Samuel Griffith Society - Ninth Conference

Mercure Hotel, Perth 24 - 26 October, 1997

Table of Contents

Published 1997 by The Samuel Griffith Society P O Box 178, East Melbourne Victoria 3002 World Wide Web Address: http://www.samuelgriffith.org.au Printed by: McPherson's Printing Pty Ltd 5 Dunlop Rd, Mulgrave, Vic 3170 National Library Cataloguing-in-Publication data: Upholding the Australian Constitution Volume Nine Proceedings of The Samuel Griffith Society ISSN 1327-1539

Foreword

John Stone

The Samuel Griffith Society's ninth Conference was held in Perth, and the papers delivered to it constitute this Volume in its Proceedings. For whatever reason -- and despite the obvious difficulties for the great majority of the Society's members in travelling to Western Australia -- the attendance was in fact somewhat greater than on any of the previous eight occasions.

Although, as before, this Conference was not focused about one particular theme, some six of the twelve papers delivered to it dealt in fact with various aspects of what the Society has termed, from its outset, "the Aboriginal question".

As these words are written, in mid-December, 1997, the federal Parliament has just adjourned for the end-of-year recess, with the Senate having rejected the Government's *Native Title Amendment Bill* and with some prospects of a double dissolution election on that (and other) issues in the second half of 1998. Against that background, Dr John Forbes' magisterial paper on *The Prime Minister's Ten Point Plan* should be required reading not merely for all Federal (and State) politicians, but also for those media savants who incessantly lecture their fellow Australians on matters in this area on which most of them clearly remain largely ignorant.

Yet, as Dr Stephen Davis points out in his paper, *Native Title: A Path to Sovereignty,* anyone who thinks that Australia's current native title mess could hardly be worse should look carefully at what is currently going on in the United Nations (and elsewhere, notably Canada) on some closely related matters, and think again.

Behind all these matters of property law, however, and associated questions such as "self-determination", "sovereignty" for so-called "indigenous peoples", and the like, lies a whole gamut of cultural (or, if you like, anthropological) questions about Aboriginal Australians which are not merely not being answered, but are not, in most cases, even being posed.

Austin Gough, a gentle man who wore his considerable learning lightly -- and who was, at the time, a member of the Board of Management of this Society -- wrote for the Perth Conference what is now Chapter Four in these Proceedings. His paper, *Romantic Solutions to Practical Problems,* deploys his own personal qualities of good humour and highly intelligent insights to gently satirise what is known today as "the Aboriginal industry" -- an industry chiefly notable for the slender representation within its ever-burgeoning ranks of anyone who could truthfully be described as a real Aborigine.

Sadly, on the evening of the very day on which Austin Gough had completed writing his paper, he was stricken by a severe coronary attack and died that night, to the great grief not merely of his wife and children, but of his wide circle of friends. I take this opportunity of saluting his work, and his memory.

The matter of "real" Aborigines having been raised, it is appropriate to mention also one other outstanding paper in this Volume, that by Pastor Paul Albrecht on *The Nature of Aboriginal Identity.* Pastor Albrecht, who was born and largely brought up at the Hermannsburg Lutheran Mission in Central Australia, has for many years now worked at the Finke River Mission there, and is a noted authority on Aboriginal language and culture.

In the course of editing this Volume I have had occasion to read Pastor Albrecht's paper carefully on several occasions. I would wholeheartedly recommend it to anyone who, like myself (and most other Australians), does not claim to have a deep knowledge of "Aboriginality" but who,

not being total simpletons, can also see before them every day mounting evidence that the Aboriginal affairs policies of successive Australian governments for the past 30 years (at least) have been, and remain, massively misdirected.

In the words of our President, Sir Harry Gibbs (see his *Concluding Remarks)*, "Australia has gone astray in dealing with its Aboriginal population ..... Surely it was a mistake [by the Parliament] to extend the provisions of the *Native Title Act* [1993] to an undefined and disparate class which includes persons who have no cultural affinity with the tribal Aboriginals, and no direct relationship with the land claimed; and equally erroneous to give a right to negotiate' -- that is, a right to demand ransom -- to persons without requiring them to produce even a scintilla of evidence of their entitlements to the land rights which they claim".

Truly, those whom the gods wish to destroy, they first make mad.

Because the chief work of this Society is to promote debate (from a federalist viewpoint) about our Constitution, that work has inevitably come to focus, in part, upon the role of the High Court of Australia, including some in particular of its Justices. This in turn has led to the generation of a widening debate about judicial activism.

In his paper in Perth, *Reflections on Judicial Activism: More in Sorrow than in Anger*, Professor Greg Craven contributed some further, one might almost say definitive, reflections on that topic. It is a paper which should be read not only by the Court's critics (for whom it will undoubtedly provide much ammunition), but also -- and in this respect more importantly -- by its friends. His conclusion (more precisely, one of them) that "there is no convincing argument of law, constitutional principle or democracy that possibly could be regarded as justifying the constitutional progressivism of the High Court" is both sobering and demanding of an answer. Perhaps one of our present Justices (for some unfathomable reason, the name of Mr Justice Michael Kirby springs to mind) could provide one.

However that may be, this is a Volume which deserves to be widely read, and widely debated. It is to that objective that, like all its predecessors, it is dedicated.

Dinner Address

Returning Power to the States: Risky or Responsible?

Hon Richard Court, MLA

It is quite a humbling experience to address such a learned audience; and when I look around the tables and see so many people from so many parts of the country that have contributed so generously to the economic, the social and the political debate in our country, it is a terrific experience.

And to see you, Sir Harry, at this conference is especially terrific because you have the unique ability to be able to put a complicated issue into a simple written form for people like myself so that we can understand many of these constitutional issues.

On many occasions I have referred to your contributions, your articles on some of these constitutional issues, and they have certainly helped me get a better understanding as we face what hopefully is going to be a period of some change in our federation.

I hope my contribution at the beginning of your conference tonight is one that will provide a practical perspective on what positive change can be realistically achieved when we consider some of those important issues facing our federation.

As Sir Harry said, my subject is *Returning Power to the States: Risky or Responsible?*, and I say, for the good of the nation it is essential.

When I last spoke to this group, I was concentrating on Native Title issues and I addressed the practical problems that had developed with the then impending Commonwealth legislation, and how those issues could be resolved.

There are people here tonight with whom we worked closely four years ago, who were a part of the team that we put together when we came into government to develop the State traditional land usage legislation, which we saw as a responsible, constructive approach to a difficult issue.

Four years down the track, people are now having another look at that legislation, and recognising perhaps that it was a practical way to address the issue.

But Native Title has been the classic case of a federal government introducing legislation which has effectively neutered the States' ability to control land and resource management, which is our constitutional responsibility.

We are sovereign States and we have the constitutional responsibility to manage land and resources.

The federal government of the day developed Native Title legislation with virtually zero practical experience in running a land and resource management system. They ignored the States' concerns both during the drafting of that legislation and when it was put into operation.

The end result has been a disaster -- totally unworkable legislation; and any democracy that doesn't have certainty in its land management system has big problems.

The Coalition that was elected has initially been slow to move on this issue. But eventually they have put forward amendments to try and address the problems.

Last year's High Court decision, the *Wik* decision, has made the Coalition's job that much harder, because following that decision we now have a situation where the High Court has said that there can be the co-existence of Native Title on leasehold land.

Paul Keating said, when his *Native Title Act* was passed, that it would only benefit five per cent of Aboriginal Australians. Hence he justified creating his Indigenous Land Fund, the revival of "extinguished" Native Title on Aboriginal-held pastoral leases, and a "social justice" package which never eventuated.

Those things were all proven to be false, and the nation now sees that Act sponsoring huge ambit claims around this country.

Over 600 Native Title claims have been lodged nation-wide. Half of them are in Western Australia and, as of today, 82 per cent of Western Australia is under claim.

Individual claims in the south-west cover some 200,000 square kilometres and stretch from Eucla to Walpole. The majority of the claims also overlap, and some areas in the Goldfields have 18 claims over a single piece of land.

I said in the Parliament last week that one project in the Goldfields has to negotiate with 24 different claimants. The Labor member for the area said I was wrong -- he said it was 27 different claimants.

All the claimants are financed by the Commonwealth, and they have been placed in a commercially advantageous position by gaining the access to the "right to negotiate" provisions of the Act, irrespective of the merits or otherwise of their claim.

At the end of September, 1450 mining leases were subject to the right to negotiate -- half of which were in the Goldfields, and if these can't be cleared through agreement they will go to the Native Title Tribunal for determination.

Since early 1994, when the legislation came in, only 10 leases have been determined, and some of those still haven't been granted as the Native Title parties have appealed the Tribunal's decision.

So this situation is wreaking havoc on the land management systems, and it's causing escalating cost and delays.

Kalgoorlie's short of land, Karratha's short of land, Port Hedland's short of land, Kununurra's short of land -- you can go around the State. The council in Karratha wrote to us and said that the price of land has now doubled as a result of the shortages of land in that area.

And these claims all occur without any proof of continuous association between the claimants and the land.

The longer all of this is allowed to continue, the further we will move away from the High Court's *Mabo* principles and the less tolerant the community will become of that legislation.

Now I just want briefly to say that the federal Government has released what has become known as their ten point plan.

These proposals do pick up many of the Western Australian government's objectives to return the control of land and resource management to the States.

The plan provides for the confirmation of the extinguishment of Native Title by freehold and other exclusive tenures.

Remember, we were accused of scaremongering when we said that there could be claims on freehold land, etcetera. Well, when you've got 82 per cent of Western Australia covered, you've got most of it covered.

Future activities within town and city boundaries will be exempt from the right to negotiate, while government services -- like the building of public infrastructure -- will be freed up.

The changes will also introduce a registration test to ensure that only *bona fide* claims attract the right to negotiate.

And very significantly, the Prime Minister has agreed to the Commonwealth sharing the compensation liability with the States.

Now we are going to work hard to try and achieve that workable Native Title legislation, and that must happen very quickly.

If the Labor Party knocks this legislation out, as they may well do in the Senate, they will have to take full responsibility for sabotaging a constructive proposal to make their unworkable legislation workable.

Now I've just given you that brief summary of Native Title because it's another classic example of how federal government legislation has overridden State legislation and again seen more power centralised in Canberra, and effectively taken away our ability for the State to properly and responsibly manage its land and resources.

Now we've spent a lot of time on that issue -- very time consuming, as many in the room would know. But we've done what we can at this stage.

We are now focusing our attention on what we now see as the next major issue, and that has been the ongoing weakening of the Federation through the centralisation of powers, particularly financial powers, in Canberra.

Now that the federal Government has put the issue of Commonwealth/State revenue sharing and tax reform on the agenda, this State is playing a constructive role in lifting the level of debate, as we see it as a once in one hundred year opportunity to get this thing right.

We started off with a Federation that the States all agreed to go into. It's deteriorated to the point where we have seen this drift of power to Canberra, and the time has now come to rebuild and strengthen the Federation along the lines originally proposed when the negotiations took place in the late 1890s and when the Federation was finally established in 1901.

In our nearly five years in government, we have argued vigorously for a major reform of the Commonwealth/State financial arrangements.

This was very often in an environment of ignorance and even hostility.

In February, 1994, I released a document called *Rebuilding the Federation*. We did it in Hobart, and it outlined in simple terms how this drift had occurred since 1901.

