One Negotiation?

A revised list of amendments could include a proposal of the Queensland Mining Council. [3] The Council's suggestion is that native title claimants be put to an election: negotiate before an exploration licence issues, or when a mining lease is applied for, but not twice. While a larger payoff would be expected after a profitable deposit has been discovered, there is many a slip 'twixt prospecting and production. Sensible claimants might settle for less while the miner still has money and an interest in the area.

"Representative Bodies" as Gatekeepers

The plethora of native title claims, many of them overlapping and conflicting, has led to suggestions that land councils or Aboriginal legal aid bureaux be commissioned to examine, select and prosecute native title claims in designated areas. (The curious financial arrangements of some legal aid agencies suggest that they be accredited very cautiously, if at all.)

Understandably, this idea appeals not only to land council oligarchs, but also to politicians seeking compromise solutions to the seemingly intractable problems which *Mabo-Wik* presents. As things stand, governments and Crown lessees are obliged to "negotiate" many dubious claims, often amid a babel of internecine quarrelling, in an effort to get developments off the ground.

The Century Zinc saga is a prime example. When years of informal talks and six months of official negotiations ended last month, only 6 of 12 rival claimants had accepted a munificent offer. [4] Aboriginal supporters of the mine say what Century would hardly have dared to express -- that they were being "held to ransom" by dissidents [5] and that the *NTA* was "making fools" of them. [6] The Century example will stand even if ATSIC manages to refurbish a major political embarrassment as a showpiece "voluntary agreement".

There are several versions of the "representative" scheme. One version would give a certified broker the authority to approve and promote one of several competing claims. The broker would have virtual power of life or death over pending claims, and subsequent claims in the same area would be barred. Milder versions of the scheme are not markedly different from the present position, in which "representative bodies" select certain claims for financial assistance, leaving others to fend for themselves.

Aboriginal bureaucrats are excited by the more potent version of the plan. [7] But their less influential colleagues doubt that "representative bodies" are so free from malpractice or nepotism that they should have their power enhanced in this way. A Joint Parliamentary Committee reported against the monopoly idea after hearing evidence from Aborigines who feared that claims might be improperly stifled, and pointed to favouritism or malpractice in past allocations of legal aid. [8] The Aborigines who fear a major increase in their masters' power are supported by the mining industry, despite its desire for greater certainty and fewer competing claims in native title affairs. [9]

It is submitted that the government should think long and hard, and try other measures, before it confers such extraordinary powers on Aboriginal bureaucrats and their lawyers. Who would

select the title brokers, and what would the selection criteria be? Facile references to a single "aboriginal community" ignore great differences in education, lifestyle and regional interests, not to mention ample evidence that some "representative bodies" are not at all representative.

It is reasonable to suspect that, if one Aboriginal organisation were the sole title broker in a region, there could be abuses of power at the expense of Aborigines, land holders, or applicants for Crown concessions. The public interest would suffer if monopolist "representatives" were bought off without due regard to taxpayers or to the long term management of Australian land. The alternative of several accredited brokers in a given area would simply exacerbate the problem of competing claims.

There is also a danger that a claim approved by a powerful, government-approved "representative" might be seen by courts, tribunals, "mediators" and claimants' witnesses as more or less proved already. Furthermore, the approval of some claims and non-approval of others would involve a judgment upon their relative merits. The High Court's rather precious (albeit selective) notions of the separation of powers could see the scheme condemned as an improper exercise of federal judicial authority.

In any event there would have to be a right of appeal from title-brokers' decisions. With public funds available, it would be naive to expect that appeals would be few and far between. On appeal, the quest for simplicity would revert to litigious complexity while the *prima facie* merits of competing claims were compared; several might be allowed to proceed after all. If the appeal involved more than a superficial examination of rival claims, it would become a full-blown, multi-partite inquiry into the existence and nature of native title in the area in question. The last state of man, litigiously speaking, would then be no better than the first.

It would be prudent to shelve any "approved broker" scheme until tighter threshold tests are tried. If they are fairly tried, and if non-claimants are given a right of appeal against registrars' decisions to grant registration, they may be an adequate filter. Then there would be no need to test the murky waters of compulsory "representation".

However, the best of all filters would be a clear signal from the courts that claimants' legends and their anthropologists' opinions will be rigorously examined in the light of any personal or ideological biases and the lessons of the Hindmarsh Island affair.

A Time Limit for Native Title Claims

This has been a serious question ever since *Mabo* appeared. Most actions at law have to be commenced within 3 or 6 years. "Limitation Acts" do not require people to finalise claims but merely to *initiate* them within the set time. It is almost five years since *Mabo* , and native title claims now cover much of Australia. It is difficult to think of any reasonable argument against a "sunset clause". In 1993 the mining industry suggested five more years; [10] State governments now suggest that one more year would be fair. [11]

However, the protagonists of native title insist that no time limit at all should be imposed. There have been extravagant appeals to the *Racial Discrimination Act* (*RDA*), [12] and an ex-Attorney-General, now a native title consultant, has invoked the equally familiar threat of "international embarrassment". [13] But everyone else is subject to limitation laws, and it has never been seriously suggested that they amount to unjust expropriation.

An alternative would be to take parcels of land one by one, advertise widely and prominently for claims, and if none is received within a certain time, deem the area to be immune from any future claim. If claims *are* lodged, let the determination of them be the end of the matter. Thus "clearances" could gradually move across Australia.

Legal Aid to Oppose Claims

Ever since *Mabo* appeared it has been a glaring anomaly that many claimants, without close scrutiny of their claims, are financed by Aboriginal organisations using ample funds, while other parties often pay their own way through the legal and bureaucratic maze. Not all respondents are wealthy companies or governments able to transfer the costs of the native title movement to the general public. A Queensland grazier protests :

> "Mrs McDonald said they would have no choice but to proceed to court. But even if the Gunggari failed to prove their claim, [the family] would probably be forced to sell the property to pay the court costs. If they somehow managed to hang on, they would then have to go through the whole process again with the Bidjara claim, with no guarantee other claims would not also be lodged. `We feel we are in an insane situation, and we cannot believe our country has put us in this position, where even if we established that the ... [existing] claims are not legitimate, ... we lose through impossible legal costs'". [14]

It is proposed to amend s.183 to ensure that non-claimants as well as claimants can rely upon legal aid, not only for court appearances but also for lengthy "mediations" under the auspices of the NNTT. Surely this can escape a righteous Senate veto.

Other Possibilities

(a) A Clearer Concept of "Connection"

So vague is the High Court's grand design [15] that it is futile to seek a definition of native title. [16] But there are subsidiary notions which should be clarified as soon as possible. For example, what amounts to a sufficient "connection" between Aboriginal claimants and the land affected by their claims? It would be naive to think that the High Court has locked itself into a test of "continuing physical occupation". On the contrary, it has left itself -- and the Federal Court -- a great deal of room for manoeuvre in this area. [17] If continuous physical occupation is required, how substantial must it be? Can a few members of the claimant group act as "land sitters" for absent friends? Would claims of "spiritual" or nostalgic remembrance be enough?

(b) The Measure of Compensation

When a would-be amender of the *NTA* is not charged with racism or threatened with "international embarrassment", he is warned that virtually any move he makes will expose the nation to astronomical compensation for rights yet to be proved and defined.

But almost five years after *Mabo* , no one has the foggiest idea how many species of native title there are, or what they are worth. "Land rights" began as a spiritual value, but the quasi-religious approach yields increasingly to the language of finance.

"Compensation", like "connection", remains wide open to judicial interpretation. Native title (whatever it is) no doubt falls within the wide meaning of "property" in the "just terms" clause of the Constitution, [18] and we may assume that in this instance the High Court will apply that guarantee more generously than when Tasmania sought in vain for "just terms" in the Franklin Dam affair. [19] Justice Mason then declared that "it is not enough [to activate the just terms clause] that the [Commonwealth] adversely affects *or terminates* a pre-existing right". [20]

Now an extinguishment of native title by the Commonwealth would simply terminate a right so far as the Commonwealth is concerned. The *States'* title to their Crown lands would be improved, but not the title of the Commonwealth (save in Commonwealth territories). So perhaps the "just terms" clause would not apply? However, the High Court has said elsewhere that if Commonwealth action vests property in someone else, that is an "acquisition" which involves "just terms". [21] In the *Tasmanian Dam Case* , [22] Justice Murphy said that the Commonwealth only "acquires" something when the Commonwealth is the beneficiary, but I

doubt whether the opinion of that keen judicial legislator would appeal to his successors on this occasion.

However, there are High Court precedents -- to the extent that precedents matter now -- which offer some solace to taxpayers, the potential payers of compensation. It has been said that the "just terms" clause does not always demand full compensation, because the Constitution does not require "a disregard of the interests of the public or of the Commonwealth". [23] Plainly, Australian citizens -- 98 per cent of whom can never aspire to native title -- have a considerable interest in the compensation issue. If the compensation bill is nearly so large as native title enthusiasts threaten, will the High Court find it politic to strike a balance between payment in full and what the country can reasonably afford?

However, if some members of the NNTT have their way, it will be possible for claimants to switch to and fro between spiritual and commercial values as opportunism suggests. In one Western Australian case [24] three members of the Tribunal opined:

> "There is no foundation for the proposition that a valuation based upon the assumption of fee simple acquisition of an area of land is the maximum sum which could ever be [awarded for native title] ... It is possible to envisage that the assumed freehold value of a small area of vacant Crown land in a remote location could be much less than [proper] compensation ....".

Soon afterwards another panel of tribunalists declared:

> "With regard to compensation .... an analogy can be drawn with personal injuries litigation where .... Aboriginal people can be compensated for such things as being unable to complete initiation rites, inability to gain and enjoy full tribal rights, loss of ceremonial function, inability to partake in matters of spiritual and tribal significance ....". [25]

It is possible, then, that native title compensation could be commercial when that seems suitable, and "spiritual" or "psychological" on other occasions. The question whether the Tribunal's lateral thinking appeals to the High Court awaits another time, another long delay and untold legal costs. But watch this space. Perhaps lawyers who have been seeking guidance in conventional "land and valuation" cases should reach for something more imaginative -- or ask the Parliament to make the *NTA* much more explicit where compensation is concerned. In this new legal province there are no firm answers. There are merely options which the High Court may select, aware that the politics of native title and the *RDA* will inhibit any attempt to alter its decrees.

(c) Section 21 "Deals" and the Public Interest

Section 21 of the *NTA* quietly and briefly says that native title holders may trade in their rights for "any consideration .... [including] the grant of a freehold estate in any land or any other interests in relation to land .... that [they] may choose to accept."

There are no adequate safeguards to prevent a government which is unduly favourable to native title interests from handing out property far more valuable than the native title which is surrendered. The same might happen if a government were anxious to free some politically attractive development from interminable "negotiations". Appropriate safeguards should be inserted.

One of the amendments proposed last year does consider the national interest -- in a different respect. A new s.84A would entitle the Commonwealth to be party to any native title case in the Federal Court, with normal rights of appeal. This should be difficult to oppose. Decisions made today may allocate vast natural resources in perpetuity to a very small percentage of the

population. If the "communities" mustered for the claim eventually disappear, redistribution could be expensive and politically fraught. The fact that it now suits a government, a lessee or a developer to make a "voluntary agreement" will not always result in a land management decision that is in the long term interests of Australia. Serious thought should be given *now* to the possibility of a growing disproportion between native title benefits and the needs and expectations of other Australians in future.

(d) Equitable Distribution of Native Title Benefits

Native title is communal title. As the caravan moves on, and whether or not "representative bodies" gain greater powers, the trustees for more or less well defined tribes, clans, or "peoples" will accumulate large holdings of land or money. The property held may be far more valuable than legal aid and other funds which have been squandered or have mysteriously disappeared. Who will make the appropriate decisions, and how will the moneys be invested? Will one group's fund always be kept strictly separate from another's? Will it be forbidden to lend one group's money to another group under the tutelage of the same organisation? No thought seems to have been given to how these accumulations of property should be handled if the notional beneficiaries disperse or disappear.

At present the *NTA* has remarkably little to say about ensuring that the benefits of native title are honestly and fairly administered to all who are meant to enjoy them. Disputes and redistributions should not be left to the complex, slow and expensive processes of the law of trusts and courts of equity. Adequate trust-accounting rules should be in place before delicate problems arise. The fiduciary duties of native title brokers should be spelt out in the Act, and some relatively simple means of resolving beneficiary-trustee conflicts provided. An Ombudsman for native title beneficiaries may be worth considering.