At Hobart the media asked the other Premiers and the Prime Minister whether they had read it, and none said that they had.

A leading national reporter said I had made a goose of myself.

Over Native Title, I can recall being told I was a "lone wolf", I suppose howling out there in the dark, but you've got to start these processes somewhere.

People four years ago in Hobart were not interested in raising the issue of Commonwealth/State financial arrangements in the federal arena.

They were the days, only four years ago, when you were not meant to disagree with Labor's central Canberra machine's thinking.

That Hobart meeting was one of my early ones as a new Premier, and it was what turned out to be a typical Council of Australian Governments (COAG) meeting under Labor. You were there to consider the federal Government's political agenda, and the communiqués for the meetings were actually distributed before the meeting had started.

We have come a long way since then.

The big breakthrough that was actually achieved was that we had the Premiers meet privately, just for a short period, and they somewhat reluctantly agreed that we would come together in an informal way and meet without the federal Government being present.

That was the beginning of what has become known as the Leaders' Forums. These Forums have become amongst the most constructive political meetings that I'm involved in. They are short, sharp, and we quickly reach common agreement on major issues, regardless as to what political party you are from, because we are able to openly discuss issues affecting our States or Territories.

It was the beginning, I believe, of us as States and Territories starting to work in a more united way. The old trick of the federal Government is always to divide the States and then it gets its way.

I can recall one of the early Premiers' meetings I went to: the Commonwealth basically put $10 million on the table and had the States spend a day working out how they were going to share it. Consider the beauty of that tactic: everyone wants to go back and say, I got my fair share of what turns out to be petty cash in the scheme of things.

But those days hopefully have gone.

In this country we now have a situation where there is an acceptance that Commonwealth/State financial arrangements must be reformed, particularly following the recent High Court decision, where the States had the ability to raise business franchise fees removed.

We are now starting to see a debate slowly developing with some substance, not just looking at the need for reform, but how can we do it.

As a country, we have a unique opportunity to look at what is occurring in the rest of the world, and examine the pros and cons on how the different countries, the different capitalist systems, are evolving in those countries.

We have seen quite amazing changes take place in recent times. We have seen recently, in the United Kingdom, the Labour Party tapping into the sentiment of the devolution of power to Scotland and Wales, and how successful that has been politically.

We are seeing in China the major shift from a controlled, planned economy to a market based economy, and one where they are slowly moving their responsibility back to the provinces. And where, in the commercial world, they are publicly acknowledging that their State owned enterprises are a disaster and they need to get them back into a more competitive corporate environment.

It's just fascinating seeing the speed of change. A couple of weeks ago I had the opportunity to sit down for a couple of hours with the Chinese Vice-Premier, Zhu Rongji in Beijing. We were presenting a proposal for that Government to include LNG among their future energy options, and this person had a completely open mind and showed a lot of flexibility in understanding what we were putting forward, and as a result of a two hours meeting, we hope by Christmas time to have achieved our goal.

It's fascinating to see that country being prepared to be flexible, and to be quite lateral in their political and economic thinking, when only a few years ago that would have been unheard of.

Now in Australia there is a strong sentiment for the greater devolution and decentralisation of powers, but that sentiment is not being tapped into. Whichever political party wakes up to it first is going to be a major winner on the federal scene.

In 1995, the States -- this is one of the initiatives that the Leaders' Forum established -- commissioned a qualitative opinion survey by the U.S.-based Wirthin Group, to examine public views towards the Federation.

The survey involved focus groups throughout the country, and there were some interesting results, including that less than 20 per cent of the people believed that the federal Government understood the needs of the people.

Some 58 per cent said that tax dollars were not being fairly distributed to the States. In New South Wales, that figure was nearly 70 per cent, much higher than the national average.
And two-thirds of those surveyed supported the retention of the States.
In essence, the decentralisation of more economic and political power to the States has become, I believe, quite an important under-current in our political system.
Four years ago it was not seen as a big issue; now it has become an issue which can have major political appeal and it can be electorally very attractive.
I believe the Labor Party is locking itself out of the debate, because at heart they continue to be putting forward, at the federal level certainly, centralist views.
The latest recruit to the Labor Party, Cheryl Kernot, said back in 1993, and I quote: "It seems that perhaps the obvious way to go is to get rid of the middle man by abolishing the States."
Only a few weeks ago, when the High Court announced its decision in relation to franchise fees, and Mrs Kernot was commenting on the High Court's decision, she said that the Court's decision posed obvious questions, namely: *"What is the purpose of the States? Why do we need them?"*
If that sort of thinking is going to be part of the Labor Party's platform, we have to concentrate on trying to persuade federal members in the Coalition parties to do something about it.
Fortunately, the Coalition has said publicly -- and the Prime Minister has committed himself to it -- that it will be putting a package in front of the people prior to the next election that will address revenue sharing between the Commonwealth and the States, and associated with it a taxation reform package.
The good news, I believe, is that they are talking about a major policy differentiation; and if they can effectively come up with a strategy that will help rebuild the strength of our Federation, I see it as a great winner.
So we have this unique historic opportunity to return to those core principles of the Federation as we move towards celebrating one hundred years of that Federation.
Now I want just briefly to comment on this issue of revenue sharing and the associated taxation reform packages, and to quickly outline the position that we see could well evolve in this regard.
When the States agreed to going into the Federation back at the turn of the Century, in Western Australia's case our major source of revenue was customs duty and excise.
We had gone through the 1890s, where the rest of the country went through a difficult depression but we went through a gold rush.
And a lot of development took place, there was a lot of infrastructure built, including things like the Perth to Kalgoorlie (C Y O'Connor's) water pipeline, and the major source of revenue was from those customs duties and excises.
Basically, when we entered the Federation we had the ability to raise the revenues that we needed for our expenditures.
That continued for the next 40 odd years, and it wasn't until 1942, when the States voluntarily gave their income taxing powers to the federal Government during the War, that we saw a major drop in their ability to raise revenues.
Between the War and today a number of things took place.
In 1971, the federal Government gave the States the ability to raise pay-roll taxes.
Between 1973 and 1989 we saw franchise fees introduced, and the financial institutions duty. In 1991 the bank debits tax was transferred to the States, and then of course most recently the States have lost their ability, with that High Court decision, in relation to those franchise fees.
But basically, from the War through to now, the States have only had access to a very narrow revenue raising base.

We now have a situation where the federal Government collects 80 per cent of all taxes in this country.
We have a situation where the States receive more in Commonwealth grants, $40 billion, than they do from their own revenue raising, $35 billion.
The States' revenue is coming from that narrow base: the gambling taxes, land taxes, F.I.Ds, bank debits tax, stamp duties, pay-roll tax.
When you compare our Federation, the Australian Federation, with those of the other O.E.C.D. countries, there is one glaring difference, and that is that we are the only Federation where the States do not have access to an income tax base and a general consumption tax base.
And when you look at those other countries, it is only Switzerland, the Cantons in Switzerland, which have access to an income tax base but not a consumption tax base.
But apart from that partial exception, we are the only country; and that's why we have this major imbalance, where the States now basically get the major part of their revenue coming through from Commonwealth grants.
When we look at the Commonwealth's tax reform principles, they've set out five simple principles:

1. They want to have no increase in the overall burden of taxation.

2. They want any new taxation system to involve major reductions in personal income tax.

3. We should consider a broad-based indirect tax to replace some or all of the existing indirect taxes.

4. There should be appropriate compensation for those deserving special consideration.

5. Number five -- which should be number one -- they want reform of the Commonwealth/State financial arrangements to be addressed.

But in addition to these, we have put forward some general principles, and no doubt at next week's Leaders' Forum these principles will be further advanced.
But we believe that there is a need to basically eliminate Commonwealth grants: to get rid of the vertical fiscal imbalance, the States should have autonomy in revenue raising, and the States should have access to some broad-based growth taxes, and we should rationalise Commonwealth and State taxes.
When we're talking about taxation reform, there is one thing that John Hewson learned the hard way, and that is that taxation is a very difficult issue to sell. It's difficult to sell before an election and it's difficult to sell after an election.
And in this country we have seen, certainly in relatively recent times, three attempts to try and change the system.
During the Fraser years there was a genuine attempt to hand back income taxing power to the States. You would recall that Neville Wran ran a very effective scare campaign on that in New South Wales and everyone ran for cover.
During the Hawke years we saw the debate developing which culminated in the tax summit, and any major reform was actually scuttled at that summit. And I think you can be critical of politicians, but I think that the business community, with many vested interests, also didn't exactly act responsibly during that exercise.
What was interesting during that process was that, at one stage, Paul Keating came over to Western Australia and addressed the Labor Party, and gave an impassioned plea to them to

support the introduction of a broad-based Goods and Services Tax (GST). They passed a motion and supported it. Of course, when it became appropriate, he was able to use the GST very effectively to sabotage the third major attempt, which was John Hewson's *Fightback!* package in the 1993 election campaign.

I just hope, I hope that in the months ahead we have a debate on these issues. I hope we can be mature enough not to go for the short-term political point scoring, and hopefully try and get an arrangement in place that has the support of the States, the Territories and the federal Government.

So when you look at those three previous attempts, you can see why any federal Government is going to be very nervous. I just hope that we will be able to address the matter, because if we fail this time I believe no one will want to touch the issue, and then you will have a very dangerous situation, where States like Western Australia, that are becoming major net contributors to Canberra, will start becoming very restless.

I am optimistic that we will be able to achieve a positive result.

I believe that, for the first time, certainly in my relatively short political career, the Australian community is actually quite prepared to accept major change in this regard, provided some positive benefits are spelled out to them.

So when you look at what is a complex issue, I believe it can be simplified by saying that the imbalance that we have between the States and the Commonwealth can be addressed by effectively abolishing grants to the States, and replacing that with a share of income tax.

I believe that the different State taxes -- the F.I.Ds and the B.A.Ds and the stamp duties and the like -- that a large number of those can be abolished if the States have a share of a GST.

The debate will be: should the States have the ability to vary their component of income tax. I believe that would be good. It would be good to have competition between the States as to the rate of income tax they would set.

In an ideal world, it would probably be good to have a varying rate of a broad-based indirect tax as well, but I think, being realistic, that would be more difficult to achieve. We have seen recently the problems when the federal Government was forced to put uniform excise duties in place on tobacco, alcohol and fuel, where there had been differences between the States.

But I hope we are able to sit down, and get back to a situation where the States would have to be both accountable and responsible for raising the revenues they need, and responsible and accountable for the expenditures they commit to.

So that, in a nutshell, for me, is one of the most critical debates that we have to work through in the forthcoming months. And I say months, not years, because the federal Government has said that we will put out an option before the election, and you have to have an election at the end of next year, and time will just go like that. That's why we have to work cooperatively, to get a decent debate.

What we are seeing in this country is a growth in government businesses being exposed to more and more competition.

But I believe the one last remaining bastion of centralisation in this country is really our political system.

We've been caught in a time warp, and if we can address that, I have no doubt that we can become one of the most sought after countries in the world in which to live.

I'll just conclude my comments by informing this conference of what I believe is a very positive initiative.

Next week, we will be officially opening the State's first Constitutional Centre. In fact, it's going to be the first Constitutional Centre of its type in this country.