(e) Judicial Arrangements and Judicial Detachment

Some of the suggestions in this section relate to laws other than the *NTA* , or simply to matters of judicial administration and decorum.

The *Wik* decision has inspired various suggestions for reform of the High Court. Some are fanciful and ill-advised. A few are perfectly reasonable. There seems to be widespread support for the proposition that consultation with the States about future appointments to the Court should be more realistic and effective. One team in the federal competition should not be able to choose all the referees, especially now that the referees usually officiate on the Commonwealth's home ground. The new Federal Court, bereft of a truly general jurisdiction, should not become the official waiting-room for High Court hopefuls -- a trend that is clearly discernible. More care should be taken to ensure that High Court judges have extensive and well-rounded experience in State Supreme Courts of civil and criminal jurisdiction.

The High Court is a peculiar institution, in that it is a constitutional umpire and an ordinary court of appeal. Constitutional courts in the United States, Germany and other countries do not have this dual role. Perhaps the time has come to divide the High Court into a constitutional arbiter on one hand, and a normal court of appeal on the other. This may help to prevent the broad-brush techniques of constitutional interpretation from spilling over and making ordinary law more volatile than it ought to be. Let us remember that *Mabo* and *Wik* are purportedly based on common law and ordinary legislation. Grandiose as they are, they are *not* constitutional decisions.

The High Court's workload was the reason given for making all appeals to it subject to special leave. The Court can now pick and choose the laws it wishes to revise. In reproving the Deputy Prime Minister for his recent criticism of the Court, Chief Justice Brennan referred to

its workload again. The High Court could shed some of the burden by leaving pure matters of State law to the Supreme Courts. It could cease tinkering with Criminal Codes, and points of evidence and procedure which are further and further removed from its members' experience -- tinkerings which too often oblige trial judges to issue impossibly complex instructions to bemused juries.

The Federal Court, just 20 years of age, has a patchwork civil jurisdiction, extended by the *NTA* . It conducts no criminal trials. Aside from some common law jurisdiction which it has "interpreted away" from the State courts,it applies various Commonwealth Acts, some of them expressed in the sweeping post-1970 legislative style. Some members of the Federal Court appear to be immune from, or indifferent to the accepted restraints on public political statements by members of the judiciary. Broad-brush legislation such as the *Trade Practices Act* [26] breeds wide judicial discretion and encourages judicial activism. Judicial review for error of law is not supposed to be an appeal on the merits, but in the Federal Court (and not least in immigration cases) it is often impossible to discern the difference. The Federal Court's decision in the *Teoh* deportation case - endorsed by the High Court [27] - is so manifestly naive and silly that there is bipartisan support for its legislative extinction.

For the time being, parties to native title cases must take the Federal Court as they find it. But these cases should be allocated to as many different judges as possible, and should not be confined to a select few. Service as a land rights Commissioner is not a necessary (or perhaps a desirable) preparation for hearing native title cases at common law.

By the same token, service in (or for) an Aboriginal legal aid office should be less important than it now seems to be in making appointments to the core or to the fringes of native title tribunals. Single-purpose tribunals which owe their existence and their future to a particular cause tend to develop (if they do not already possess) an identification with that cause. Some modern tribunals are precisely for the promotion of particular and sometimes divisive causes. If they often said "No" to their applicants they would forfeit business, lose the respect of their courtiers, and eventually their *raison d'être* . Regular courts -- particularly courts of truly general jurisdiction -- do not so naturally attract people with one particular legal bee in their bonnet, or who tend to think that particular classes of litigants should normally succeed.

It has been noticeable since 1994 that the President of the Native Title Tribunal (judicial title notwithstanding) makes frequent media appearances and statements not confined to the more apolitical aspects of the *NTA* . Recently he lectured us to the effect that any attempt to legislate against the *Wik* decision would make us objects of international contempt. [28] And on the day after that decision was announced he warned pastoral lessees that their only choice now is to "negotiate or litigate". [29]

It is fair to add that when a decision of the President displeased native title activists, one of them railed against the Tribunal, in which (he said) there was "no justice", and against a decision which "stinks of racism and corruption." [30] It is very doubtful whether any non-Aboriginal publicist would be permitted to make such remarks with impunity.

Others connected with the Tribunal are less restrained. In a paper presented to this Society in Adelaide last year I quoted some emotively partisan and entirely gratuitous comments on Australian history in the NNTT by a member of the Tribunal. [31] Recently he was at it again: "Lawyers Tip World Backlash if Wik Reversed". [32]

Mr Wootten is one of that growing band of ex-judges who do not continue in office until retiring age, but perform a lateral arabesque when something more interesting turns up. He is another Tribunal functionary who does not shun the limelight. He has advised the Prime

Minister to take lessons on Aboriginal culture, and not even to think about extinguishing native title on pastoral leases:

> "Such a staggering expropriation could only be supported by someone who either was ignorant both of Aboriginal traditions and of the traditions of our Western rule of law .... or was a monster." [33]

When the populace of an outback town resisted Mr Wootten's proposals to dedicate their swimming hole to the Rainbow Serpent, he berated them as "racially hostile" and "environmentally blind", and described submissions which they made to him by legal right as "crude, shallow and self-serving." [34] The new Minister declined to act on Mr Wootten's report.

The staff of tribunals, as well as judges, are well advised to practise judicial restraint, whatever their private enthusiasms may be. The Government should bear this in mind when it is time for appointments or re-appointments to the institutions concerned.

An amendment to the *NTA* to end the Tribunal's inappropriate dual role as claims facilitator and claims mediator should be given high priority.

(f) Reception and Assessment of Evidence

In theory, *Mabo* created native title. In reality it will be created by "voluntary agreements", or by judges' acceptance of evidence from claimants and their supporting "experts". But while forests are being felled to publish native title theory and counter-theory, the evidence problem is either ignored or taken for granted, Hindmarsh Island nowithstanding.

No amendment so far proposed considers the difficulties inherent in obtaining truthful and reliable evidence in support of native title claims, and the extreme difficulty of obtaining evidence to resist them. [35] The evidentiary advantages so strongly favour claimants that there is no justification for retaining a rule [36] that the Federal Court need not observe the rules of evidence in native title cases, and may act upon a motley of findings and opinions, including those of "any other person or body." [37] Courts dealing with minor offences or claims for a few thousand dollars must observe the rules of evidence, but those rules can be disregarded when large slices of Australia are in issue!

In the end, the nature and extent of the new race-based property law will depend on the sort of evidence which is deemed good enough to affect titles which were clear and incontestable until *Mabo* arrived in June, 1992. Claimants' anecdotal evidence will be supported by opinions of anthropologists or other social "scientists" whose finances and careers commonly depend on the goodwill of Aboriginal claimants or their sponsors. The "experts" may have close and lengthy associations with claimants, and a sense of solidarity with them.

Are such "sciences" a sufficiently reliable basis for radical changes to our long-established land title and land management systems? If so, can the scientific impartiality of many of their practitioners be relied upon? Is there a danger that their cultural relativism will become moral relativism in the course of testimony? Social "sciences" are notoriously more prone to personal, political or ideological factors than empirical disciplines : "Research and ye shall find". It will rarely be a good "career move" for an "expert" on Aboriginal affairs to testify against a native title claim. If he is not predisposed to support the cause, he must be aware that jobs, peer-group approval and access to research materials depend on treating discretion as the better part of valour. In 1994 I quoted some observations of a senior journalist, Mr P P McGuinness, on this point. [38] I noted that no public rebuttal of his comments, effectual or ineffectual, had appeared in eighteen months. The time-lapse now approaches five years.

It is interesting to note that the very name "Wik" appears to be a recent anthropological discovery. A community development officer who worked in "Wik territory" between 1976

and 1984 does not recall the people calling themselves by that name a decade or two ago. A brave anthropologist who wrote his PhD thesis there says that, as recently as 1993, when their *Mabo* -style claim was launched, many of the claimants wondered what their lawyers and experts meant by 'Wik people". [39] Let us hope that these commentators are protected in their future careers -- or better, that they do not need protection.

Everyone who is worried about "ambit claims" and conflicting applications should realise that the best, if not the only remedy lies in close, unsentimental scrutiny of claimants' evidence by rigorous and manifestly "uncommitted" members of the judiciary, taking into the account the ease with which claims may be made and the technical and political difficulties in rebutting them.

Without legislative support and careful choice of personnel, courts and tribunals may not display that judicial scepticism with which novel and ambitious claims are properly greeted. Expert witnesses, like juries, are a wonderful responsibility-shifting device at the best of times, especially when a case is a "hot potato". It will certainly be more comfortable to accept the pro-title "experts" than to reject them, and that will be easy if they almost always testify on the claimants' side.

What about *Wik?*

In Adelaide last year I suggested that the *Wik* case (then awaiting judgment) would end in some compromise which would compound the *Mabo* confusion. *Wik* is not merely legislation passed by the thinnest of majorities; it is retrospective legislation. The leases are subject to new and inscrutable limitations. The result was accomplished by expecting governments of one hundred or more years ago to use language perfectly suited to deal with revelations made by the High Court in 1992 and on the eve of Christmas 1996. With the benefit of hindsight, it is not very clever to pick holes in documents written many years before native title was ever heard of.

The extension of the "target area" to pastoral leases is enormous, and the bargaining power of those who claim to speak for less than 2 per cent of Australians is commensurately increased. It is estimated that 40-50 per cent of Australia is now open to claims, mainly in Western Australia, Queensland and the Northern Territory. [40]

Last year it was proposed to insert new sections 25(1) to 25(1F) in the *NTA* to allow pre-1994 pastoral leases to be renewed on different terms. Before *Wik* this may not have caused much controversy. But it would now be subject to the "right to negotiate" if a native title claim arose.

It was also proposed to extend sub-section 235(7) to mining leases. (As it stands, that provision declares the renewal or extension of commercial, agricultural, *pastoral* or residential leases to be "permissible future acts".) When this change was put forward it was thought that native title could not affect pastoral leases. But now an extension of a mining concession which straddles a pastoral lease may give rise to a "right to negotiate" after all.

One of the more remarkable defences of the *Wik* decision is that it has not created much uncertainty. There is, I suppose, no uncertainty if one can unerringly predict meanings which the High Court may attach to "native title", "native title owners", "measure of compensation for native title", "continuing connection with the land", and the arcane relationship which *Wik* creates between pastoral leases and native title.

However, we are told that *Wik* is not a puzzle because it states that rights conferred by pastoral leases prevail over inconsistent native title. Quite so, but that doesn't take us very far. It merely asserts an abstract relationship between two unknowns -- the true extent of thousands of pastoral leases on the one hand, and innumerable native titles of unknown content on the other.

It is not very helpful to be told, in algebraic fashion, that "X" prevails over "Y" until the substance of both "X" and "Y" are known. It is one thing for native title enthusiasts to say: "Yes, there *is* uncertainty, but it is a price of `reconciliation' which we must pay." It is harder to take them seriously when they claim that *Wik* is not a riddle inside an enigma.

There is ample room for argument about the rights given by any particular pastoral lease; it will not be reduced by the availability of public money to fuel the debate. Those leases come in many details, [41] and most of them, being pre- *Mabo* , naturally do not speak with the precision that is necessary now.

The leases are only one side of the equation; the other is more problematical. Will there be a native title claim? If so, what will it amount to? If one is proved, to what extent will it be consistent with the lease? Who are the people with whom the lessee must co-exist? Will there be any other claimants? What disputes might there be about the co-existent rights in practice? How, and at whose expense, will they be resolved? What will happen if native title holders bring strangers to the land? Will the natives pay a share of rent, rates and repairs? Who will be legally responsible for accidents on the property? And if all this is *just too hard* , how much should the lessee pay to be rid of the co-tenants? The President of the United Graziers' Association puts it this way:

> "What I object to is that on a very broad basis we're looking at an arrangement where there's no control over who have access, when they have access, and where they have that access. You could have a scenario now where a group from Musgrave Park [42] could come to my place and go fishing." [43]

The *naiveté* and impractibility of the *Wik* decree surpass even *Teoh* . [44]

What is to be done? The modest amendments proposed last year pale into insignificance now. The radical proposal is that the *NTA* be amended to extinguish native title over pastoral leases, not just in the Preamble and in an ex-Prime Minister's speech, [45] but in the operative parts as well. It seems unlikely that the Government would brave the political passions and the righteousness, real and contrived, which this would provoke. The argument that in the "1993 deal" Aboriginal politicians accepted extinguishment by pastoral leases would not subdue the clamour.