We have been able to carry out a magnificent restoration of the old Hale School building opposite Parliament House. That will be, hopefully, an opportunity for us to help widen the debate in relation to constitutional issues.

We will be holding a series of forums around the State. They may well culminate in our own form of Convention next year to address a number of issues, the Republican issue, the State Constitution, federal constitutional issues.

I know there may well be some criticism of how that constitutional centre operates; but just seeing the young children that are already starting to go through that centre from the schools, instead of just coming to Parliament House and having a look at what happens there, is something that I find very encouraging.

So I wish your conference well. It has been a pleasure to speak to you again.

Introductory Remarks

John Stone

Ladies and Gentlemen, welcome to this, the ninth Conference of The Samuel Griffith Society.
As Western Australians, it is a particular pleasure for both Nancy and myself to be meeting again in this State, almost four years since we first met here in Fremantle.
On that occasion, as last night also, the Society's opening Dinner was honoured by the presence of the Premier, the Honourable Richard Court, and we were privileged to be addressed by him.
Without, I hope, venturing too far into political partisanship, perhaps I may say that, in these days of such electoral volatility, it is rather a comfort to return to a State after an absence of almost four years and find the Government, and even the Premier, unchanged.
I may add that, when the Premier in question has himself been a member of this Society almost since its inception, it is doubly pleasurable. It would be going too far, of course, to imply any causal connection between those two circumstances, but .....
In his address to us last night the Premier referred to the developments now occurring in two areas of interest to this Society -- the native title question, and the Federal-State financial imbalance.
As Mr Court said, it is sobering to reflect that, since we met in Fremantle, one of the main topics then discussed -- native title -- has gone from bad to worse. Shortly after that meeting, the Keating Government's *Native Title Act* 1993 was passed by the Parliament to the accompaniment of wild scenes of jubilation in the Press Gallery of the Senate. Almost four years later, the Native Title Tribunal established by that Act -- and provided with powers which the High Court, in the *Brandy Case*, has subsequently found it constitutionally unable to exercise -- has so far resulted in the determination of some 10 native titles (most of which are still not even finalised).
To render confusion worse confounded, the High Court, in its *Wik* judgment delivered two days before Christmas last year, decreed that pastoral leases did not (or not necessarily) extinguish native title, and that the only way to determine whether, in any particular case, that did result would be to, in effect, have a court decide the matter. That, at any rate, seemed to be the outcome, although since all four Justices who found along those general lines delivered different judgments, differing markedly in their particulars, it was more than usually difficult to be certain.
Some of you with long memories will recall that, when the *Mabo* decision was first delivered in June, 1992, the lead judgment was written by Justice Sir Gerard Brennan, who has since become the Chief Justice. Sir Gerard's son, and noted Aboriginal affairs activist, Father Frank Brennan, later acknowledged, in an interview with Cameron Forbes of *The Australian* (20-21 February, 1993) that he had discussed Aboriginal affairs with his father from time to time "over a barbecue and a cleansing ale and that sort of thing", and said that he thought his father's "judgment was very good" and that "it took things as far as they could be at this stage".
Since it was of course the *Mabo* judgment which was the initial source of all our difficulties in this area, it therefore seems somewhat ironical that, in the *Wik* judgment, not only was Sir Gerard Brennan in the minority of three Justices who held that pastoral leases *did* extinguish native title, but that in his personal judgment the Chief Justice now went further, saying (in implicit criticism of the majority Justices' views):

> "If the grant of a pastoral lease conferred merely a bundle of statutory rights exercisable by the lessee over land subject to native title in which the Crown ... had only the radical title, the

> rights of the lessee would be ..... rights in another's property. And, if leases were of that character, an estate in fee simple [ie. freehold] would be no different."

Does anyone remember the ridicule to which, after the *Mabo* judgment, one or two people were subjected (Mr Richard Court was one of them) when they suggested that, before we were much older, people would be facing claims over the freeholds of their back yards? Only a few years later, the Chief Justice of the High Court and chief author of that *Mabo* decision is, in effect, agreeing with them.

After much shilly-shallying, the Government now has legislation before the federal Parliament which, if enacted, will at least dispose of that particular problem, and which is designed to deal more generally with the native title question. The Government has said -- and I think that for once it may actually mean it in this case -- that there will be no further compromise on this matter, and that if necessary it will fight a double dissolution election next year on it. The more I think about it, the more I conclude that that would be no bad thing.

Mr Court also referred last night to the Federal-State financial imbalance, a matter on which, in part, Professor Grewal will address us later today. Here too the High Court has recently exercised a malevolent influence through its regrettable decision on State franchise fees.

Mr Court has rightly said that the basic solution to this problem is for the States to resume the use of their State income taxing powers -- which, legally speaking, they have never lost -- so that the Commonwealth would significantly reduce its own income tax levies (and the massive grants to the States which go with them) and the States would each add their own individual surcharges, quite possibly at different rates.

Again, this matter -- and the associated possibility of the States' participation in a broadly based consumption tax -- are questions to be pursued in the months ahead, in conjunction with the Commonwealth Government's proposals, earlier this year, for major tax reform. Without in any way wishing to play the role of wet blanket, I shall only say that I am not noticeably holding my breath.

Next February we shall see the long-awaited meeting of the Constitutional Convention, to discuss now *only* the republic issue. Already the 76 appointed delegates to that Convention have been named, and next month we shall be voting in each State for the 76 elected delegates. In a spirit of full disclosure -- as the Australian Securities Commission says, whenever it says anything at all -- I should mention that I have personally nominated in Victoria. At a nomination fee of $500, the experience seemed cheap at the price.

It is a matter of some regret to this Society that next February's Convention will concern itself solely with the republic issue -- not merely because that issue has become rather boring, but also because there are quite a number of issues about our Constitution (such as the abuse of the "external affairs" power) which would genuinely repay wider public discussion. The Prime Minister has said that other steps will be taken to facilitate an airing of such other issues, but again, I am not holding my breath.

Ladies and gentlemen, today and tomorrow morning we have ahead of us eleven papers combining both depth and diversity. We shall begin this morning with a bracket of four papers on widely differing aspects of what we have from the outset called "The Aboriginal Question". The first of those papers will be given by our old friend Mr S. E. K. Hulme, QC, who will speak to us on *The Racial Discrimination Act* 1975. To chair that and other papers this morning I shall therefore now hand over to the Hon. Peter Howson who, as most of you would recall, was himself at one time Minister for Aboriginal Affairs, and who brings to this whole area a wealth of knowledge, an abiding regard for Aboriginal Australians, and a strong vein of practical

common sense in approaching the problems from which so many of them so unfortunately suffer. Please welcome Peter Howson.

Chapter One

The Racial Discrimination Act 1975

S. E. K. Hulme, QC

It is a little over five years since, on 3 June, 1992, the High Court of Australia handed down its decision in what has come to be called *Mabo No. 2*,[2] overturning 150 years of property law on the Australian mainland. Since that time we have had *The Commonwealth v. Western Australia*,[3] striking down the Western Australian *Land (Titles and Traditional Usage) Act* 1993, with its scheme to replace "native title" [4] by a system granting equal rights but under statute.

That Act contained the only practical and workable solution which has been brought forward. (I confess my bias.) We have had *Wik Peoples v. Queensland*,[5] holding that the grant of pastoral leases did not extinguish any native title formerly existing over the same land. With it all we have seen unprecedented division in Australian society,[6] unprecedented racial disharmony, unprecedented savage and continuing criticism of the High Court, and an increasing call for the total situation to be dealt with by constitutional amendment, rather than left with the Court. It seems to me unlikely that the High Court will command for at least a generation the automatic and admiring respect it commanded in the not very distant past.

It seems worthwhile to spend a little time considering aspects of the statute which underlies all these events, and the interpretation of that statute by the High Court. The matter becomes of particular significance when one sees that the *Native Title Amendment Bill* 1997 leaves s. 7 (1) of the *Native Title Act* 1993 unaltered:

> "7.(1) Nothing in this Act affects the operation of the *Racial Discrimination Act* 1975."

And one recalls the pledge of the Prime Minister not to interfere with the principles of the Act.

The *Racial Discrimination Act* 1975 [7] was passed during the dying months of the Whitlam Government. The Khemlani loans affair, and steadily increasing tension between House of Representatives and Senate, gave Australia many more exciting things to think about. This Act sounded nice and warm; the kind of thing kindly parliamentarians could get brownie points for. It was enacted without fuss.

The heart of the Act may be found in ss. 9, 10 and 12, and in particular in the following provisions:

> "9.(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life."

> "10.(1) If, by reason of, or of a provision of, a law of Australia or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin."

"12.(1) It is unlawful for a person, whether as a principal or agent:

(a) to refuse or fail to dispose of any estate or interest in land of a second person or the right of a second person to occupy any land or any residential or business accommodation, ...

(c) to treat a second person who is seeking to acquire or has acquired such an estate or interest . . . less favourably than other persons in the same circumstances; .....

(e) to terminate any estate or interest in land of a second person;

by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that person."

Other cases of forbidden conduct are spelled out in s. 11 and ss. 13 to 17.

You will notice that whereas s. 10 (1) is directed towards the operation of laws, s. 9 (1) and s. 12 are directed to the conduct of individuals.

It may strike you that arrangements such as those under which Aboriginal children living in certain areas get financial assistance for being sent away to boarding school, and other children in the area do not, would not last long against all that. So I should mention also s. 8(1), which excludes from these provisions any special measure to which paragraph 4 of Article 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination* applies. Paragraph 4 says:

"Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups requiring such protection as may be necessary to ensure such groups or individuals equal enjoyment of human rights and fundamental freedoms shall not be deemed racial discrimination."

I say more as to these provisions below.

The Question of Constitutional Validity

The Commonwealth having no direct constitutional power to make laws with respect to racial discrimination, the final recital to the *Racial Discrimination Act* noted the powers principally relied on by the Commonwealth in enacting the Act. The first was the power [under s. 51 (xxix) of the Constitution] to make laws with respect to "external affairs". The second was the power [under s. 51 (xxvi)] to make laws with respect to "the people of any race, for whom it is deemed necessary to make special laws". The third was the power [under s. 51 (xxvii)] to make laws with respect to "immigration and emigration".

In connection with the external affairs power, the recitals refer to the *International Convention on the Elimination of All Forms of Racial Discrimination*, which was formulated under the auspices of the United Nations, was opened for signature on 25 December, 1965, and came into force on 2 January, 1969. The recital does not itself say that Australia had signed the Convention, but it in fact had, on 13 October, 1966.[8] Section 7 of the Act gave approval to ratification of the Convention by Australia, and on 30 September, 1975 the Convention was so ratified.[9]

Uninstructed by judges and commentators, the ordinary citizen might well wonder what these matters of domestic concern within Australia had to do with the external affairs power. Members of the Society stand of course in different stead, for they have heard the connection between the external affairs power and the governing of Australian domestic affairs much discussed -- if not explained -- in a series of scholarly papers delivered at earlier Conferences.[10]

Briefly, as interpreted by the present-day High Court, the external affairs power vests in the Commonwealth Parliament power to make laws with respect to any matter as to which the Commonwealth government (not even the Commonwealth Parliament) has chosen to enter into an obligation to act in this way, with one or more foreign countries.[11] No one knows how many such treaties have been entered into.

State laws are exposed to having their purpose negated by, or to being made nugatory under s.109 of the Constitution because inconsistent with, a law which the Commonwealth government has power to enact only because a past or present Minister for External Affairs has chosen that Australia should enter into a treaty on the matter. You like the position or you don't.

Interpretation of the *Racial Discrimination Act*

The principal discussion so far is that in *Mabo No. 1*,[12] not -- or not yet -- the famous one.

In 1879, Sir Thomas McIlwraith, Premier of Queensland, acting in fine defiance of the authorities in London, proclaimed in the name of Queen Victoria the annexation of the Murray Islands, in Torres Strait, just off the coast of New Guinea. London reluctantly confirmed the annexation. In 1982 Eddie Mabo and other inhabitants or former inhabitants of the Murray Islands brought action in the High Court of Australia, for declarations as to their ownership of pieces of land in the Murray Islands.

The claim rested on the basis that the system of land ownership on the Murray Islands prior to annexation had been such that, under the common law as long established, the rights of ownership under that system survived the annexation of the islands by the United Kingdom. No claim was made about any land on mainland Australia. Nothing in the claim turned on matters of race, though inevitably all the people involved in the Murray Islands system were of the same (Melanesian) race.

At common law, the content of the law in force after annexation depended on whether, at annexation, the land concerned was "settled": whether there was shown, by the presence of houses or farms or gardens or otherwise, an attachment of particular people to particular pieces of land. Where that was shown -- as, say, in India, or Ceylon, where at the time of annexation by England millions of people lived on and worked their particular pieces of land -- there was no question but that title to land (and in general all local law) survived, subject to the right of the conquering Crown to alter it.

In contrast was the case where the land was not already "settled", either because there was no one there at all (a very rare case in fact; Antarctica and some Pacific islands are some of the few examples), or because such inhabitants as were present led nomadic lives, with no attachment of particular persons to particular pieces of land, but appearing to wander where hunting took them. In these circumstances, common law doctrine said the land was available "to be settled" by newcomers who *did* have notions of ownership, and demonstrated it by such things as houses, gardens, fences, and the like. Such places were acquired "by settlement", and were referred to as "settled colonies." Those who "settled" there brought with them the common law.

In 1985, before evidence had been called in the action, the Queensland Parliament enacted the *Queensland Coast Islands Declaratory Act* 1985. The effect of the terms of this Act was to extinguish all claim to land in islands in a specified area of Torres Strait, except under grant from the Crown. The Act did not provide for compensation. Nothing in the Act applied to mainland Australia.

On the face of it the Queensland Act may strike you as a pretty ruthless way of going about things. What the Act purported to do, without compensation, was to take away claimed ownership rights which might well have been -- and as we shall see, were in fact -- real rights

recognised by common law. No doubt things might seem different if I knew more of the intervening history, but the Act does seem rather rough.

That would not in itself have affected the validity of the Act. It is perfectly well established that State governments are not required to pay just or indeed any compensation on compulsory acquisition.[13] States are allowed to be rather rough.

I add, incidentally, that the Queensland Act would have caused no injury to media hero and statuary subject Eddie Mabo, resident of Townsville. His subsequent sworn evidence as to his entitlement to land in the Murray Islands was disbelieved, and his claim failed. His name survives because what started out as a case to establish individual claims was transmuted into a case as to the existence of the system under which he had claimed unsuccessfully.

In 1988 the High Court heard a challenge to the validity of the Queensland Act, on the basis of inconsistency with the *Racial Discrimination Act*. For the purpose of the hearing, the assumption was made that land ownership rights of the type claimed *had in fact existed*. (That involved, incidentally, the assumption that the Murray Islands were already "settled" and could not become a "settled colony".)

The Court lined up in various permutations on various issues. On the basal issue, it held by a majority that the Act was inconsistent with s. 10 (1) of the *Racial Discrimination Act*, and invalid (because under s. 109 of the Constitution, State legislation yields to Commonwealth legislation to the extent of any inconsistency).

It might have been expected that much would be made of the absence of compensation. It is true that mention is made of it, and it may be that the adjective "arbitrary" in the phrase "arbitrary deprivation"[14] is intended to refer to that aspect of the matter. Yet that is not the normal meaning of the word, and the principal judgment (Brennan, Toohey and Gaudron JJ.) mentions the absence of compensation but does not stress it. The basal reasoning may be traced through a series of quotations:

a. "The effect of the 1985 Act ... is to extinguish the rights which the plaintiffs claim in their traditional homeland and to deny any right to compensation in respect of that extinction." [15]

b. "The question which s. 10 poses . . . is whether, under our municipal law, the Miriam people enjoy the human right to own and inherit property -- *a right which includes an immunity from arbitrary deprivation of property* -- to a more limited extent than other members of the community." [16]

c. "In respect of property rights arising under the Crown lands legislation, the answer must be no. A person who is a member of the Miriam people is entitled to own and inherit those property rights in the same way and to the same extent as any other Australian." [17]

d. "But the 1985 Act destroys the traditional legal rights in and over the Murray Islands possessed by the Miriam people . . . and, by an arbitrary deprivation of that property, limits their enjoyment of the human right to own and inherit it."[18]

e. "By extinguishing the traditional legal rights characteristically vested in the Miriam people, the 1985 Act abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands."[19]

f. "...the 1985 Act has the effect of precluding the Miriam people from enjoying some, if not all, of their legal rights in and over the Murray Islands while leaving all other persons unaffected in their enjoyment of their legal rights in and over the Murray Islands." [20]

That, so far as this judgment at any rate is concerned, the case did not turn on the absence of compensation, can be seen from its stated conclusion:

g. "In practical terms, this means that if traditional native title was not extinguished before the *Racial Discrimination Act* came into force, *a State law which seeks to extinguish it now will fail*. It will fail because s. 10 (1) of the *Racial Discrimination Act* clothes the holders of traditional title who are of the native ethnic group with the same immunity from legislative interference of their human right to own and inherit property as it clothes other persons in the community." [21] (Emphasis added throughout.)

Thus we seem to have the position that, so far as State governments are concerned, we are left with native title as it is, as declared by the High Court from time to time. If, for the reasons the Court gives, a State cannot extinguish native title, with or without compensation, neither can a State alter it in any way, for that equally interferes with rights held by Aboriginals only. For the State governments, the judgment seems to create a legal Alsatia in *any area* which concerns Aboriginals alone. That is I think what flows from conclusion (g) above. And as regards the Commonwealth, likewise there is a legal Alsatia if the Commonwealth conforms with its own statute.

You may consider the judgment's reasoning less than convincing. The fact is that no holder of title under the Crown, of any race or colour, has immunity from legislative interference with his property rights. Interference by compulsory acquisition of land for public purposes is an everyday event: consider dams, airports, freeways and, in Melbourne, Citylink. Take away compulsory acquisition of land held by title under the Crown and then try to build a railway from Melbourne to Darwin, or Adelaide to Darwin, or Sydney to Canberra, or a pipeline from the Pilbara to the south.

Nor is it any ground for resistance, that the authority concerned does not need so much land, or is open to criticism in some other way. The Commonwealth government behaved with monstrous vandalism when it acquired for destruction, in order to erect a few buildings for the Australian Broadcasting Commission, about one-half of the great Victorian garden at 'Ripponlea", already reserved under an Interim Development Order for a public park. But in hotly contested litigation, no one ever suggested that the arbitrary nature of that vandalism operated to provide a defence.[22]

Again, it is true that when the Commonwealth acquires, it must do so on just terms. [23] I have said that no such requirement applies in the case of State governments. Acquisition is just as effective whether or not compensation, or adequate compensation, is paid. And if you say that no State government would ever dream of compulsorily acquiring, on other than just terms, land held from the Crown, you don't know your State governments.

Ask the pastoralists. In the late 1940s and early 1950s, millions of acres were resumed by State governments for soldier settlement. The resumptions were at prices prevailing either in 1939 or 1942. In *Minister of Lands v. Pye* the State had acquired for 211,000 pounds land worth over 600,000 pounds. Indeed arrangements were made between the Commonwealth and the States, under which States were to acquire pastoral land cheaply, and use it for soldier settlement in a manner agreed with the Commonwealth, following which the Commonwealth would make a grant to the State based on the less than fair compensation that the State had paid.[24]

At least those pastoralists got 1939 or 1942 prices. The New South Wales holders of land held under early grants, which included title to minerals therein, received *nothing* when the very valuable coal deposits in the land were resumed by the State. Take all these facts to the quotations set out above, and the statements as to difference of treatment may seem less powerful. Poor pastoralists. After a generation of having land filched by governments, they are told that that cannot be done to Murray Islanders, because it doesn't happen to anyone else. In the cause of preventing discrimination, the Court gave to the single race that had native title in the Murray Islands a position no ordinary Australian has.

Applying this to the Mainland

In the same breath, all that becomes law as to the mainland also.

In a paper I wrote some years ago, following the High Court's decision in *Mabo No.2*,[25] I expressed some surprise that in a case concerning native rights as found *by evidence* to exist in a Melanesian culture on the Murray Islands, the High Court should lay down rules as to the position in an Aboriginal culture on mainland Australia, as to which it had before it no evidence whatsoever. I suggested that this was contrary to the High Court's long-established practice of not deciding any constitutional issue unless *required* to do so in order to decide the case before it, and where that is the position, to decide *as narrow a point as will dispose of the instant case*. That course allows the Court to feel its way step by step in difficult areas, and goes far to preserve it from criticism on the basis that it is "legislating".

Since then similar criticism has been made by many others, and I fancy that it now represents the accepted view. Certainly it had become strongly enough established by 1995 for the Court to seek to answer it. In the *Native Title Act Case* [26] the Court said:

> "The principles stated by this Court in its judgments have effect upon the operation throughout the Commonwealth of the whole complex of Australian laws. Consequently, when this Court was called upon in *Mabo v. Queensland (No. 2)* to consider whether native title survived the annexation of the Murray Islands into the Colony of Queensland on 1 August, 1879 and whether the Meriam people were entitled to their enjoyment of native title to or in respect of unalienated Crown land in the Murray Islands, the general question of the recognition by the common law of the native title of Aboriginal peoples to or in respect of traditional lands in other parts of the Commonwealth arose for consideration and was answered. As all parties and interveners have accepted in argument, the present case falls to be determined in the context of the answer which the majority of the Court gave." [27]

In fact that "general question" did *not* arise. Common law as already established provided ample basis for the Murray Island claim to succeed, without saying one word about the mainland. In the light of the very strong factual case, I have no quarrel at all with the result as regards the Murray Islands. But that doesn't get you to the mainland. Why the Court extended its dictum to the mainland, has never been made clear.

Indeed it is not clear what the Court *did* in *Mabo No. 2.* There are two, and as I see it only two, conceptual possibilities:

> (a) That the court overruled (for Australia) the centuries old common law distinction between the acquisition of settled and unsettled land; or
>
> (b) That the court accepted the distinction, but found as a fact that Australia had in fact been settled land.

The first seems unlikely. We know that the Court did require, and did examine, evidence as to the existence of a pre-annexation system of land ownership in the Murray Islands. The process was required only if the Court *did* recognise the distinction between settled and unsettled land. But the second is equally unlikely, given the total absence of evidence.