A less radical step would be to define some of the essential concepts which *Mabo* and the *NTA* now leave up in the air. If it seems too courageous to define "native title" or "Aborigine", [46] an attempt might be made to define "connection with the land" and some common forms of access to Crown lands by Aborigines in modern times. The results could be less arcane than current definitions of "category A (etc) past acts", "low impact future acts" and "impermissible future acts". [47] At the same time the States could amend their *Land Acts* so as to enable pastoral leases and licences to cope with the Age of *Mabo* .

No doubt such amendments would be opposed as restrictions upon native title. The drums of discrimination, compensation, human rights and international embarrassment would resume their insistent beat. But if the amendments fail in the Senate, the Government at least can say that it did what it could to make native title manageable. If they somehow pass the Senate, the Parliament will be inviting the High Court to accept reasonable efforts to translate native title from the Court's airy generalities to the real world, or to bear full responsibility for the consequences. How can it be confidently asserted that definitions take something away when no one knows what native title amounts to?

Let us not under-estimate the difficulties -- legal, political and emotional -- which any significant amendments will encounter. There will be "ambit" threats of crippling

compensation, charges of racism, vows to disrupt the Olympics, threats to spend public money on High Court challenges or attacks on Australia in nebulous "international communities". The *RDA* will be held up as a Mosaic tablet which will bear no alteration. Indeed, the politics of the *RDA* may be a more powerful deterrent than wild `guesstimates' about compensation. A leading land-rights activist has already declared that he who dares amend the *RDA* must be in favour of racial discrimination.

The political strength of the *RDA* resides as much in its tendentious title as in the vague declarations and denunciations in its operative parts. (Imagine, if you will, a *Belief in Democracy Act* and picture the trials of any government trying to amend it, irrespective of what it had come to mean in practice, or how it was being exploited.) It was in the 1970s that the formerly prosaic but precise art of legislative draftsmanship began to yield to pious declamations in the style of the United Nations Charter. The unintended or undisclosed consequences of such decrees are incalculable, and their effects on judicial institutions are highly questionable.

The High Court stands ready to revisit *Wik* and *Mabo* . It knows the difficulties which governments face if they do more than tinker with minor details of the *NTA* . The Court's astute use of the *RDA* has given "native title" constitutional status in all but name. But by no means is it the only form of assistance to Aborigines. It was not the first form of "land rights", and it may be the least beneficial.

The Prime Minister does not believe that "voluntary agreements" can solve all the difficulties. He accepts that some legislation will be needed, and that the real question is "how extensive" it need be. [48] It will be fascinating to see whether his Government can eschew extinguishment and yet make changes of real significance.

Endnotes :

1 . *The Australian* , 12 February, 1997 : *Aborigines to Take Hard Line in Talks* .
2 . *Courier Mail* , 22 February, 1997 : *Negotiating a Minefield* .
3 . *Ibid.*
4 . *Courier Mail* , 15 February,1997 : *Death of a Deal* .
5 . *The Australian* , 22Ä23 February, 1997 : *Pro-Mine Blacks `Held to Ransom'* .
6 . *The Australian* , 26 February, 1997 : *Elders Backing Mine Want PM to Act* .
7 . *The Australian* , 22 April, 1996 : *Aborigines Seek Title Safeguards.*
8 . *Courier Mail* , 14 February, 1997 : *Why Wik is a Challenge for All.*
9 . *The Australian Financial Review* , 24 December, 1996 : *Ruling Puts Coalition in a Tough Spot.*
10 . *Courier Mail* , 3 June, 1993 : *Miners Want Mabo Limit.*
11 . *Sydney Morning Herald* , 21 January, 1997 : *What the States Want* .
12 . *Courier Mail* , 18 January, 1997 : *Poll Gives Thumbs Down to Wik Ruling.*
13 . *Courier Mail* , 20 January, 1997 : *Sunset Clause Will End Rights: Lavarch.*
14 . *The Australian* , 1Ä2 February, 1997 : *Spirit of the Land Touches Graziers.*

15. See J R Forbes, *Mabo and the Miners*, in Stephenson and Ratnapala (eds), *Mabo: A Judicial Revolution*, University of Queensland Press (1993), 206 at 213Ä215.

16. "All stakeholders agree that one of the major problems .... is that there is no clear-cut definition of native title": *Courier Mail* , 18 January, 1997 : *Heart of the Matter* . The *NTA* makes no attempt to define it.

17. See for example the analysis of *Mabo* hints in J R Forbes, *Mabo and the Miners* , *loc.cit.* .

18. Commonwealth Constitution, s.51(xxxi); *Clunies Ross v. Commonwealth* (1984) 155 CLR 193 at 201Ä202; *Minister of Army v. Dalziel* (1994) 68 CLR 261.

19. *Tasmanian Dam Case* (1983) 158 CLR 1.

20. *Ibid.* , at 145. Emphasis added.

21. *Trade Practices Commission v. Tooth & Co Ltd* (1979) 142 CLR 397 at 407Ä8, 423, 452; *P J Magennis Pty Ltd v. Commonwealth* (1949) 80 CLR 382.

22. *Op.cit.* , at 181.

23. *Grace Bros Pty Ltd v. Commonwealth* (1946) 72 CLR 269 at 291; *Nelungaloo v. Commonwealth* (1948) 75 CLR 495 at 541Ä42.

24. *Re Minister for Mining and Energy of Western Australia Future Act Application, Appln WF 96/1Ä11*. Native Title Service [100,046] at page 52,074.

25. *Re Minister for Mining and Energy of Western Australia Future Act Application, Appln WF 96/3 and WF96/12*. Native Title Service [100,048] NNTT (Sumner O'Neil and Neate, Members), Perth, 17 July, 1996.

26. As a distinguished State judge of appeal remarked to the writer, parts of the *Trade Practices Act* , on which a great deal of Federal Court jurisdiction has been constructed (and vigorously expanded), are so wide as to resemble terms of reference for a Royal Commission, rather than rules suitable for judicial reasoning.

27. *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 69 ALJR 423. A convicted drug-dealer and his infant children were found to have "legitimate expectations" based on an international treaty of which they had never heard, which had never been translated into domestic law, and which even the criminal's lawyers had not thought of before they reached the appeal courts. Thus mere treaties become part of domestic law via the judges, and official decisions can only be secure if they take account of hundreds of international arrangements.

28. *Courier Mail* , 8 February, 1997 : *Justice Warns Nation Risks Condemnation* .

29. *The Australian* , 24 December, 1996 : *Historic Victory for Native Title* . On 23 January, 1997 the Queensland Premier was moved to refer to the learned tribunalist as "an apologist for the failed native title regime".

30. *Courier Mail* , 15 February, 1995. The decision in question related to the extinction of native title in the *Waanyi Case* . The decision was upheld in the Federal Court but was overturned in the High Court.

31. Quoted in this writer's *Revisiting Mabo : Time for the Streaker's Defence?* in *Upholding the Australian Constitution* , Proceedings of The Samuel Griffith Society, Volume 7 (1996) 111 at 118.

32. *The Australian* , 1Ä2 March, 1997.

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3 . *The Australian* , 4 February, 1997 : Letter from Hal Wootten, NNTT, Sydney.
3
3 . *Courier Mail* , 20 July, 1996 : *Town Hits Back Over Racist Tag* .
4
. See J R Forbes, *Proving Native Title* , in *Upholding the Australian Constitution* , Proceedings
3 of The Samuel Griffith Society, Volume 4 (1994), 31; *Mabo and the Miners* , *op.cit.* , at 212ff;
5 *Mabo and the Miners ÄÄ Ad Infinitum?* , in M A Stephenson (ed), *Mabo: The Native Title Legislation* , University of Queensland Press (1995) 49 at 56ff.
3 . *NTA* , s. 82(3).
6
3 . *NTA* , s. 86.
7
3 . J R Forbes, *Proving Native Title* , *op.cit.* , at 52Ä53. The original article, entitled *Strict Assay*
8 *Is Needed on This Mother Lode* , appeared in *The Australian* , 8 December, 1992.
3 . *The Australian* , 28Ä29 December, 1996 : *Title Fight* .
9
4 . *The Australian* , 7 January, 1997 : *Judgment Adds to Delay and Expense* .
0
4 . About 70 in Queensland alone, as noted in the *Wik* case.
1
4 . A site of some significance beside a high school in inner-city South Brisbane.
2
4 . *Courier Mail* , 29 January, 1997 : *Borbidge Calls for End to Wik Impasse* (Mr Larry Acton).
3
4 . See note 46 and related text.
4
4 . *Commonwealth Parliamentary Debates (Representatives)* , 16 November, 1993, p.2880 (Mr
5 Keating).
4 . As it stands, the *NTA* (s.10) takes the meaning of "native title" for granted and the definition
6 of "aborigine" (s.253) is perfectly circular.
4 . *NTA* , ss.229Ä232, 234, 235.
7
. *Courier Mail* , 3 March, 1997 : *PM Plans `Some Legislation' to Solve Wik Impasse.*

Chapter Eleven

An Australian Dilemma : Reconciling the Irreconcilable

Roger Sandall

There are many things one might say about civilization. But there are only two things to be said about tribalism -- or which have to be said before going into the subject in more detail. One is that it has for many years had a remarkable imaginative hold on the human mind. At least since the time of Rousseau, numerous forms of noble savagery have lurked on the fringes of western consciousness as fancied and fanciful alternatives to civilization. The other is that, despite the bewitching appeal it has for so many people, tribalism just won't do. Tribal justice won't do. Tribal ideas of truth and falsehood won't do. While tribal economics, as an alternative to modern economic organization, are little but a recipe for disaster.

All of this has been known for a long time. Even in the 18th Century, as Rousseau was writing, his compatriot Voltaire was poking fun at the sentimentalism of his ideas and ridiculing the notion of a Golden Age in Antiquity. "London is ten thousand times better than Rome was then," he wrote, and the same went for the rest of Europe. "Paris was then only a barbarian city, Amsterdam was a swamp, and Madrid a desert". Those who don't like city life, he suggests, should go off to the Orkney Islands and try life there, where men eat oats and kill for scraps of fish. If romantic urbanites admire the past so much, said Voltaire, let them practice what they preach and go and live there.

Some might think that Voltaire was merely using 18th Century Orkney life as a butt for French mockery, so perhaps it's worth remembering that the High Tory Sam Johnson, visiting the Hebrides a few years later, felt much the same way. Both men were agreed that, if the culture of these violent and benighted islanders were ever to advance, they would have to mend their ways -- knuckle down, buckle up, stop spilling their porridge, and do other improving things.

Whatever their differences, Voltaire and Johnson both believed in progress. And the good news is that, one way or another, large numbers of old-fashioned Orcadians did lift their game, got themselves an education, brushed their hair and joined the modern world. The death toll from fighting over scraps of fish diminished. It may have taken a couple of hundred years, but the important thing is that they found a way, educationally and culturally, of getting from "then and there" to "here and now", across the Big Ditch separating traditional cultures from modernity. And what I am calling an Australian Dilemma is the fact that a choice is going to have to be made about this Ditch. Because the two sides are not reconcilable, and to pretend that a part of the Australian population -- the Antipodeans -- can stay for ever as a publicly funded cultural protectorate on the other side is an increasingly unrealistic option.

Prevailing views in this area of social policy seem deeply contradictory. On the one hand they embrace the Principle of Cultural Autonomy. This dictates that the Antipodeans should be encouraged to look after themselves in their own places, and to control as much as possible of their lives, the state economically underwriting this highly dependent "independent" status. If things don't work out -- well, too bad. At least they've gone wrong under Antipodean control. But on the other hand, the very people who advocate cultural autonomy also favour the Principle of International Intervention, which encourages organisations like the United Nations to poke their noses into Antipodean affairs. Investigative committees are invited to visit Australia and report

on what they find. And we all know what they find -- disease, illiteracy, alcoholism and homes with broken windows and barely a stick of useable furniture. The investigative committee then announces its findings to a scandalised world, a Graham Richardson or an Alexander Downer rushes off to Central Australia to register, as loudly as possible, their personal dismay and their determination to do something -- immediately. But the only thing that happens immediately is that they collide head-on with the Principle of Cultural Autonomy, find that taking action would mean interfering in Antipodean "internal affairs",and soon after this everything fizzles out ... until next time.