The evidence as to the Murray Islands justified a finding that the Islands were already "settled". At common law as it had long stood, the rest followed. As I said earlier, it followed from the fact that the Islands were already "settled", that they never could be "acquired by settlement", making them a "settled colony". Nor in fact did English settlers ever "settle" them. Yet Brennan J's discussion rests on the express assumption that they *were* a "settled colony".[28] That is the one thing the evidence shows they were not.

None of that concerned the mainland. All that needed to be said as to certain mainland cases cited by the State of Queensland in argument, was that they rested on proof or assumption or judicial notice that the nature of Aboriginal culture on the mainland was such that the land had not been "settled", and they were irrelevant to the position as found by evidence to obtain on the Murray Islands. The question whether that view as to the mainland was right, could have been left to be decided another day, in a case in which evidence was called on the matter. If at that point the finding was that a system had existed compelling the answer that the land had indeed been "settled", common law as long understood would have said that the rights inherent in that finding survived annexation. Only if the finding was that on the evidence the land had not been "settled", would there have arisen any question whether the common law rule was unsatisfactory.

That is the kind of process long followed by the High Court -- and all wise courts of ultimate appeal -- in the discharge of their tasks, especially in regard to constitutional cases, where the Court's decision can leave the people, through their Parliament, powerless to deal with the matter. It is a lasting pity that the High Court departed from that step by step process here.

What has so far not I think been mentioned in this context, is that the whole Australian inheritance of the common law rests on the view that Australia was a "settled colony" (i.e. a place not previously "settled"). Only in such colonies did the new settlers bring with them the common law, as opposed to having to accept the existing system, subject to the right of the Crown (not Parliament) to alter it. If Australia was in fact already "settled", New South Wales was not a "settled colony", and those who came there did not bring the common law with them. Truly *Mabo No. 2* has implications.

The Language of the Statute

I would suggest that one of the vices of this and other "discrimination" legislation lies in the enactment as binding law of what are properly to be seen as political slogans, aims and aspirations. It is one thing for legislation to be measured, politically and morally, against slogans of this sort. When one establishes such broad slogans as legal rules, trouble lies ahead.

People do in fact discriminate every day, and they do so perfectly properly. The selectors of the Australian cricket team discriminate against persons of inadequate skill, every time they pick a team on the basis of cricketing merit. If I got out statistics showing that everyone in the Australian Test team was aged in the 20's or 30's, and that there was a marked shortage of 65 year old barristers, you would think I was barking up the wrong tree. We take sport too seriously to pay regard to such nonsense. Yet I read recently that legislation which was intended to expose children to criminal culpability if they knew the difference between right and wrong, discriminated against middle-class children because they were more likely to have been taught that difference.

We would of course think something seriously wrong, if cricket selectors picked someone on the ground that he was a Presbyterian, and that without him there would not be a Presbyterian in the team. In different circumstances it might be perfectly proper to pay regard to the Presbyterianism, and equally wrong to pay regard to the ability at cricket. It all depends on who is doing what, and for what reason.

Again it is well known that, at any age, women as a group have a higher expectation of life than men of that age. For that reason a life company, left alone, would charge a woman more for an annuity than it would a man of equal age. Ask your teenage daughter if that discriminates against women. When she has recovered her breath, tell her that for the same reason, a life company would insure her life for *less* than it would a man's. She may become less dogmatic.

By leaving everything to a general slogan, you finish with the practical rule being decided not by Parliament but by courts, and finally by an unelected ultimate Court which may have its own agenda, with the rule changing from time to time in accordance with that agenda. That is not the Court's fault, but the legislature's. But the result is the same. When people talk of "trusting the Court", I always remember that a very great court, the Supreme Court of the United States, long held legislation controlling the hours of work of children invalid, as an interference with a slogan called "rights of property".

The position is exacerbated by the language of the statute. No doubt it is seen as safer, when the statute derives its validity from the treaty, to follow closely the language of the treaty. But it is not required of a statute giving effect to treaty obligations, that it follow the identical turgid language. The relevant provisions of this Act contain too much United Nations language which would not be found if the draftsman had sat down to distil from the thrust of the treaty, wording suitable for an Australian statute.

Let me assert my belief, that unless Parliament looks with care at its various anti-discrimination legislation, there will follow results which on their own no one would have proposed.

Positive Discrimination

The Act describes itself as an Act "relating to the Elimination of Racial...Discrimination". It is based on a treaty for "the Elimination of All Forms of Racial Discrimination". Neither the Act nor the treaty means it. Each provides an exception for "special measures":

> **Section 8:**
>
> "8.(1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article I of the Convention applies..."
>
> **Article I:**
>
> "4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary to ensure such groups or individuals equal enjoyment of human rights and fundamental freedoms shall not be deemed racial discrimination..."

You will see in paragraph (4) that discrimination of the kind concerned, which if you believed in it you might well call "justifiable racial discrimination", is deemed *not to be racial discrimination at all.* Of course they have to say it that way. How otherwise could they condemn "All Forms of Racial Discrimination"? Once again the United Nations provides material to make George Orwell blush. And so, by express adoption, does a Commonwealth statute.

You may justifiably feel discomfort arising as soon as you see the word "groups". We are to consider the protection (etcetera) not just of individuals, but of groups. Division is on the way

already. I observe that people who make their living looking after the good of others commonly do think this way. Being required to pay to each person the respect due to each individual person is much too hard. Groups are so much easier to make assertions about, and deal with. So the Act lets us give protection to an individual who does not need it, so long as he is a member of a group which as a whole is considered to need it. Equally we are to deny protection to an individual who does need it, because he comes from a group which, seen overall, does not.

We are to say to the non-Aboriginal child who does not get sent away to boarding school, that his lot is to be worse than that of the Aboriginal child next door, because the Aboriginal child's group does, and his group does not, need protection. He may query that.

(What, incidentally, is his group? White Australians? Non-Aboriginal Australians? White or non-Aboriginal Queenslanders? White or non-Aboriginal children? It depends on where you wish to finish. Try "children living in outback Queensland", and then say why the Aboriginal child next door needs more protection than the non-Aboriginal child.)

How can they -- how dare they -- wonder at the support for Pauline Hanson, while they try to heal past injustice by present injustice, government sponsored at that?

I have never had the pleasure of meeting Essendon's great Aboriginal footballer and Norm Smith Medal winner, Michael Long. But when he wrote in a newspaper article recently that he longs for the day when the laws apply identically to all people, without reference to race or colour, I felt a shot of hope. That's precisely what I want.

Let's deal with poverty, and not follow the Governor-General's divisive habit of separating it into Aboriginal poverty and non-Aboriginal poverty. Let's deal with ill-health and inadequate medical facilities, not Aboriginal ill-health and inadequate medical facilities and non-Aboriginal ill-health and inadequate medical facilities. Let's stop our laws forcing us to think racist and be racist. Michael Long's statement made my day. It is for that statement (and others he has made) that I would like to shake his hand.

Meanwhile we have the Act which is too sacred to be touched.

A bold High Court and a quiet Attorney-General

In recent months there has been criticism from high judicial places indeed -- the Chief Justice, Sir Gerard Brennan and the former Chief Justice, Sir Anthony Mason -- of the fact that the Attorney-General, Mr Daryl Williams, QC has not spoken out more vigorously in defence of the High Court (sometimes "the judiciary") against political attacks, and of his failure in this regard to fulfil a traditional role of the Attorney-General. He ought, said Sir Anthony Mason recently, to be prepared to "take issue with his political colleagues when they attacked the High Court." Mr Williams replied that he fundamentally disagreed with Sir Anthony's criticism, and added that Sir Anthony failed to recognise that "times had changed, and that support for the traditional role of the Attorney-General ignored contemporary reality".

It is time to analyse the position a little more closely, and consider whether Attorneys-General ever were under a duty such as that assumed by the two Chief Justices. It is appropriate to do so in Mr Williams' home town.

It has been long true, and it remains true, that the Attorney-General has certain functions in the administration of the law which he must deal with on his own personal responsibility. The issue of the fiat often required for a plaintiff to sue a government is a traditional example. It has long been accepted that political considerations must be treated as irrelevant in the performance of that duty, which is one for the Attorney-General alone, as part of the system of administration of justice. This has not changed, though certain strong Prime Ministers and Premiers have been

known to lean on Attorneys-General very hard indeed in respect of it. I see no reason to think that Mr. Williams would do less than his duty in functions such as these.

It is also true that Attorneys-General have often spoken out when there has been criticism of judges which is demonstrably unfair or misconceived: as, for example, if a judge were attacked for imposing a harsh sentence, when the relevant law gave him no discretion in the matter. If anyone criticised the High Court for dealing with constitutional matters, I would expect to see the Attorney-General stating that the Constitution itself gave that jurisdiction to the High Court. I see no reason to think that Mr Williams would fail to speak in relation to matters of this sort.

For the rest, I have found it extremely difficult to find in the books any sign whatsoever of an alleged traditional role of an Attorney-General, to defend judges or courts publicly, regardless of his own views. *Edwards*[29] knows nothing of any such role. Nor does any parliamentarian I have spoken to, including a very long-serving State Premier and several former Attorneys-General. I note that in the United Kingdom the Lord Chancellor's Office, which has the general supervision of the state and functioning of the judiciary, often enough expresses public criticism of the actions of a particular judge.

To put it in terms of the local facts, there is, it seems to me, very little criticism of "the judiciary" in Australia. On an earlier occasion I mentioned two fields where criticism does occur periodically. The first occurs in the context of rape cases, as e.g. where a judge is unwise enough to make a statement about women generally, instead of confining his comments to the woman concerned. The ensuing criticism will be personal ("Outrage by Judge X") and it will be in relation to a particular case.

The second field of criticism concerns leniency and inconsistency in sentencing. This is a more general criticism, but the particular occasion will often be sparked by an action of a particular judge. Beyond those two fields there seems to me little general criticism indeed. For the third field of criticism concerns the High Court alone.

It is in relation to specific decisions which the High Court has made in recent years; the manner in which the Court has handled these cases; curial and extra-curial indications by members of the Court that a range of implied rights can be spelled out of a Constitution from which it is known, as a matter of historical fact, that they were deliberately omitted in the name of parliamentary democracy; and suspicion of a theme which links all these, and is seen as an agenda of using judicial power to protect Australian citizens from alleged excesses or failures of Parliaments. It is only in relation to this third field of criticism that I have heard from the High Court, or anyone else, any criticism as to the extent to which Attorneys-General have performed their alleged traditional role as a defender.

Mr Williams may comfort himself with the reflection that probably no one has a greater personal interest than his latest critic, Sir Anthony, in seeing the High Court defended. Alone among our Chief Justices, Sir Anthony inherited a High Court which had great prestige, and handed on a Court which had lost much of it.

Criticisms such as those mentioned above may be right or they may be wrong. They are matters of opinion, not matters reflecting basic misunderstandings of the type I would expect to bring an Attorney-General to his feet or cause him to issue a statement. Why should an Attorney-General defend a court against criticism of this kind, if he considers the criticism to be right, or considers the criticism, whether right or wrong in the particular case, to be a justifiable reaction, made in the context of a parliamentary democracy, to the Court's conduct? I can find no authority that an Attorney-General has ever had a duty of that kind.

Sir Anthony concedes that an Attorney-General "may have justification for voicing criticism himself". This is very fair, but where does it lead? Must the Attorney-General remain silent as to his own view, while misleading the public by publicly defending the Court against the criticism he in his own heart considers justified? That cannot be, for Sir Anthony leaves him free to "voice" his criticism. Is it that he is free to criticise the Court privately, so long as he publicly makes the defence he considers ill-conceived? Or is he publicly to both criticise and defend, so that no one takes any notice of him at all? It is not an Attorney-General Sir Anthony wants, but a reborn Janus.

Sir Anthony also said that there was a "great need for self-restraint and mutual understanding between politicians and judges". So there is. On the judicial side we have long called that "judicial restraint". A very great American appellate judge, Judge Learned Hand, said that the only two possibilities consistent with democracy, were judicial restraint and popular control of judges. If courts are seen as bold and adventurous, there will be popular criticism and calls for popular control:

> "One or other is the condition of democracy; it is a condition of anything but ceremonial dancing before the ark of the covenant."

In his book *Slouching Towards Gomorrah*, Robert Bork, another American appellate judge (and a nominee kept off the Supreme Court of the United States by allegedly free speech liberals), said of a particular decision which had been much criticised by politicians:

> "When political leaders denounced the ruling and the judge, four members of the court of appeals issued a statement saying that political attacks on the ruling threaten to weaken the constitutional structure of this nation', and These attacks do a grave disservice to the principle of an independent judiciary and, more significantly, mislead the public as to the role of judges in a constitutional democracy.' For sheer chutzpah this is hard to beat. It is the judiciary's assumption of power not rightfully its own that has weakened, indeed severely damaged, the constitutional structure of the nation. It has been the judiciary, and not its critics, that has misled the public as to the role of judges in a constitutional democracy. Harsh criticism by political leaders of outrageous judicial decisions is a legitimate and necessary response." [30]

I have said before, and will say again, that in Australia too it is the conduct of the Court which has led to criticism and questioning as to the role of the High Court, criticism and questioning which is I think deeper and more widespread than the Court or Sir Anthony yet recognise.

Nor is it only politicians who criticise. A letter I received in 1994, following publication of a paper I wrote on *Mabo No. 2*, read in part as follows:

> "It is excellent, cogent and convincing: it is well organised and scholarly. *The court's decision was not merely wrong, it was unnecessarily mischievous and has proved deeply divisive.*
>
> "Lacking the discipline of the occasional appeal to the Privy Council and with no rights of appeal, the court chooses what work it will do. When I think of the work the court did in other days -- trials at first instance, tax and industrial property, even personal negligence, as well as its appellate work -- I wonder how this court fills in its time. Its social engineering -- Tom Denning gone mad -- the individual judges dispensing justice' as they personally see it in the circumstances rather than confining themselves to the administration of the law as it exists, *must ultimately bring themselves into disrepute. The populace must in the end refuse*

to accept what unelected and unrepresentative judges hand out. The court will at least lose respect. That I think is on the way for this court." (Emphasis added.)

The letter is signed very simply, "Gar".

Endnotes:

1. The full title of this paper is, "The *Racial Discrimination Act* 1975 and A Related Matter to do with the High Court of Australia".

2. *Mabo v. The Commonwealth* (1992) 175 CLR 1.

3. (1995) 183 CLR 373.

4. It is a great pity that this name has come into use. The word "title", in particular, has overtones of uniformity, and of concepts of property and ownership as known in respect of land held of the Crown, which sit very uneasily with rights of the type now gathered under that name. Unless protected by definition, as in the Western Australian Act itself, the result can be misleading. I note that in *Wik* itself Toohey J. said at p. 126:

"Inconsistency can only be determined . . . by identifying what native title rights in the system of rights and interests . . are asserted in relation to the land contained in the pastoral leases. This cannot be done by some general statement; it must focus' specifically on the traditions, customs and practices of the particular aboriginal group claiming the right."

It is always a pleasure to agree with his Honour.

5. (1996) 187 CLR 1.

6. Probably the next worst was the division associated with the Conscription debate of 1917. More recent issues such as bank nationalisation and the banning of the Communist party were nowhere near as divisive even at their height, and they soon passed off entirely.

7. Act No. 52 of 1975.

8. See *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 per Gibbs CJ at p. 178.

9. *Ibid.*

10. See *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 1 (1992), p. 141 (Dr Colin Howard); Volume 3 (1993), p. 1 (Dr Colin Howard); Volume 5 (1995), p. 1 (Dr Colin Howard), p. 17 (Professor George Winterton), p. 47 (Professor Michael Coper); Volume 6 (1995), p. 1 (Rt Hon Sir Garfield Barwick), p. 9 (S. E. K. Hulme), p. 105 (Dr Colin Howard); and Volume 7 (1996), p. 1 (Dr Colin Howard).

11. See *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 per Mason, Murphy and Brennan JJ., and *The Commonwealth v. Tasmania* (the "Tasmania Dam Case") (1983) 158 CLR 1 per Mason, Murphy, Brennan and Deane JJ.

12. *Mabo v. Queensland* (1988) 166 CLR 186.

13. See, e.g., *Minister of Lands v. Pye* (1958) 87 CLR 469.

14. I have referred before today to the frequent difficulty in teasing out of unnecessarily vague language just what present-day High Court judgments are meant to mean. The use of the phrase "arbitrary deprivation", without identification of what precisely it meant, is symptomatic of this problem.

15. 166 CLR 186 at 213-214.

16. *Ibid.*, at 218.

17. *Ibid.*

18. *Ibid.*

19. *Ibid.*

20. *Ibid.*

21. *Ibid.*, at 218-219.

22. See *Jones v. The Commonwealth (No. 1)* (1963) 109 CLR 475 and *Jones v. The Commonwealth (No. 2)* (1965) 112 CLR 206.

23. Section 51 (xxxi) of the Constitution.

24. Something of the story may be found in *PJ Magennis Pty. Ltd. v. The Commonwealth* (1949) 80 CLR 382, *Tunnock v. The State of Victoria* (1951) 84 CLR 42, and *Pye v. Renshaw* (1951) 84 CLR 58.

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

26. *Western Australia v. The Commonwealth* (1995) 183 CLR 418.

27. *Loc. cit.*, pp. 417-418.

28. 175 CLR 1 at 26.

29. *The Law Officers of the Crown* (1st edn, 1964).

30. Robert Bork, *Slouching Towards Gomorrah*, p. 115.

Chapter Two

The Prime Minister's Ten Point Plan

Dr John Forbes

In June, 1992 the High Court created (or if you will, discovered) a remarkable new form of land title.[1] The discovery was a prelude to years of political, legal and economic disruption which even sequestered judges might have anticipated. The discovery soon became an icon of correct and progressive thought, although it is tied to a concept that is usually anathema these days: native title is explicitly a race-based right.

Effectively, *Mabo* spread Australia-wide the "land rights" which the Commonwealth bestowed on the Northern Territory in 1976. The Hawke Government flirted with the idea of doing it by legislation in the 1980s, but Western Australia's Labor government gave the scheme short shrift.[2] Little by little we may be led to the light. *Mabo* merely indicates that, whatever "native title" means, it *might* exist on the mainland as well as on Murray Island, and if so it resides in places, in forms and on terms yet to be revealed. In 1914-1918 war-weary troops in the trenches had a refrain which students of native title could echo now: "There *is* a Front, but damned if we know where."

The Court did make native title subject to the creation of freehold and certain other titles known before June, 1992, but this was a gesture rather than a concession. There must be compensation ("just terms") for any interference with the windfall, and there is no set-off for the billions spent on Aboriginal welfare since the 1970s, or for the Land Acquisition Fund, or for anything which Europeans brought to Australia.

The Court also relied for the permanence of its decree on the *Racial Discrimination Act* 1975 ("the *RDA*") and domestic politics based on perceived views of an international "community". The *RDA* and the "just terms" clause[3] are the twin pillars of native title. It is curious that people who sneer at "Eurocentricity" and "cultural cringing" play domestic politics by appealing to "international opinions" before which every knee must bow. Consistency and intellectual *chic* are not bosom companions.

Time for *Mabo* Mark II.

The extreme vagueness of *Mabo* Mark I soon forced Parliament's hand, as it was no doubt meant to do. After months of bitter debate and melodramatic lobbying by "players" and "stakeholders", the *Native Title Act* 1993 ("the *NTA*") emerged in the dying days of the year. At the eleventh hour the farmers and graziers, on being told that native title would be confined to vacant Crown land, broke ranks with the miners. That was not one of history's finest tactical withdrawals. This time the miners are leaving the front running to the farmers.

The *NTA* does not tell us what native title is; it leaves that to courts and tribunals to compose as they go along. It creates a zealous National Native Title Tribunal ("NNTT") whose life will not be prolonged by making native title difficult to claim. It also creates a "right to negotiate" remarkable in two respects. It is more extensive than any right held by members of other races facing a compulsory acquisition of property, and it is available not only to people with established rights but also to those who merely claim them. (This fundamental distinction is constantly blurred by media references to claimants as "native title holders" or "traditional owners".)

Three years of the *NTA* have done little to allay the fears and uncertainties raised by *Mabo* Mark I and Mark II.

Time for *Mabo* Mark III.

On the strength of some brief and passing remarks in *Mabo*[4] the Keating Government, many influential lawyers and the farmers who subsided at the last minute embraced the belief that pre-1994 leases were immune from native title. That article of faith was challenged in *Wik and Thayorre Peoples v. Queensland* ("*Wik*").[5]

In June, 1996 judgment in *Wik* was still reserved. I penned a paper for this Society's Adelaide conference in fear and trembling that at any moment *Wik* might deconstruct it when no time for revision remained. Now I return to the crystal ball for prospects of the Ten Point Plan and its elaboration in the *Native Title Amendment Bill* 1997 ("the Bill"). Overnight developments are less likely this time.

In Adelaide, somewhat against the tide, I advised caution. While I suspected that the majority in *Wik* would be smaller than in *Mabo* (and that came to pass), it seemed unlikely that the Court would "stunt the growth of its child by saying that all pre-1975 pastoral leases extinguish native title".[6]

Wik finally arrived on 23 December, 1996; it is not only elected politicians who know how to release bad news when the country is at the beach. By the narrowest margin, the Court held that native title is not necessarily extinguished by pastoral leases but may co-exist with them. Instantly the acreage open to claims rose from 35 per cent to 78 per cent.[7] It is noted in *Wik* itself that about 42 per cent of Australia is under pastoral leases, and that in some States the figure is as high as 80 per cent.[8]

Native title enthusiasts have ridiculed claims that *Wik* worsens the uncertainties of *Mabo*,[9] but Justice McHugh and his brother Kirby[10] do not agree. McHugh J. is convinced that "there will be serious uncertainty until this Court finally resolves the consequences [for] pastoral leases".[11] Even Kirby J. admits that *Wik* "introduces an element of uncertainty into land title in Australia". But his Honour consoles himself -- if not Australia's farmers and graziers -- with the thought that "... this is no more than the result of the working out of the rules adopted in *Mabo*".