One must ask: what has the enthusiastic promotion of Antipodean Cultural Autonomy for the last twenty years got to show for itself? Dot paintings are pretty, but they will only take us so far. A small well-paid élite with its own ideological priorities is not so pretty, and under the banner of "my culture, right or wrong (at your expense)" seems to be taking the majority of its constituency nowhere at all. In any case,the vital questions are surely these: Are Antipodean literacy rates higher? Can more Antipodeans do their own accounts? Is their health improved? How do they live, and are their houses better looked after than they were? Because those are the things which visiting inspectors from the United Nations are interested in -- not dot paintings or élite privileges. They want to see what progress has been made in the lives of ordinary Antipodeans since they came here last, and how successful they have been in crossing the Big Ditch.

But first let's take a look at this momentous divide between past and present, and try and see just what it means. The best-known Big Ditch thinker was probably Karl Popper. On one side of the Ditch, said Popper, you had tribalism. On the other you had civilisation. Progress consisted of getting across the Ditch, and the first culture across was that of Athens. Such is the underlying sociology of *The Open Society and Its Enemies* . You might say it's a rather crude scheme, and perhaps it is. But it served Popper's purpose, which was to point up the sharp contrast between what he called the "closed societies" of tribalism and the "open societies" of the modern world.

Now the first thing to be said about tribal culture is that, in a number of ways, belonging to a tribe is fun. Emotionally, psychologically, socially, it's often a rewarding place to be. We know this from the millions of people who "go for" this side or that, who troop into sporting arenas all over the world to cheer and shout for their teams. And of course sporting events are just a pale shadow of the past. Old-time tribal warfare as it was conducted for thousands of years was huge fun. Clan fought clan, with swinging claymores and stabbing dirks and blood all over the place, and for those participating, whether winners or losers, it gave a sense of solidarity, of social cohesion, incomparably more satisfying than anything available today. Read Homer. Or get a taste of it from the movie *Braveheart* or from Kenneth Branagh's *Henry V* .

But for Popper's view of civilisation this presents a problem. Because there's no going back to tribal justice, tribal knowledge, tribal definitions of truth, tribal notions of right and wrong -- not as the working principles of a modern society. Lost innocence cannot be regained. For better or worse, the emotional rewards of such a life have yielded to the cooler benefits of civil government, and there is now a Big Ditch separating representative institutions under the rule of law, accommodating diverse associations and protecting individual liberty, from both the solidary warrior states of antiquity and from tribal groups today.

For a score of reasons Popper obviously felt that the civilisation of Athens was preferable to the more barbarous culture of Sparta. It was from Athens that the best in the West had come. Nevertheless, he warned, for some people the Spartan side of the Ditch might have been a more comfortable place to be. Not only more fun, but more reassuring, more secure. This was because the freedom and responsibility required by life in Athens involved higher levels of psychological

strain. "To live in the haven of a tribe", he wrote, "is for many men an emotional necessity". And this was dangerous, since deep yearnings for the lost unity and shelter of tribalism meant that the rational conduct of modern politics would be always at risk. [1]

Friedrich von Hayek said something similar. But he went further. In *The Three Sources of Human Values* he depicts the morality of the traditional world as downright threatening. It is, he argues, the anachronistic social inheritance of aeons of primaeval existence in small bands. (And if you're wondering whether "aeons" is quite the right word, think of the almost unchanging 1,000,000 years of the Old Stone Age.) This meant that for hundreds of thousands of years an ethic had been instilled "which is directly opposed to all that is innovative, creative, progressive in human civilisation .... " In Hayek's words, to be able to build up from nothing a civilisation which countless millions now depend on for their lives, it has been necessary for modern man to "shed many sentiments that were good for the small band, to submit to sacrifices which the discipline of freedom demands but which he hates ...." Collectivism "is thus strictly an *atavism* , based on primordial emotions." Worse still,it is a futile yearning for the wrong side of the Ditch. [2]

Popper had pointed to the connection between communism and fascism and the tribal ethos. He saw both these modern totalitarian political systems as forms of "arrested tribalism". Recently, in 1996, Herbert Giersch alluded to something similar in a discussion of *Tribal Morality and Macro Society* , where he took up the same themes. "In Germany", he said, "much of the instinctual morality of the tribe was taken up and abused by National Socialism in an esoteric-romantic variant to exploit the readiness of people to submit. `You are nothing, your people is all'... -- these were typical slogans by which the propaganda of the `Thousand Year Reich' tried to transfer tribal morality to macro society." (It might be noted that, in much the same way, today's Antipodean leadership are very much inclined to say to anyone bold enough to dissent from the dominant majority, "But you are nothing. Your culture is all!")

In his own version of Big Ditch theory Giersch argues against the fatal illusion that the moral rules of the small bands in which mankind lived for hundreds of thousands of years in the Stone Age (this being what he calls the `instinctual morality of the tribe') can be transferred across the Ditch into the modern world. The result of this effort could be seen in the system communism created. Instead of tribal morality being *modernised* (the hopeful socialist ideal), a fateful attempt was made to *tribalise* modern industrial organisation, the disastrous consequences of which only ended in 1989. [3]

Now, as I'm sure you realise, this is pretty shocking stuff, and it's especially shocking to anthropologists. No self-respecting member of the profession would dream of letting Hayek and company get away with it. Certainly not Marshall Sahlins, who published his well-known book *Stone Age Economics* in 1974. Before making a trip to Chicago in that year, a colleague begged me to bring him back a copy of what he confidently predicted would become a classic. He was right, and the following will give a taste of what this classic contains:

> "The hunter, one is tempted to say, is `uneconomic man'. At least as concerns non-subsistence goods, he is the reverse of that standard caricature immortalised in any *General Principles of Economics* , page one. His wants are scarce and his means (in relation) are plentiful. Consequently he is `comparatively free of material pressures', has no `sense of possession', shows `an undeveloped sense of property'... and manifests a `lack of interest' in developing his technological equipment.

> "Economic Man is a bourgeois construction ... It is not that hunters and gatherers have curbed their materialistic `impulses'; they simply never made an institution of them ... We are inclined to think of hunters and gatherers as *poor* because they don't have anything; perhaps better to think of them for that reason as *free* .
>
> "Want not, lack not." [4]

To which I need perhaps only add that when Sahlins touches occasionally on the profit motive there's usually an outburst of bad language about "theft", "robbery" and "chicane". Indeed, one easily gets the impression that Sahlins' attitude toward modern capitalistic enterprise owes about as much to Proudhon's announcement that "all property is theft" as to anything else. Needless to say, you can forget about any Lockean notions that rights to land embody an ethic of productivity, or a reward for bringing land into cultivation. In Sahlins' view the very 'neolithic revolution" itself, the domestication of plants and animals and the introduction of farming, along with the huge increase in food it made possible, was a fatal backward step. Crossing the Ditch, for Sahlins, is synonymous with the Fall of Man.

But on the other hand there's nothing surprising and nothing much wrong with his description of Stone Age economic attitudes. Primitive economics, with its pattern of reciprocities, its enmeshment in the wider social structure, its hostility to accumulation, its rigidly regulated rules of distribution, its come-one, come-all dispersal of domestic resources, is largely what he says it is. Primitive attitudes toward nature, which emotionally fuse the secular and the divine, are just that. All that's surprising is the attitude of the author towards this sort of thing. Marx at least regretted that large numbers of peasants were condemned to what he called "the idiocy of rural life". Sahlins, a modern American professor, unregretfully praises the idiocy of the palaeolithic. And unfortunately, no Voltaire among his colleagues rose up to say: "Well, all right then, go and live there!" Possibly because they were all too busy flying off to conferences which glorified the world before the wheel.

So in each of these areas -- in politics as discussed by Popper; in the domain of social ethics discussed by Hayek and Giersch; in the economics set before us by Sahlins -- profoundly irreconcilable aspects of the tribal and the modern worlds are displayed. Is there anything else?

Indeed there is, says Professor Ernest Gellner, the Big Daddy of Big Ditch thinking, from whom some of these examples have been borrowed. We also have to take into account what passes for "knowledge" in the pre-modern mind; take into account what he calls, with beguiling frankness, "the blatant absurdity" of many primitive beliefs. What Gellner is pointing to here is the uncomfortable fact that 99 per cent of the prehistory of the human mind is the history of error, of grotesque misunderstandings.

Item: The amazing and amazingly widespread notion, thousands of years old, that by poking about in the steaming entrails of a newly slaughtered goat you can foresee the future. (That is, by reading intestinal omens.) Item: The notion that distant stars are interested in the fates of either you or me. Item: The idea that by messing about with the waters of some coastal estuary the fertility of local women will be impaired.

In all these examples,the natural and the social, cold physical facts on the one hand, and warm dollops of wishful thinking on the other, are hopelessly confused -- while at the same time receiving a cultural rationale. A common way of describing knowledge in modern society is to say that knowledge consists of "rationally justified true belief". By contrast, what is misleadingly called "knowledge" in pre-modern societies usually consists of "culturally justified false belief".

The trouble is, says Gellner, that in pre-modern cultures illogicality is woven into the fabric of social life. Professor of Philosophy at the London School of Economics from 1962 to 1984, Professor of Social Anthropology at Cambridge from 1984 to 1993, he is the author of the least-mentioned and most profoundly ignored books in any modern anthropology curriculum; and in an effort to define the essential differences between the two sides of the Big Ditch, he formulates an interesting sociological law: *logical and social coherence are inversely related* . Social coherence being the primaeval priority, logical coherence being the priority of modern life. [5]

What does this entail? Well, since the essence of traditional societies is *solidarity* , it is in old-time traditional cultures that, when push comes to shove, facts and truth are always likely to be sacrificed to social needs. We saw this recently. When, in the name of solidarity, some South Australian Antipodeans became committed to the defence of a non-existent `tradition' at Hindmarsh Island, facts and truth were promptly thrown overboard. (The fourteen women known so patronisingly as the `dissidents' were in fact a good deal more than that. They were upholding a radically different view of truth. Not the intimidating kind which says, "what the collective says is true, *is* true -- or else!", but the kind which involves an independent individual freely deciding, on the basis of available evidence, that this, rather than that, is the case.)

Conversely, since the essence of modernity is a respect for *facts* and *truth* , modern life is where the ties of social solidarity are often most severely strained. We have also seen an example of this recently. In the reform of the New South Wales Police, despite visible strains in the social fabric, several suicides, and public funerals attended by the best people in town, social solidarity has had to yield to the legal processes by which those in error are brought to book. And innumerable previously closed envelopes have been opened.

One final example, because more than anything else it highlights the difference between the tribal mind and the way we live now. You may have noticed that, despite six months of investigation, the FBI still does not know what caused the crash of that 747 off Long Island last July. "We understand what the families want", said the FBI director recently. "They want answers, and we want those same answers, but we just don't have them, and we are not going to make up some answer for the sake of doing that." In the contrasting circumstances of tribal society, when inexplicable disaster strikes, there is *always* an answer, it is invariably *made up* to fit the situation, and its first and sometimes its only priority is to *fix the blame.* Witches, sorcerers, and the invisible but malign motives of one's enemies are the ever-present and universal agents of misfortune. In all of this, the motive of vengeance is paramount. "Someone's going to pay for this!" is the attitude which overrides all matters of fact. Try telling Saddam Hussein that, although 230 of his closest associates have just been blown away, nothing can be done because unfortunately we just don't know why. The messenger would be only the first to die.

So whatever happened to common sense? Because of course in some areas the tribal mind is realistic enough. If you want to know whether there's a bear in the cave or a croc in the creek, you can trust a palaeolithic hunter where you'd be mad to trust a professor. In matters of life or death, always ask the hunter first. It's when he attempts to explain the unobservable (the mysteries of human fertility) or deal with unaccountable misfortune (why me and not you or him?) that the Stone Age imagination goes hopelessly astray. Again, it is perfectly true that cognitive absurdity is to be found at all levels of social evolution. Sam Johnson believed in clairvoyancy. A famous actress friend of a well-known Australian politican believes in "channelling". It is even possible, judging from the popularity of New Age magazines, that more people in more places now believe more nonsense than ever before. But that misses the point.

The argument about the cognitive Big Ditch is not about individual minds. It is about institutions. And what distinguishes the West from the rest is that its political, judicial, and scientific institutions obey rules and procedures designed to circumvent the frailties and follies of individual minds and to get at the facts. Ultimately (i.e. above and beyond the glamorous attractions of a consumer society), that is why life in the West is politically desired, judicially admired, and is a huge and unprecedented scientific success.