By August, 1997 about 600 claims had been lodged, some over vast areas and many overlapping.[12] When the Bill appeared, more claimants rushed to register in the hope of avoiding the higher threshold test that it proposes.[13]

Wik gives no answer to these questions: (1) For the umpteenth time, what *is* native title? (2) How difficult or easy is it to prove? (3) How does one find an anthropologist to question a claim? (4) How does one distinguish an "exclusive" Crown lease (immune from native title) from a "non-exclusive" one? (5) On leases of the latter sort, where do the lessee's rights end and Aborigines' rights begin? (6) How are demarcation disputes to be settled, at what expense, and at whose expense? (There are many more questions, but those niggling little examples will do.)

Time for *Mabo* Mark IV.

Long before the *Wik* decision, the Keating Government knew that the *NTA* was in need of significant amendments. A Bill appeared in November, 1995 but lapsed when a general election was called. On 27 June, 1996 the new Government produced another Bill, but shelved it until the High Court produced the son of *Mabo*.

Wik put the 1996 Bill back in the melting pot. Mr Howard's "Ten Point Plan" was published on 4 June, 1997, and on 4 September, 1997 it emerged as a Bill and was immediately referred to a Joint Parliamentary Committee. Despite assertions by the Prime Minister that major amendments will not be accepted, it is doubtful whether the Senate will pass the Bill in any semblance of its

present form. But if the Bill does pass into law more or less intact it will then face the third house of the legislature, a High Court in the process of reconstruction.[14]

I shall concentrate on the Bill, which seeks to implement the Plan. In short form the Plan proposes:

1. Validation of some 1994-1996 Crown grants.

2. A declaration of "exclusive possession" tenures.

3. Protection of government services (roads, pipelines, etc).

4. Extension of "non-exclusive" leases to other forms of "primary production".

5. Interim access rights for registered native title claimants.

6. Improved access for miners to land under native title claim.

7. Protection of infrastructure developments.

8. Clearer Commonwealth and State[15] control of water resources and air space.

9. A stricter "threshold test" for registration of claims.

10. Improved facilities for settlements out of court.

As predicted in March this year,[16] the Government has rejected demands by the Queensland Premier and others[17] for a "one-point solution", namely the extinction of all native title, subject to compensation. The Government explains:[18]

> "[I]t is important to confirm that native title has only been extinguished on exclusive' tenures. To go further ... could undermine the very certainty and security sought ... [given] the likelihood of successful constitutional challenges. ... [Besides, native title] claims ... would simply be converted into claims for compensation, and would continue to involve the same expensive, time consuming ... litigation as claims now do.[19] It would greatly increase the potential exposure of governments ... It would be unlikely to be passed by the Senate [and] ... would jeopardise the passage of those amendments on which there might otherwise be a parliamentary consensus ...
>
> "It would risk permanent disaffection between indigenous and non-indigenous Australians [and] ... would ... be widely seen as unfair ...
>
> "[It] could provide a greater stimulus for calls for an Olympic boycott[20] ... It could be a breach of our international obligations ... ."

Within a week of its appearance the Ten Point Plan was publicly criticised by two federal judges, causing international embarrassment.[21] However, Father Frank Brennan SJ, a son of Chief Justice Sir Gerard Brennan and a leading proponent of "land rights", was more encouraging. Preferring the *patois* of American baseball to Australian sporting parlance, he ruled that the Plan was "within the ballpark".[22] But alas, a self-appointed referee is always at risk of dismemberment, and Aboriginal politicians quickly made it clear that Brennan was not their spokesman on this occasion.[23] Mr Noel Pearson depicted the Prime Minister trying to "wash the blood of extinguishment off his hands",[24] and regretted that he and other Aboriginal

"negotiators" were too kind to other parties when the original *NTA* was cobbled together.[25] The Bill, Pearson declared, contains "vile proposals" which "must at all costs be stopped".[26]

Initially there were signs that the federal Opposition, sensing an electorate tired of a diet of Aboriginal affairs, would let the Bill through. But in early October the Opposition spokesman on Aboriginal affairs told the parliamentary committee that "some things are not negotiable".[27] The proposed reduction of the right to negotiate is a major grievance.[28] There have been dark hints of a double dissolution if the Bill is rejected,[29] and one senior party administrator is confident that the Government would win the ensuing election "in a landslide".[30] But other counsellors are against a confrontation of that kind.

This paper does not canvass every aspect of the Bill. It comments on:

1. The validation of 1994-1996 grants.
2. The declaration of "exclusive" tenures.
3. Permission to extend "non-exclusive" leases to other forms of "primary production".
4. Interim access rights for registered native title claimants.
5. The new threshold test and its effect on the right to negotiate.
6. Changes of interest to the mining industry.
7. Facilitation of agreements.
8. A Compensation Cap and Time Limits.
9. The role of the Federal Court.
10. "The Hindmarsh Proposition".

1. The Validation of 1994-1996 Grants

The Bill would validate Crown grants, other than mining rights over vacant Crown land, made between the commencement of the *NTA* (1 January, 1994) and the *Wik* revelation on 23 December, 1996.[31] The States would be allowed to pass similar legislation.[32]

It is likely that this point will be won after some huffing and puffing to enhance opponents' bargaining power in other areas. The case for validation is strong, because in 1993 the former Government (in close consultation with influential Aborigines) concluded that native title was not claimable over pastoral leases. According to *Wik* that was a serious mistake, but the fact remains that those who made it were influenced by the federal government,[33] by the fulsome Preamble to the *NTA*[34] and by an implication in the Act itself.[35]

Wik was a windfall; it has been said repeatedly and without contradiction that in 1993-1995 leading Aboriginal "negotiators" accepted the conventional wisdom that all Crown leases extinguished native title.[36] Consistent with this claim, not one legal challenge was made to the grants in question. The guardians of native title certainly do not lack public funds or an appetite for litigation, but this time they did not go "to the haven of the courts to be saved from the wolves at Parliament House".[37]

Against this background, and considering that compensation is payable to anyone adversely affected, it seems unlikely that politicians will fight the validation provisions to the death.

2. The Declaration of "Exclusive" Tenures

In reliance upon statements of the majority in *Wik*, it is proposed to declare that certain past Crown grants[38] conferred exclusive possession and so extinguished any relevant native title.[39] The list includes freeholds, commercial leases, "exclusive" agricultural and pastoral leases, residential leases, community purpose leases and other grants (not including mining titles) to be specified in a Schedule to the Act. Also in reliance on *Wik*, it will be declared that native title over "non-exclusive" leases is extinguished "to the extent that the grant involves ... rights ... that are inconsistent with the native title".[40] *Wik* seems to accept[41] that a Crown lease which confers exclusive possession extinguishes native title.

However, the "exclusive" list is controversial. Rural interests complain that the proposed Schedule omits many tenements which *are* exclusive,[42] including a large number of leases in the Western Division of New South Wales.[43] On the other hand, native title advocates contend that the "exclusive" declarations would effect extinguishment on a scale greater than any envisaged by *Mabo*, *Wik* or the *NTA* and so violate the *RDA*. In Queensland, the list would rule out native title over about 25 per cent of the State, but 58 per cent would still be claimable.[44]

The professed purpose of the "exclusive" list is to "confirm" *past* extinguishment of native title in a manner "consistent with the *Wik* decision".[45] To the extent that the "exclusive" list accurately reflects that decision -- and it is recognised that perfection cannot be guaranteed[46] -- it merely underlines legal history. It would only operate retrospectively[47] to the extent (if any) that it treated as "exclusive possession acts"[48] some transactions which, on a judicial view, were not originally of that kind. In such a case the Government would fall back on a compensation clause[49] to counter claims of unlawful discrimination. If that were deemed insufficient, it is submitted that the legally good portions of the list could be "severed" from the bad.

3. Permission to extend "non-exclusive" Leases to other forms of "Primary Production"

These proposals are in aid of rural lessees who fear that any significant improvement to a non-exclusive holding, or a change from grazing to (say) cotton growing or "farmstay tourism", may be invalid unless they run the gauntlet of the right to negotiate.

It is proposed[50] to allow any form of "primary production" on a non-exclusive lease without the need to negotiate.[51] "Primary production" is widely defined[52] to include grazing, farming, fishing, forestry, horticulture and aquaculture. Limited rights may also be granted to third parties.[53] Any adverse effect upon a co-existing native title will attract compensation and the "non-extinguishment principle" will apply.[54] These proposals are essentially a modification of the right to negotiate, and the Government's view is that such a special right may be wound back without contravening the *RDA*.

4. Interim Access Rights for Registered Native Title Claimants

These rights would accrue to persons interested in a registered claim if, on 23 December, 1996[55] they "regularly had physical access to the whole or part of the area ... for the purpose of carrying on one or more traditional activities". Pending judgment or settlement they would have access to the subject land "in the same way and to the same extent" as in the past, subject to the rights of the lessee.[56] These rights would be additional to any access allowed by State land laws or the Aboriginal heritage legislation.[57]

"Traditional activity" means hunting, fishing, gathering, camping, performing ceremonies or visiting sites of significance.[58]

The proposed rights may make little difference in jurisdictions such as South Australia and Western Australia, where there are similar rights under State law.[59] Graziers in Queensland and New South Wales may find them harder to accommodate.

Interim rights of access would not necessarily be enjoyed by every Aborigine who is party to a registered claim. Some invidious distinctions may be involved. There could well be disputes about who is and who is not entitled to access, or as to whether persons who *are* entitled to it are exceeding their licence. Such disputes could be taken to the Federal Court, which might refer them to mediation.[60] There is a reasonable apprehension that, once people have interim access, a final decision in their favour could be a foregone conclusion. However, the difficulties are glossed over in a forlorn hope of reducing political opposition to the Bill.

5. The new Threshold Test and its effect on the Right to Negotiate

There is broad agreement that *some* tightening of the registration requirements is warranted. Decisions of federal judges[61] have made registration -- and hence the right to negotiate -- absurdly easy to obtain, particularly since *Wik* doubled the area open to claims. "Ambit" claims are an embarrassment to responsible Aborigines and a burden to leaseholders.

Under the new regime, persons seeking to register claims under the *NTA* would have to give details of the subject land and the customary basis of the claim. Further, the Registrar would have to be satisfied "that at least one member of the native title claimant group currently *has or previously had* a traditional physical connection with the area covered by the application".[62]

This would certainly be an improvement upon the vapid treatment of "sufficient connection" in *Mabo* Mark I, to which the existing *NTA* adds nothing. In *Mabo* it is a question of "presence amounting to occupancy" from a time "long prior" to the "point of inquiry". A "substantial" connection may exist where claimants have continued "(so far as practicable) to observe the customs ... of that clan or group".[63] The connection (physical, spiritual, contemporary or historical?) depends on native "laws and customs".[64] There can be native title where the clan continues to occupy or use the land, and other possibilities remain open.[65]

One judge speaks of a title "rooted in physical possession", but gives no indication of how far back in time the search for it may be taken.[66] According to the same judge, a customary connection may survive European influences, such as the "profound" effects of Christianity, the use of schools, other modern facilities and the adoption of a cash economy dependent on government allowances.

As an undergraduate exercise in Legal Drafting all this would leave something to be desired. On the crucial issue of "connection" the High Court has a great deal of room for manoeuvre.