Now let's turn to some directly practical matters. What is likely to happen, for example, when tribal attitudes and rules are imported holus-bolus into the machinery of modern administration? Into a world, that is, which rightly assumes that the office and the office-holder are two different things; that appointment should be by merit only; that public funds are not private resources; and that accounting procedures and documentation must accompany all officially authorised tasks?

Of course, we all know what is likely to happen -- chaos. Because, as any reader of Max Weber knows, there is the most radical and irreconcilable contrast between the modern organisation of such matters and the conduct and attitudes prevailing in the pre-modern world. There, in contrast, a man is obliged to favour his relatives (it is a sign of loyalty), is expected to opportunistically use whatever funds come his way for their benefit, is unable to psychologically separate office and incumbency, and, having learnt his accounting and economics in the school of Professor Marshall Sahlins, usually has a lofty disdain for such things.

A tribal take-over of a modern government agency is therefore likely to see a complete inversion of modern administrative values. Nepotism will no longer be seen as a vice. It will be seen as a virtue. The private use of public funds will not be seen as strictly forbidden. It will be obligatory. Under such a regime it is entirely fitting that one's relatives be appointed as "researchers" and "assistants" and "associates" and "facilitators". That is exactly what those relatives expect from any loyal member of the tribe, and they will be very disappointed if they are not appointed to such positions.

Or consider the economic categories of "transaction costs" and "information costs". [6] A concern with reducing these to the minimum is a proper concern of both business and government. But in the pre-modern world transactions, far from being reduced or economised, are enlarged and ritualised, are ornamented with art and ceremony and food and drink, are prolonged as much as is humanly possible, and accompanied by so much social elaboration that, more often than not, the irreducible inner kernel of economic benefit is hard to find. I am not suggesting that anything quite like this either will or must take place in transactions undertaken by agencies staffed by tribesmen. But given the expectations of the troops, a tendency toward this sort of thing is only natural.

It is however on the question of "information costs" that we come face to face with true irreconcilability. For as Hayek and others have stressed, nothing is more central to the social and economic organisation of a free and open society than the free and open flow of information. The concept of an "information society" has become popular in some quarters, and uniform and equal access to information has become a significant legislative concern. By contrast, the whole emphasis of tribalism is on the control, restriction, and withholding of information. Only specific categories of people are allowed access, and this restriction is inseparable from the wish to preserve distinctions of status, power and prestige. Thus the role of "secret knowledge" possessed only by a chief or priest or elder -- which, translated into plain English, means information strategically doled out or withheld for political purposes.

Seen from this perspective, the three enquiries into the Hindmarsh Island dispute are a dramatic instance of the information costs imposed on a modern economy by the conflict between the

requirements of decision-making in open and in closed societies. In terms of information, perhaps never in the history of judicial endeavour has so much been paid, by so many, for so little.

Such however are the typical effects of tribal demands for loyalty, for solidarity -- for *social* coherence. Of the contrasting world which you and I inhabit Gellner says that "it is the complex and cognitively `progressive' societies ... which possess a high level of *logical* coherence. All `facts' can be cross-related and fitted into a single logical space." Within this space "there are no special, privileged, insulated facts or realms" -- no secret envelopes, no unapproachable mysteries. That's what living in an open society means.

So what are the policy implications of all this? And why do they involve or imply an Australian Dilemma? Big Ditch theory argues that there is a profound and irreconcilable difference between the beliefs and practices of traditional tribal cultures and the modern world, and that if traditionalists are to take part in that world, individually and collectively -- the participation of all citizens of equal legal status being the foundation of modern democratic life -- then sooner or later they will have to cross the Ditch.

This is something numerous peoples and cultures have achieved over the past two hundred years -- it is certainly something the Orkney Islanders achieved. Of course, they had numerous advantages compared to Australia's Antipodeans. In the year 1770 the Orcadians had been farmers trading wool and hides for centuries, while the Antipodeans were simple hunters and gatherers using wooden and stone tools. Freehold land tenure has existed in the Orkneys for a thousand years. The average Orcadian had known 400 years of Scots preceded by 500 years of Norsemen, and had directly experienced the costs and benefits of state administration, powerful overlords, and the moral and intellectual discipline of the Church. There was nothing equivalent here.

But despite all these immense advantages, consider for a moment a negative hypothesis about how things in the Orkneys might have turned out. Try and imagine how the Orcadians would have managed under the policies advocated in Australia today. Would they have made much progress after 1770 if, instead of being able to respond to various incentives for modernisation, there had been a state-sponsored structure of disincentives to cultural change? If they had been told that their ancient ways were fine -- just fine -- and that their main priority should be to hold fast to their culture and Be Proud? If, whenever somebody tried to introduce improvements, they were warned that this might undermine their True Identity? If, instead of learning to add and subtract and keep their accounts, they were warned against the linear thinking of the dreadful Sassenachs? If, instead of adopting modern health procedures, they indulged a taste for old-time Caledonian Cures? If they were at all times encouraged, despite the visible deterioration of many island communities into lawless sociopathic disarray, to fall back on the slogan, "My culture, right or wrong"?

In Viking days some Orcadians were possibly slaves; and over the succeeding centuries they were several times overrun and slaughtered by invading forces. No doubt this occasioned much temporary misery. But what if this were then treated as a ubiquitous exculpation clause, the Orkney Islanders being urged to indiscriminately invoke these historic misfortunes as an excuse for the delinquency of their bairns, for their love of whisky, for their derelict windowless cottages and Lord knows what else? What progress would the Orcadians have made if the Scottish Parliament had espoused the principle, not that each citizen of the realm was an equal bearer of rights and duties, but that the Orcadians, by virtue of their belonging to a distinct culture, and as historic victims of dispossession, were collectively entitled to a range of rewards

and immunities and exemptions with no complementary duties attached? This is mere speculation, of course, but it seems to me that the chances are better than even that in this situation the Big Ditch separating the Orcadians from the modern world would today be as wide as the distance from John o' Groats to Scapa Flow, and the succession of busybodies from the United Nations would never end.

The source of the foregoing collection of sedulously cultivated grievances, delusions of grandeur, fantasies of political autonomy, and demands to be treated both as equal and more than equal (while at the same time being exempt from the standards applied to everyone else) is of course the doctrine of "multiculturalism" in word and deed. Central to this doctrine is the denial that a Ditch exists -- or if it does exist,that anyone should be urged to cross it. And it is both illuminating in itself, and a striking comment on the paralysis of Australian thinking on this matter, to note how far the views of a representative collection of American left-liberals, once sympathetic to such doctrines, have now changed.

Their thoughts can be studied in the 1994 book *Multiculturalism: Examining the Politics of Recognition* . After fifty pages of beating about the philosophical bush, Charles Taylor concludes that, while an ecumenical view of cultural variation is morally admirable, acknowledging the *equal worth* of all cultures is just not on. [7]

Commenting on Taylor, Michael Walzer asserts that, since immigrant minorities voluntarily chose to leave their old cultures when they came to America, they should now accept the rules of their adopted country, adding that it is incompatible with the liberal idea of individual rights that we should "treat our minorities as endangered species in need of official sponsorship and protection." [8]

And then there is the interesting case of K. Anthony Appiah, formerly of Ghana, now of Harvard University, and a famous name in progressive circles. Professor Appiah knows very well how he got across to the Harvard side of the Ditch, so he is naturally loth to give too much educational authority to provincial tribal cultures on the other side: "as children develop and come to have identities whose autonomy we should respect", he writes, they may reasonably expect the state to protect them from cultural and familial backwardness. [9]

In conclusion, Steven C. Rockefeller argues that the mere survival of this or that culture should not be regarded as an ultimate goal in itself:

> "The democratic way means respect for and openness to all cultures, but it also challenges all cultures to abandon those intellectual and moral values that are inconsistent with the ideals of freedom, equality, and the ongoing cooperative experimental search for truth." [10]

In brief, the only proper ultimate goal in a democracy is the survival of civilization itself.

It would be nice to think that sensible reconsideration along these lines would eventually be found on the Australian Left as well. But I am disinclined to hold my breath until it does. As it is, with the ideal of equality and integration replaced by preference and separation, and a once-large reservoir of public goodwill now souring into resentment and despair, Gellner's words on the damaging effects of aggressive ethnic nationalism within the modern industrial state seem more apposite. He is commenting on the fact that much romantic nationalist fervour is born from a reaction against the requirements of industrial modernity, and that this reaction tends to freeze or petrify all that is most backward in traditional life.

"Equality of status and a continuous, shared culture", he writes, "seems a precondition for the functioning of a complex, occupationally mobile, technically advanced society. Hence it does not easily tolerate cultural fissures within itself, especially if they correlate with inequality which thereby becomes frozen, aggravated, visible and offensive." [11]

It seems to me that the net effect of over twenty years of the anthropologically aided and abetted policy of "my culture, right or wrong" has been precisely to reinforce among the Antipodeans an "inequality which thereby becomes frozen, aggravated, visible and offensive." This seems quite well to describe the situation we are in. Surely there has to be a better way.

Endnotes :

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Chapter Twelve

The Wik Judgment

S E K Hulme, QC

Introductory

I suppose that at no time after 1788 was there greater goodwill towards Aborigines throughout the whole of Australia, than at the time of the constitutional amendment of 1967. The amendment did two things. It deleted from the Constitution s.127, providing that Aboriginal natives should be excluded from any reckoning of the numbers of the people of the Commonwealth or any part of it, and it gave to the Commonwealth power to pass laws with respect to Aborigines (by removing an exception which had taken "the aboriginal race" out of the s.51 (xxvi) power to make laws with respect to "The people of any race").

The amendment is one of only two amendments which the Australian people have ever approved, to give more power to the Commonwealth. (The other was the social services amendment of 1946). The proposal received the support of all major parties and almost all sections of the community. It was approved in all States, and by 90.77 per cent of the voters, a figure not approached before or since. It may be worth observing that the proposal was brought forward by a Liberal-Country Party government, led by Harold Holt.

Since that time many laws to do with Aborigines have been passed by the Commonwealth, and many billions of dollars have been spent by the Commonwealth. In recent years we have *Mabo* and the *Native Title Act* . The result has been that the overall health and happiness of the Aborigines is perhaps lower than at any time since 1967. No politician dares say so, and church and media would no doubt deny it; but I fancy that general community goodwill towards Aborigines is also at its lowest since 1967. If you doubt it, listen to the response when Pauline Hanson speaks on talk-back radio. There has been what is widely seen as a very expensive and almost total failure of perfectly good intentions. The tale continues.

The Comalco and Aurukun Matters

The decision in *Wik* [1] will be remembered famously for what it decided and said as to pastoral leases and native title. That must not be allowed to obscure the fact that the case raised other issues also. These arose in connection with what may be called the Comalco and Aurukun matters.

Within an area of native title claim, Comalco Aluminium Ltd. held several bauxite mining leases issued under an agreement called the Comalco Agreement. Entry into the Agreement by the State was authorised by the *Comalco Act* 1957 (Q'land), and that Act gave the Agreement itself statutory force. In paragraphs 40 to 95 of the Statement of Claim various attacks were made on the validity of the Act (these attacks were subsequently abandoned) and the Agreement and the leases.

It was said, broadly, that the Agreement and Special Bauxite Mining Lease ML 7024 were invalid, on the ground of procedural unfairness: the making by Queensland of the administrative decisions to enter into the leases would affect the holders of native title in the land concerned, and those holders had not been heard before the decisions were made; further, Queensland had an interest in the matter that Queensland was deciding (paras. 49 to 53). It was said that the Agreement and the leases were separately invalid, because Queensland owed fiduciary duties to

the Wik people, and duties as a trustee, and it had acted against their interest, in breach of those duties (paras. 54 to 58). It was said that Comalco knew of the breaches, and was liable to the Wik people, as a constructive trustee, for profit resulting to it as a result of those breaches (paras. 59 to 61); that Queensland and Comalco were both aware that the rights of the Wik people would be affected by the Comalco Agreement, and were liable in unjust enrichment (paras. 62 to 64); and that Comalco was liable for unlawful exploitation of the bauxite deposit (paras. 65 to 68).

A broadly similar attack was made in respect of an agreement called the Aurukun Associates Agreement, entered into under the *Aurukun Associates Agreement Act* 1975 (Q'land) (paras. 92 to 147). The substantial defendants to this attack were Queensland and Aluminium Pechiney Holdings Pty. Ltd.

Various issues had fallen by the wayside on the way to and before Drummond J., and in turn the High Court. There remained one broad question on the Comalco matter:

> "4. May any of the claims made in paras. 48A to 53, 54 to 58 (a), 59 to 61, 61A to 64 and 65 to 68 of the further amended statement of claim be maintained against the State of Queensland or Comalco Aluminium Ltd. notwithstanding the enactment of the *Comalco Act* , the making of the Comalco Agreement, the publication in the Queensland Government Gazette of 22 March, 1958 pursuant to s.5 of the *Comalco Act* of the proclamation that the agreement authorised by the *Comalco Act* was made on 16 December, 1957, and the grant of Special Bauxite Mining Lease No. 1 ?"

Question 5 asked a similar question as to Aurukun.

Drummond J. answered both questions, No. The High Court was unanimous in agreeing.

Brennan CJ. (Dawson and McHugh JJ. concurring), and Kirby J. (Toohey, Gaudron and Gummow JJ. concurring), gave broadly similar reasons. The plaintiffs did not attack the validity of the *Comalco Act* . That Act gave the Comalco Agreement statutory force. The Agreement entitled Comalco to require the issue of the lease. It followed that the granting of the lease could not lead to actionable claims. Question 5 was answered in like manner.

It will be seen that the decision was put on the basis that the *Comalco Act* authorised the granting of the specific lease. The judgments (I say it not in criticism, but simply as fact) said nothing as to the underlying allegations outlined above. But in the ordinary mining case, there will be no special legislation. Matters will rest solely on general *Mining Acts* , plus administrative action by the State. The result is to leave undetermined, save in special circumstances, the allegations concerning the State's allegedly unfair administrative procedures in determining and granting leases and its alleged position as a trustee, and breaches of that trust; and the consequent claims for damages.

There is need for very great caution in any area where attack on these grounds is available. The holder of the lease can find himself exposed to the claim that his lease is invalid, and that he must account for profits made and must pay on the basis of unjust benefit. The claims rest mainly on the views of Toohey J. as expressed in *Mabo No. 2* . Probably their best chance of acceptance has passed. But curious things can happen (see *Mabo Nos 1 and 2)* , and it is to be remembered that Toohey J. has been in the majority in *Mabo No. 2* and *Wik* .

What is the field in which these attacks are open? I see nothing to distinguish leases under the *Land Acts* from leases under the *Mining Acts* in this respect, and nothing to distinguish Queensland from the other pastoral States. Save where there has been special legislation (as with most very large mining projects), all mining and pastoral leases in the pastoral States seem to me exposed to the possibility of these claims.

A further field exists. Most grants in fee simple have been made by executive action under general *Land Acts* legislation. One would think the administrative procedure and trustee attacks would be *stronger* here, since we know that a (valid) grant in fee simple *does* , and *totally* , extinguish native title. Torrens title legislation may intervene to protect the holder, but this seems uncertain. I believe that a claim over land held in fee simple is already in the courts.

The Pastoral Lease Issue

(a) Introduction

This is the issue on which the fame or notoriety of *Wik* will chiefly depend. Question 1B asked, in relation to one lease:

"....

> (b) does the pastoral lease confer rights to exclusive possession on the grantee ?
>
> (c) does the creation of the pastoral lease that has...(this) characteristic confer on the grantee rights wholly inconsistent with the concurrent and continuing exercise of any rights or interests which might comprise such Aboriginal title or possessory title of the Wik Peoples and their predecessors in title which existed before the *New South Wales Constitution Act* 1855 (Imp) took effect in the Colony of New South Wales ?
>
> (d) did the grant of the pastoral lease necessarily extinguish all incidents of Aboriginal or possessory title of the Wik Peoples in respect of the land demised under the pastoral lease ?"

Question 1C asked similar questions as to other leases.

At first instance, Drummond J. held that he was bound by the decision of the Full Court of the Federal Court in *North Ganalanja Aboriginal Corporation v. Queensland* [2] to hold that the mere *grant* of a pastoral lease extinguishes native title, provided the lease is for a significant period, and subject to any inconsistent provision in the lease; and that nothing turns on whether the rights under the lease and the native title can both be enjoyed without interfering with each other.

Pastoral leases are directed predominantly to the back-country. They go a long way back in our history. They seek to reconcile the large-scale which successful pastoral activity must take in those often arid areas, and the security of tenure required for capital investment to that end, with the desire of government to retain ownership of the land in order to meet the demands of the unknown future.

In almost every State a statute called something like the *Land Act* authorises the granting of such leases, usually and perhaps invariably prescribing a grant to be made in formal legal language. The lease is frequently but not always expressed to be "for pastoral purposes only". The grant is usually made with reservation to the Crown of all minerals (as are all modern grants in fee simple). The lease frequently imposes obligations for the expenditure of money on such matters as fencing, bores, and these days airstrips. Almost invariably it reserves a right of entry to persons authorised by the Crown, for any reason, including inspection and survey. It is usually expressed to be subject to rights arising under mining legislation (as is most land held in fee simple). It may oblige the lessee to permit the passage and depasturing of cattle moving along recognised stock routes. In some States (but not Queensland) it is customary for the lease to include a clause requiring the lessee to permit Aboriginal natives to hunt, etc. in their traditional manner.

(b) The Minority View as to Exclusive Possession

Because it represents traditional analysis of a known kind, and sets up the issues more clearly, it is convenient to begin with the judgment of Brennan CJ. (Dawson and McHugh JJ. concurring), holding that the grant of the lease *did* extinguish native title.

The judgment rather jumps into the issue without that prior explanation so useful to the non-lawyer members of this Society, and accordingly it might be helpful to make a few preliminary remarks as to the significance of "exclusive possession". The basal distinction between a person who has a mere personal licence to be on someone else's land (e.g. a visitor, or a spectator at a football match, or each of us here this morning), and a person who has an interest constituted by a lease of the land, revolves around this concept.

Exclusive possession is in a sense both the touchstone and the consequence of being a lessee. In general, if you have a right to exclusive possession, you are a lessee. If the instrument under which you hold is a lease, you are entitled to exclusive possession. Windeyer J. spelled it out in *Radaich v. Smith* :[3]

> "What then is the fundamental distinction which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise."

In determining whether or not the transaction is one of lease, the court of course looks at the language of the document concerned. Brennan CJ. went through the terminology of the Act and the technical language of lease which the Act used for itself and prescribed for the lease. He cited a passage from an earlier judgment of his own in *American Dairy Queen (Qld) Pty. Ltd. v. Blue Rio Pty. Ltd* :[4]

> "By adopting the terminology of leasehold interests, the Parliament must be taken to have intended that the interests of a lessee, transferee, mortgagee or sublessee are those of a lessee, transferee, mortgagee or sublessee at common law, modified by the relevant provisions of the Act. The incidents of those interests are the incidents of corresponding interests at common law modified by the relevant provisions of the Act."

His Honour called in aid the reasoning of the Privy Council in *AG v. Ettershank*,[5] where their Lordships said as to the *Land Act* 1862 (Vic.):

> "What the Act of 1862 authorises and prescribed in the case of a selector, is that he shall receive `a lease', and by s.22 such lease is to contain `the usual covenant for payment of rent', and a condition for re-entry on non-payment thereof. When, therefore, the statute authorises a lease with these usual and well understood provisions, it is reasonable to expect that the Legislature intended that it should operate as a contract of the like nature between private persons."

His Honour said that if the leasehold is regarded as a mere bundle of statutory rights, not as an estate held of the Crown, the same is equally true of a grant of land in fee simple.[6]

That was the main thrust of the argument. His Honour dealt with certain features alleged to turn things here the other way. The obligation to allow persons authorised by the Crown to enter for purposes of inspection, etc., his Honour regarded not as something inconsistent with a right of exclusive possession, but rather as showing that there *was* a basic right of exclusive possession.

So also with the express obligation to allow cattle to pass along the established stock routes. His Honour cited a passage from the judgment of the Privy Council in *Glenwood Lumber Co. Ltd. v. Phillips* :[7]

> "If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."

It is a good and a strong judgment. As previously I have made some criticism of his Honour's judgment in *Mabo No. 2* , it is proper that I should say so.

I might add that many instruments which no lawyer would have doubted were leases, contain quite severe restrictions and reservations of one kind and another. A lease of premises in a large shopping mall will normally specify the only purpose for which the land may be used (e.g., as a milkbar), will reserve a right of entry for persons authorised by the landlord, and will require the premises to be open for business during certain hours: i.e., will require that the lessee allow other persons to be on the leased premises for much of the day (and night). I have never heard it suggested that any of this was inconsistent with "exclusive possession", or prevented the transaction being one of lease. Questions as to the right of exclusive possession have been determined in a sensible way, in accordance with the kind of property the subject of the lease.

(c) The Majority Views on Exclusive Possession

Toohey J. notes the use of formal technical language, but points out that *these* leases are the creature of statute. [8] So of course they are. But if the statute prescribes the use of an instrument in a known form, why should one not take it that, subject to anything else the statute might say, the statute intends the instrument to carry the incidents which in all other circumstances accompany the use of that known form?

Toohey J. puts *Radaich v. Smith* to one side, as arising in a context of commercial agreements designed to avoid tenancy protection. Why that makes irrelevant what was said by Windeyer J. as to the distinction between lease and licence, Toohey J. does not say. He notes the dictum of Brennan J. in *American Dairy Queen* , but puts it aside because the case concerned the assignment of a sub-lease, in a commercial context. Again, his Honour gives no explanation of why that fact makes irrelevant what Brennan J. said as to the effect of using in a statute the formal language of lease. All cases arise in some kind of context. The approach Toohey J. takes here would let him distinguish as irrelevant almost any authority cited to him.

His Honour cites 19th Century despatches indicating governmental intention that land already used by natives for hunting should continue to be available to them for that use. The relevance of an 1839 despatch from Sir George Gipps to the Secretary of State, to the interpretation of the *Land Act* 1962 (Queensland) is neither obvious nor explained. Self government has not gone as far, it would seem, as I thought it had.

Gaudron J. turns to the *Land Act* 1910. [9] Her Honour notes the use of technical language and the adoption of the distinction between lease and licence. The force of this is said to be reduced by various factors. Since the pastoral lease is the creature of statute, one cannot take it that the pastoral lease has the usual accompaniments of a lease. One must look within the statute for indications as to whether the pastoral lease is to carry the right to exclusive possession.

Yes, one must. But do not the facts that the statute prescribes for the pastoral lease the normal language of the normal lease, and in its ordinary context that language carries that right, constitute the statutory sign that her Honour sought? Attention is drawn to the existence in the lease of various restrictions on the use of the leased land. Throw in the presumption that a

legislature will be presumed not to intend to interfere with property rights unless it evidences that intention clearly, and her Honour finds no exclusive possession here.

Gummow and Kirby JJ. give essentially similar reasons, and it seems unnecessary to pursue them individually. Accordingly, the claim to a right of exclusive possession failed.

(d) The Question of Extinguishment

There being then no automatic extinguishment of *all* native title rights by the grant of the pastoral lease, questions arose as to when extinguishment of some rights might occur.

Toohey J. says [10] that the essential test is the ability of each particular native title right to co-exist with the pastoral lease. This would require specific examination of the particular native title right claimed, and of the particular lease. Toohey J. does not say in express terms whether what is done by the pastoral lessee matters, but it would seem that his test is not what is done, but what the terms of the lease require (or perhaps permit) to be done.

Gaudron J. sees the argument that things such as the erection of a manager's residence support the case for exclusive possession. [11] That argument she has already rejected. She says that the question whether *performance* of the *conditions* attached to the lease has impaired or extinguished a particular native title right will depend on evidence led at the hearing. No reservation is made for performance of things permitted but not required by the terms of the lease.

Gummow J. says that it could be that "enjoyment" of native title rights would be "excluded" by actual construction of the airstrips and dams required by the lease. That would depend on the facts. How these alternative terms "enjoyment" and "excluded" fit with the concept of "extinguishment" his Honour does not tell us. What is clear is that the event which would bring about the change is the performance of conditions, and not the imposition of them, by the grant of a lease requiring them. [12]

Kirby J. takes a flatly contrary stand on that point. The answer must lie in the rights granted, not in the manner of their exercise. To allow native title to be affected by what the holder of the lease *does* would be tantamount to giving him a kind of unelected delegated power to alter rights. "This cannot be." [13]

The End Position

It is dismaying that none of the majority judgments so much as adverts to the fact that leases may *permit* things to be done, without *requiring* them to be done. A lessee may do much on a pastoral lease which is not *required* to be done, but is done in order to have a better property. Nor does any of the judgments advert to the fact that, where something is required or permitted to be built, the lease may very well not prescribe a particular site for it. Often the lease *could* not do so. The successful bore will be where water is found, not where a clerk has marked a place on a map. The Lands Department will not carry out a special survey and ground analysis to determine the precise site for the airstrip. The lease will express itself along lines of requiring that an airstrip be built "in the area north of Judges Creek", leaving its precise location to the future and the decision of the lessee.

Gaudron and Gummow JJ. both see the possibility of extinguishment (Gummow J., "exclusion"/ "enjoyment") flowing from performance of a condition. Neither makes provision for the case where the improvement is permitted, without being required. It appears that improvements made voluntarily will *not* extinguish (and therefore cannot be allowed to interfere with) native title rights.

Where a work is required, but its location is not fixed by the lease, it seems unlikely that it would be held that inconsistency at grant exists *everywhere* , because of what is later to happen

somewhere in the lease. Yet the practical choices must be everywhere or nowhere. The thought of identifying *all* areas that might be suitable for an airstrip, and finding inconsistency on all of them because all are at some kind of risk, would be bizarre. And if one did do that, Kirby J. at least would then maintain the inconsistency on *all* of the possible sites even after the airstrip had been built, since to do otherwise would mean that the lessee had altered legal rights, by building the airstrip at this site rather than on one of the others. "This cannot be."

It is impossible to feel sure, but the broad position seems to be:

(1) Work Required by Lease

A. *Site Located by Lease*

At Grant: Toohey and Kirby JJ: Inconsistency would arise.

Gaudron and Gummow JJ: No inconsistency can arise.

On Performance: Gaudron and Gummow JJ: Inconsistency can arise.

B. *Site Not Located By Lease*

At Grant : No inconsistency can arise, because one cannot identify the site affected.

On Performance: Gaudron and Gummow JJ: Inconsistency could arise.

Kirby J: No inconsistency can arise, as the lessee cannot have power to alter legal rights.

Toohey J: Not clear.

(2) Work Permitted But Not Required

A. *Site Located by Lease*

At Grant: Toohey and Kirby JJ : No inconsistency can arise, as you cannot say that native title cannot co-exist with a mere possibility of future voluntary action.

Gaudron and Gummow JJ: No inconsistency ever arises at grant; and in any event no inconsistency arises from making an improvement which is no more than permitted.

On Performance : Gaudron and Gummow JJ: Performance of a condition can lead to extinguishment, but not in the case of a voluntary action.

Kirby J: No extinguishment can arise from an action by a lessee, still less a voluntary action.

Toohey J: Semble no inconsistency.

B. *Site Not Located by Lease :* As for case (A), but more so.

I add two comments to this cheerless table:

(1) Quite apart from all of that, there will arise in the case of the decision to carry out any such works, all the claims underlying the Comalco and Aurukun matters. If performance of works can affect native title rights, is there a duty on the lessee to consult with the natives concerned, before determining where (in the case of required works not located by the lease) or whether and where (in the case of voluntary works) to do them? Where does the final decision rest? If the final decision rests with the lessee, has he been made a judge in his own cause? Is his decision invalid accordingly?

(2) When works are done, and extinguishment of one or another native title right has followed, there will arise the matter of compensation. The *Racial Discrimination Act* 1975 seems likely to ensure this. At the present time there exists no guidance whatever as to how these rights would be valued in such circumstances.

I do not see how one can avoid the conclusions:

(1) That following the decision in *Wik* there exists, in the interplay of all of Queensland's pastoral leases and many of its mining leases, on the one hand, and on the other hand rights of native title, profound uncertainty, quite incompatible with the properly planned conduct of business affairs.

(2) That there is no reason to doubt that this general position obtains equally in all the pastoral States.

(3) That, subject to political pragmatism, one set of these uncertainties applies equally to grants of land in fee simple.

I add that any time you say that this or that attack is not likely to succeed, *Mabo* bids us beware.

The High Court and the Art of Legislating

Sparked by *Mabo* , *Theophanous* , and other cases, criticism has been levelled at the High Court on the basis that it has begun to act as a legislature. Much has been said as to judicial creativity, judicial activism, etc. Do judges make law? Ought they to make law? Are there limits to how much law they can make?

The answers to those questions are Yes, Yes, and Yes. More accurately, Yes but, Yes but, and Yes. For there is much to add before the answers become meaningful.

Of course there is a very real sense in which judges make law. If judges do not make law, where did the common law come from?

"I need not remind my readers that Anglo-American common law is pre-eminently judge-made law." [14]

In one of his fairly frequent "rare public utterances", an address entitled *The Role of the Courts at the Turn of the Century* , given to the Australian Institute of Judicial Administration, the former Chief Justice, Sir Anthony Mason dealt scornfully with post- *Mabo* criticism that the High Court was assuming a legislative role.

"Implicit, if not explicit, in what I have been saying about the role of the judge, especially the appellate judge, is that it entails incidentally the making of law. I would have thought that there was nothing remarkable in that statement had it not been for some comments, made in the aftermath of recent High Court decisions, that the Court was undertaking a legislative role. Some comments seemed to imply that a court exceeds its function if it `makes law'. Only a person entirely ignorant of the history of the common law could make such a suggestion.....

"It is scarcely to be credited that anyone with any understanding of the judicial process now believes the fairy tale that the judges `discover' the law and then declare it, without actually making it, as though the judges resembled the Delphic oracle in revealing the intention of the pagan gods."

On a later date Sir Anthony said:

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

There is a confusion here which would do no credit to a law student in his early years; a good deal of setting up a straw man, and boldly knocking him down. For there is a very real difference between merely "making law" and "legislating". There is a question of approach and degree, which makes a defence of, "We all make law" quite inadequate to a charge of "legislating".

In the ordinary trial court, the judge will rarely make law. He sits basically to apply laws as to which there is no dispute, to facts proved before him, perhaps after much dispute. Murder cases rarely have anything to do with elucidating the law of murder. Such a judge will declare the pre-existing law as he conceives it to be, and proceed to apply it. He would be both surprised and disturbed if he were told he had made some law today. This is the function one sees judges carrying out on television, and reads about in trial scenes in books. It is the community's normal picture of a judge. It is a function which is in general finely performed, to the community's unstated but considerable satisfaction. [15]

Sometimes, of course, there will be dispute before a trial judge as to the legal rule to be applied, or as to the precise content of that rule. To take an illustration from the most recent volume of law reports ready to hand, a bank claims to have suffered loss from a careless valuation. The bank sues the valuer for breach of contract. The valuer claims that s.26 of the *Wrongs Act* 1958 (Vic.) entitles him to raise a defence of contributory negligence. Question: Does s.26 apply where a plaintiff sues for breach of contract, or only when he sues in tort? Smith J. holds that it is available in both cases, and reduces by 25 per cent the damages otherwise payable. [16]

There indeed, you will say, is a judge making law. Before he gave his judgment there was not, and now there is, a rule on the matter. That is why this case, unlike other and much more dramatic cases heard in the Supreme Court, is given its gentle immortality in the law reports.

But that is not the whole story. Certain things will be noticed.

First, what the judge made was only a little bit of law. Judges make law, it has been said, but only in the interstices. "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." [17] This is the judge as oyster. Insert your little bit of grit, and the judge produces his little judicial pearl.

Second, in making his little bit of law the judge will have proceeded in a particular way. He will not have sat down under a palm tree and decided how he would run the world. He will have argued from known precedent, from reason, from analogy, from principle, from history, from morality, to explain how he has arrived at his answer, and to justify for his little bit of law its place as a thread in the law's wider fabric. This is what Sir Owen Dixon described as hard and lonely work. The judge has sought not just "his" answer, but the "correct" answer. The judge gives his reasons, not only so that the litigants know why he decided as he did, but because the system requires that the profession generally have those reasons. He justifies his answer not on the basis that he made it, but on the basis that it was the *proper* answer. Here lies a paradox. You can say, no doubt truly, if simplistically, that the judge is "making law". The way he makes it, is by a process of *looking* for it. And this is not a fairy tale.

Thirdly - and again there is paradox in this most difficult area of jurisprudence, where one is rather chasing one's own tail - once the judge has made his little bit of law - here, now, at judgment - *we apply it as if it always had been the law* . Indeed the judge does so instantly, in

applying his little bit of law, made today, we are assured, to events that occurred a year ago. As the good professor used to say, How can this be? The answer is that the law itself treats the judge as having *found* the legal rule, *not* as having made it; treats him as having declared what the law already was.

It is all a good deal more complex than Sir Anthony told us.

In the Full Court of the Supreme Courts of the States, or in the Courts of Appeal which in some States have replaced them, or in the Full Court of the Federal Court, this kind of thing occurs more often. For the reason that a case goes on appeal, is that it is one of the very small minority of cases (almost certainly less than 0.5 per cent of the cases heard in the courts) which turn on a disputable point of law. Again the judges will make law by seeking the law which is "correct", from principle and reason and analogy and the rest.

Indeed, we *know* that there is this external standard of correctness. If leave is sought to appeal to the High Court, the applicant's submission must specify "the *error(s)* complained of in the court from which the proceedings are brought". [18] To speak of "error" in the law as *made* in the court below, is to acknowledge that there are measuring sticks by which the rightness or wrongness of the law as made by the judge can and is to be judged. Something is *not* automatically law, because a judge has made it.

The High Court is of course a court of ultimate appeal. In a particular sense what an ultimate court of appeal says to be the law *is* indeed the law, simply because that court has said so. Even that does not mean that the profession will regard every one of that court's decisions as "right". Even the decisions and judgments of an ultimate court of appeal are properly to be brought to account against the basic touchstones mentioned above. Chief Justice Coke famously told King James I that the monarch himself was *sub deo et lege* : under God and the law. Even a court of ultimate appeal will not claim for itself a position and power which the law denies to the monarch. So even here, the correctness of the decision is still an issue. "The law has no *mandamus* to the logical faculty", said Justice Oliver Wendell Holmes. Posterity too will judge. Indeed, on a later occasion an ultimate court itself may say that its own earlier decision was wrong: the law it "makes" today will say that the "law" it "made" last time, *never was the law* .

For all appeal courts, but especially for courts of ultimate appeal, questions inevitably arise as to the extent to which the court may properly interfere with established common law structure. This is where there arises the issue relevant to *Mabo* . It is an issue which Sir Anthony Mason passed by unmentioned, when attacking the "fairy tale" approach as to "making laws".

Certain legal principles, judge-made though they originally were, can become so established as part of the law of the land that the only proper way they can be altered is by legislation. Thus I doubt if even the boldest spirit on the High Court would say that that Court could properly decide, today, that the standard of proof in an ordinary criminal matter was other than "Beyond reasonable doubt". A recent judicial statement on the matter is that of Brennan J. in *Mabo No. 2* itself. [19] There Brennan J. accepted that the Court is not free to adopt a new rule if the adoption "would damage the skeleton of principle which gives the body of our law its shape and internal consistency." It is ironic that that was said in a case which overturned rules which, in the words of Deane and Gaudron JJ., had been accepted "as a basis of the real property law of this country for more than a hundred and fifty years": [20] but the principle remains correct.

In *State Government Insurance Commission v. Triawell* [21] the High Court was invited to alter for Australia the common law rule as to liability for damage resulting from farm animals straying onto the highway, as laid down by the House of Lords in *Searle v. Wallbank* . [22] The invitation was based on the proposition that the spread of the motor car had made the existing rule

inappropriate in Australia. The principal statement of the reasons for not accepting that invitation was as follows:

> "If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law.
>
> "In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature. These considerations must deter a court from departing too readily from a settled rule of the common law and from replacing it with a new rule. Certainly, in this case they lead to the conclusion that the desirability of departing from the rule in *Searle v. Wallbank* is a matter which should be left to Parliament.
>
> "It is beyond question that the conditions which brought the rule into existence have changed markedly. But it seems to me that in the division between the legislative and the judicial functions, it is appropriately the responsibility of Parliament to decide whether the rule should be replaced and, if so, by what it should be replaced. The determination of that issue requires an assessment and an adjustment of the competing interests of motorists and landowners; it might even result in one rule for urban areas and another for rural areas. It is a complicated task, not one which the court is equipped to undertake." [23]

That all seems very sensible, and likely to appeal to you. All that may surprise you is the name of its author: Sir Anthony Mason.

In *Mirehouse v. Rennell* [24] in 1833, the great Baron Parke dealt with the question in a manner still relevant:

> "Our Common Law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science."

In his *Law in the Making* , Professor Sir Carleton Allen KC cited that passage and continued:

"No judge at the present time would need any reminder to keep this principle `steadily in view'." [25]

It follows that the criticism that the Court has behaved like a legislature is in no way met by saying that judges cannot help making law. There is at one end of the spectrum the undoubtedly proper steady interstitial development of the common law, seeking to develop the law by reference to existing law and established principles. At the other end lie changes which unarguably belong to the legislature. In between there is a band into which judges venture at some risk. Judges will differ among themselves as to how far they should venture into this tricky area. Judicial activists will call for the court to press ahead. Exponents of judicial restraint will point out that we live in a democracy, and will argue that significant changes in the laws should come from the elected legislature and nowhere else. What is being said, is that the High Court has got it wrong in this area.

What the Court cannot I hope but be aware of, is the truly horrifying fall in that respect which in the past ordinary members of the community felt and expressed for the High Court. I well remember being assured in earlier years by my Oxford law tutor, the great Dr J.H.C. Morris, that the High Court of Australia was far and away the greatest appellate court in the English-speaking world. It is a good while since people have said so.

In recent years the Court has given decisions which have, in the perception of many, taken it beyond its proper function. Members of the Court have given considered explanations of the approach they see as proper for the Court to take today. These explanations have added fuel to the fires of concern. In recent days the Press has revealed to us the sight, the very sad sight to the many who have so respected the Court, of the Chief Justice of the High Court of Australia writing to the Deputy Prime Minister of Australia, requesting him to temper his criticisms of the Court, since it is important that the community think well of the Court.

So it is, and the Chief Justice's letter encouragingly shows that the Court is indeed, and properly, concerned as to the community's perception of it. But I do not think that the community takes its views on this matter from Mr Fischer or anyone else. Much more than clever people give it credit for, the Australian community is apt to make up its own mind about things. (In the days of apartheid, after fifteen years of joint effort by all political parties, all churches, and all media, polls continued to show Australian opinion firmly in favour of sporting links with South Africa.) Recognition of this independence of thought on the part of the Australian community was one of the main reasons that Sir Robert Menzies was able to hold office as Prime Minister for seventeen years, and retire when he chose. My old grandmother, the wife of an engine-driver, with no sources other than the daily newspaper (when Grandpa had finished with it), decided that Hitler was an utterly evil man long before that realisation dawned on the clever people who knew about these things. If sections of the public have a very critical perception of the Court, the fault is not Mr. Fischer's.

It is not by what politicians or media or commentators say, that the community will judge the Court. Like all of us, the Court will be judged by what it does. The remedy is in the Court's own hands, and really in no one else's.

Endnotes :

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1 . *The Wik Peoples v. The State of Queensland and ors.,* Action QG 104 of 1993 in the Federal Court of Australia. After various interlocutory steps, there came before Drummond J. the determination of certain questions of law prior to any ascertainment of the facts. Some of those questions concerned pastoral leases, and others the Comalco and Aurukun matters. Drummond

J. answered all the questions against the Wik People: (1996) 63 FCR 450. Appeal to the Full Court of the Federal Court having been lodged, the High Court ordered that the appeal be removed into the High Court pursuant to s.40 of the *Judiciary Act* . That Court's decision is reported at (1997) 141 ALR 129.

2 . (1995) 61 FCR 1.

3 . (1959) 101 CLR 209 at p.222.

4 . (1981) 147 CLR 677 at p.686.

5 . (1875) LR 6 PC 354 at p.370.

6 . (1977) 141 ALR at p.155.

7 . (1904) AC 405 at p.408.

8 . 141 ALR at p.176ff.

9 . 141 ALR at p.205.

10 . 141 ALR at p.184.

11 . 141 ALR at p.218.

12 . 141 ALR at p.247.

13 . 141 ALR at p.275.

14 . Vinogradoff, *Common Sense in Law* (2nd Ed., 1946), p.122.

15 . There seem only two areas where any significant amount of criticism arises. One is apt to arise whenever a judge hearing a rape case says anything about the behaviour of women generally. That judge soon learns that some people do criticise particular judges, by reference to particular cases; and that they do so vociferously. The other area of criticism concerns sentencing, as to leniency and as to inconsistency. Outside these areas criticism of the actual judge seems almost nonÄexistent. Let me say that if my affairs caused me to be brought to court in other than my business capacity, I would sooner be brought to an Australian court than almost any other court in the world.

16 . *Challenge Bank v. Cooper* (1996) 1 VR 220 at pp.235Ä243.

17 . Sir Henry Maine, *Early Law and Custom* , p.389.

18 . See Practice Direction No. 4 of 1996 of the High Court of Australia, para. 6(c)(i).

19 . (1992) 175 CLR 1 at p.29.

20 . 175 CLR at p.120.

21 18. (1980) 142 CLR 617.

22 . (1947) AC 341.

23 . 142 CLR at pp.633Ä634.

[24] . (1833) 1 Cl. & F. 527 at p.546.

. Professor Sir Carleton Allen, KC, Law in the Making (4th Edn, 1946), p.223.

Concluding Remarks

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

I am sure that you share my view that we have had another useful and stimulating conference.

There have been three important themes which have connected the various papers and addresses which we have heard. The first is federalism. Welcome and eloquent reminders of the importance of the federal system in protecting the subject against arbitrary excesses of governmental power, and in safeguarding democracy, were given to us both by Professor Moens and by Mr John Wheeldon.

Unfortunately, in Australia, we find a serious imbalance in the working of our federal system. Professor Moens and Professor Goldsworthy gave us examples. Professor Moens dealt with appointments to the High Court, a process in which at present the States may have a voice, but no substantive role. Although, as Mr Peter Durack has said, Justices of the High Court have generally enjoyed a merited respect, it surely seems clear in principle that a Court which is called on to decide important controversies between the Commonwealth and the States should not be comprised of judges selected by one of those litigants alone. The remedy supported by Professor Moens, which would require the approval of at least three States to a proposal for appointment by the Commonwealth, would appear to have a great deal to commend it. Professor Goldsworthy discussed another example of imbalance, probably not intended by the framers of the Constitution, namely the fact that the Commonwealth alone can initiate referenda to amend the Constitution. He made a strong case for allowing the States to initiate referenda, although he acknowledged the difficulty of achieving that result.

Mr Harry Evans dealt with one of the institutions most vitally concerned with the protection of federalism, the Senate, and showed that the Senate still fulfils that role, even though it is now dominated by political parties, because it ensures a geographical spread of political representation, and thus prevents the domination of the political process by the representatives of the larger States.

Also germane to the question of federalism was the paper in which Mr John Stone justly criticised the grant of self-government to the Australian Capital Territory, and expressed fear that there might ultimately be a drive to grant Statehood to that Territory. Mr Stone's suggestion that the boundaries of the Territory should be redefined is daring but attractive.

Dr McGrath's paper may also be thought to be relevant to the theme of federalism, since the integrity of the electoral process is important to the survival of any democratic political system, including federalism.

Finally, the expansion of Commonwealth power has owed much to the interpretation given to the Constitution by the High Court, a subject dealt with by Dr Howard and Professor Craven.

The second theme is the republic. My own paper attempted to show the many questions that have to be answered before our Constitution could be made a republican one. We were fortunate to hear Sir David Smith, who effectively rebutted the commonly made but false assertion that Australia has at present no Australian Head of State, and who explained the role of the Governor-General.

The final theme is the Aboriginal question. The relationship between the majority of Australian citizens and those of Aboriginal descent is perhaps the greatest cause of division in Australia today. We have had three notable papers on the subject.

Mr Hulme has given us his usual incisive exposition of the judgments in *Wik* . [1] The results of that decision have clearly been unsatisfactory. The opinion has been vigorously expressed by some of the very able propagandists for the Aboriginal cause that it would be utterly wrong for the Parliament to diminish the rights that flow from the decision in the *Wik* case. It is difficult to support that view. Parliament has frequently legislated to reverse or vary the law as declared by the High Court, as it is entitled to do if the law is not a constitutional one.

There is nothing hallowed or immutable about the rights conferred by native title, which has been recently discovered, and whose present application has depended on a series of decisions reached by the narrowest of majorities. The validity of the *Racial Discrimination Act* was upheld by a majority of 4 to 3 in *Koowarta* . [2] Then in *Mabo No. 1* [3] a different majority of 4 to 3 held that the *Racial Discrimination Act* was inconsistent with, and rendered inoperative, State legislation which would have excluded native title entirely. That decision is the key to the present situation. Then *Wik* was decided by another 4 to 3 majority. This is not to say that each majority was necessarily wrong, but it does show that there has been such a diversity of judicial opinion that Parliament should not hesitate to interfere if it thinks that the public interest demands it.

The problems are exacerbated by the *Native Title Act* . Dr Forbes has clearly shown that the *Native Title Act* leads to inconvenient and unjust results, and I hope that his useful suggestions for amendment are read by our legislators.

Finally, Mr Roger Sandall went to the heart of the problem. The claim made by some that the Aboriginal people should have the best of two irreconcilable worlds, and should have the financial benefits which a developed society can provide, and yet enjoy special privileges because they are Aboriginal people, lies at the base of the conflict that is arising in our society today. The result, as Mr Sandall has said, has given great rewards to some, but it does nothing to help most of the Aboriginal people.

We are indebted to all of those who have given papers at this conference. I thank you all for your support, and indeed everyone concerned in organising this conference.

Endnotes :

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1 . (1996) 71 ALJR 173.
2 . (1982) 153 CLR 168.
. (1988) 166 CLR 186.

Appendix I

Contributors

1. Addresses

John STONE was educated at Perth Modern School, the University of Western Australia (BSc Hons, 1950) and then, as a Rhodes Scholar, at New College, Oxford (BA Hons, 1954). He joined the Australian Treasury in 1954, and over a Treasury career of 30 years served in a number of posts at home and abroad, including as Australia's Executive Director in both the IMF and the World Bank in Washington, D.C. (1967-70). In 1979 he became Secretary to the Treasury, resigning from that post - and from the Commonwealth Public Service - in 1984. Since that time he has been, at one time and another, a Professor at Monash University, a newspaper columnist, a company director, a Senator for Queensland and Leader of the National Party in the Senate and Shadow Minister for Finance. He has recently served as a member of the Defence Efficiency Review into the efficiency and effectiveness of the Australian Defence Force, and currently contributes a weekly column to *The Australian Financial Review*.

Hon. John WHEELDON was educated at Perth Modern School and the University of Western Australia (BA Hons, 1953), and subsequently practised law in that State. In 1965 he was elected Senator for Western Australia, and served in that role until resigning from the Parliament in 1981. During the years of the Whitlam Government he chaired the Federal Parliamentary Foreign Affairs and Defence Committee before being appointed, first, Minister for Repatriation and Compensation (1974-75) and, in 1975, Minister for Social Security also. Following his resignation from the Parliament he became Associate Editor of *The Australian*, resigning in 1989 to continue his writing on political affairs.

2. Conference Contributors

Professor Greg CRAVEN was educated at St Kevin's College, Toorak and the University of Melbourne (BA, 1980; LLB, 1981; LLM, 1984). He taught at Monash University (1982-84) and was Director of Research for the Legal and Constitutional Committee of the Victorian Parliament (1985-87). After serving for three years (1992-95) as Crown Counsel to the present Attorney-General for Victoria, he returned to his previous post of Associate Professor and Reader in Law at the University of Melbourne, before being appointed (1996) as Professor of Law at Notre Dame University, Fremantle. He specialises in constitutional law, and has written and edited a number of books in that area, including *Secession : The Ultimate States' Right* (1986) and *Australian Federation: Towards the Second Century* (ed.) (1991).

Harry EVANS was educated at Lithgow High School and the University of Sydney (BA Hons, 1967). After a brief period in the Parliamentary Library, he has served on the staff of the Senate since 1968, including as Secretary to a number of major Senate Committees, such as the Regulations and Ordinances Committee and the Select Committees on the Conduct of a Judge and Allegations Concerning a Judge. After periods as Clerk Assistant (1983-87) and Deputy Clerk (1987-88), he has been Clerk of the Senate since 1988. He is the author of numerous articles on parliamentary and constitutional matters, as well as editing the 7th edition of Odgers' *Australian Senate Practice*.

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. In recent years he has become one of our foremost experts on the law of native title.

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