Mabo's meanderings encouraged the Native Title Tribunal to doubt the necessity of a physical connection,[67] and when a company associated with Charles Perkins lodged a claim over the Ernest Henry mine site in Queensland he insisted that it was irrelevant that most of the claimants did not live in the area.[68] Anthropologists of the 1930s and 1940s, free from today's enticements of consultancy and expert-witness fees, were often unable to find consistent genealogies within a single century.[69] The locations of native groups in the late 19th and 20th Centuries were often determined by mission sites, the only traditional link being "the natural affinity which we all have for the place of our birth".[70] John Holmes, a Queensland Professor of geography and supporter of native title, considers that "on core pastoral lands ... or sub-coastal Queensland, ongoing Aboriginal connection is usually tenuous".[71]

Former Governor-General Bill Hayden represented the Queensland government in the Century Zinc mine negotiations. He reported that the Waanyi people were claiming land which they did not occupy until the 1890s.[72] A few days after the *Wik* decision, a community development

officer who worked in the relevant area from 1976 to 1984 said that he could not recall the name "Wik" being used then, and that when litigation began in 1993 "many of the claimants wondered what their lawyers and anthropologists meant by [it]". David Martin, an anthropologist who did post-graduate work in the same area, explains that 'Wik" is a modern term covering "diverse" peoples "who have forged links through ceremonies, marriage *and politics*".[73] It appears that some of the myriad clan names now appearing on native title application forms may be as recently settled as some "traditional lands".

"Sufficient connection" is one of the most elusive concepts in *Mabo,* and the effort to clarify it was one of the most difficult tasks for the framers of the Bill. Neither farmers nor Aborigines are content with the proposal "that at least one member of the ... group currently has *or previously had* a traditional physical connection" with the land. In the Aboriginal perspective it is too demanding; from the graziers' viewpoint, too loose.[74] The chairman of ATSIC complains that the word "physical" was added "at the last moment".[75] The President of the United Graziers' Association claims a promise by the Prime Minister that a *current* physical connection would be required, but "the word current' seems to have slipped out".[76]

Curiously, there is little public comment on the proposal that only one member of a claimant group need show the relevant connection. One wonders whether such people will become living treasures -- a species of Queen Bee -- to be rationed out to the many claimant groups. In June, 1997 a gold mine at Georgetown in north Queensland closed under pressure of a native title claim, throwing 40 per cent of the town's work force out of employment. The local mayor complained that only "two or three" of the claimant group lived in the area,[77] but that could be enough to secure registration and the right to negotiate if the Bill becomes law.

However, the proposed threshold tests and other changes would see fewer claimants with a right to negotiate.[78] The right would also be withdrawn from (a) acquisitions for public works and infrastructure facilities; (b) "primary production" developments on "non-exclusive" leases; (c) small-scale mining activities; (d) some renewals of mining titles; (e) the management of water resources and air space; and (f) developments within towns and cities.[79] But it would still apply to compulsory acquisitions for the benefit of third parties (excepting infrastructure developments) and to many grants of onshore mining titles.[80]

The proposed reduction of the right to negotiate is at the epicentre of the storm, which is not in the least surprising. The right is technically procedural, but in reality it may be much more valuable than the unproved native title which it purports to protect. Items which cannot be awarded at arbitration, such as private "royalties"[81] or profit shares,[82] may be obtained by "voluntary agreement" if a developer or a government wants peace and faster progress and believes it can absorb the cost or pass it on. (Governments can always pass it on, but this is not a luxury which many countrymen can afford.)

Few developments are so large as Queensland's Century Zinc mine, but in that case people who will never have to *prove* native title now will receive the equivalent of $90 million from the company and the State.[83] (There are already internecine disputes about the distribution of the bounty[84] but they need not detain us here.) Relatively small projects can yield handsome payments without proof; a gold mine at Tenterfield, NSW recently paid $1.3 million to get rid of a native title claim.[85] Developers disposed to buy claimants off may be encouraged by a Federal Court decision[86] that compensation in the form of private "royalties" and bursaries for Aboriginal students is a valid tax deduction.

The political and economic value of the right to negotiate ensures that any proposal to modify it will be fought tooth and nail in the Parliament, the media and the courts as an unconstitutional

interference with property and a sacrilege against the *RDA*. The native title lobby claims that the right to negotiate is an intrinsic part of native title,[87] but it is not part of the common law revelation in *Mabo*. It is a "special measure" not enjoyed by others. Indeed, people who acquire property by purchase rather than a novel judicial decree must *establish* their titles before they contest an acquisition.

The proposed changes to the right to negotiate are *not extinctions of native title*. People who now have a right to negotiate, but who will lose it if the Bill passes, may still pursue their claims at common law.[88] Provided that native title claimants are no worse off than established property owners facing compulsory acquisition, they are not victims of discrimination; they have merely had a procedural privilege modified or withdrawn. (Indeed, as mere *claimants* they are still better off than established owners.)

The Government's position is that the right to negotiate is a "special measure" (that is, reverse discrimination), which can be reduced or withdrawn at Parliament's discretion without affecting the *RDA* or the international agreement on which it is based.[89] (There is a compensation backstop in case the High Court rejects this argument.)[90]

The new threshold test would reach back to 27 June, 1996.[91] Retrospective legislation is not unconstitutional; it is common in the field of taxation. When the law in question is merely procedural, there is not even a common law presumption against it.[92]

6. Changes of Interest to the Mining Industry

Mining titles granted over Crown leaseholds between 1 January, 1994 and 23 December, 1996 would be validated. The "exclusive possession" list, if effective, would assist miners as well as farmers; if a farmer's lease is immune from native title, a miner who seeks secondary rights over that lease may also forget about the right to negotiate.

The right to negotiate would cease to apply to many mining developments.[93] In cases where it still applied it could be satisfied by approved State procedures, such as the objection and compensation provisions of State mining laws, suitably amended. Applications for the registration of dubious native title claims could be opposed by placing relevant information before the Registrar.[94]

The right to negotiate would apply once only to all acts constituting a single project.[95] This would be of considerable value; at present, if there is a native title claim, the miner must "negotiate" at the exploration stage, at any intermediate stage[96] and again when a lease is sought. It is also significant that the States could specify the stage of a development at which the once-only right to negotiate would arise.[97] Normally the cash value of that right is greatest when a commercial deposit has been proved, and the miner and the State government want production to begin quickly. If the right had to be exercised at the exploration stage, "traditional owners" would tend to make less ambitious demands and mining companies would consider less munificent settlements.

The time for negotiations would be 4 months in all cases;[98] presently it is 6 months when a production title is sought. The NNTT would have to complete an arbitration "as soon as practicable", and the Minister could intervene in cases of delay.[99]

The position regarding renewals and extensions of mining titles granted before 23 December, 1996 would be clarified and improved. The right to negotiate would not apply, provided that the area is not enlarged and new proprietary rights are not created.[100] An extension longer than the original term would not entail negotiations. There would be compensation for any consequent interference with native title, and the non-extinguishment principle would apply.[101]

The Bill would allow the States to confirm their ownership of mineral deposits. (However, in most if not all jurisdictions the Crown appropriated minerals long ago.)[102] In *Wik* the trial judge dismissed a claim to minerals, and that ruling was not questioned in the High Court.[103]

7. Facilitation of Agreements

The Government is endeavouring to "sell" the Bill by placing greater emphasis on mediation and extra-curial settlements.[104] *Prima facie* this is a "motherhood" issue, but in practice there is tension between an expedient desire to use already-powerful Aboriginal bodies -- much to their delight[105] -- as organisers and rationalisers of claims, and on the other hand, a policy of *not* granting monopolies to regional native title brokers. Monopoly is a prospect feared by some Aborigines[106] as well as respondents with limited resources. But bureaucratic convenience shows every sign of winning.[107] A formal assurance that people who do not trust the brokers may "go it alone" sits beside statements that "Commonwealth funding for claimants will be channelled mainly through the representative [bodies]"[108] and advertisements for their superior resources and experience.[109]

The over-arching authority of ATSIC would remain.[110] Claimants refused assistance by regional brokers would have a right of appeal to ATSIC.[111] ATSIC would be relied on to report unsatisfactory brokers to the Minister, who (if suitably informed) could demand information and appoint special auditors.[112] The efficacy of these provisions would depend greatly upon the politics and diligence of the incumbent Minister. ATSIC resents even this degree of supervision, and in blithe disregard of recent history[113] it claims that "accountability" is already "stringent and adequate".[114]

The Bill does little to guard against abuses of power by the brokers, or to ensure that benefits exacted by negotiation are fairly and efficiently distributed. Complaints of maladministration of the Century Zinc mine settlement[115] were followed by reports that Aborigines in Kakadu National Park have gained surprisingly little from $40 million in mining "royalties" paid to their representatives in the last 17 years.[116]

Mining companies which enjoy good relations with local Aborigines and prefer to deal with them direct may notice little improvement. Recently a Miss Hobbs gave evidence to the Joint Parliamentary Committee describing her experience with native title "consultants" and "negotiators" in Western Australia.[117] She complained that they allow no contact with the nominal claimants, and will only talk to company representatives in consideration of substantial fees charged on a daily basis -- hardly an incentive to expedite a settlement. (One's fancy strays to extra-curricular business practices in certain foreign climes.)

Hobbs added:

> "It is clear ... that some of the claims lodged in the last year or two are lodged for reasons other than protecting native title; it's openly admitted to us that they're lodged for reasons of obtaining access to funds from mining companies. I've had that stated to me personally. ... My opposition here is to us being forced to work in a corrupt environment and to contribute to corruption."

Not a word of her evidence appeared in Brisbane, Sydney or national newspapers. They concentrated on evidence yet to be given by Mr Sean Flood who, so they said, was bravely resigning from the Native Title Tribunal in order to fight the Bill publicly.[118] In an earlier paper I quoted a remarkable fulmination in one of Mr Flood's decisions.[119] In truth, his position became untenable several months before the recent gesture, when he embarrassed President French by a public denunciation of the Ten Point Plan.[120]

As Miss Hobbs indicates, mediation is often not a quick, cheap and efficient alternative to litigation. The Century Zinc saga dragged on for five years. A representative of the Queensland government was paid $180,000 and his staff cost a further $542,700, not to mention travelling expenses and their public service salaries. The Carpentaria Land Council received $900,000 to "participate in negotiations".[121] Readers who wonder whether mediation is quite so sharing and caring as its disciples claim may read the comments of Mr Justice Young quoted in an earlier paper.[122]

8. A Compensation Cap and Time Limits

Proposed s. 51A, which would apply to claims filed before or after[123] the Bill becomes law, would limit compensation to "the amount that would be payable [in the event of] a compulsory acquisition of a freehold estate in the land".[124] This is probably meant to put paid to imaginative claims based on "spiritual attachment" or "psychological trauma" suggested by some native title tribunalists.[125] However, the limit is open to an argument that in remote areas, where land values are low, a freehold valuation would not fully compensate native title holders for rights lost or diminished.

On the matter of time limits, it is proposed to limit native title applications to six years following the enactment of a new s. 13(1A). Claims for compensation would have to be filed within six years after the Bill becomes law, or within six years of the relevant "future act".[126]

Critics assert that this would be unconstitutional, racially discriminatory, or both. Their reasons are not obvious. Most legal actions are subject to time limits, some as short as three years. If and when the "sunset clause" becomes law, it will then be five or six years since *Mabo* Mark I, and the additional time in the Bill will result in a liberal 12 year limit for native title claims.

9. The Role of the Federal Court

The Bill does not question the eminently questionable assumption that native title claims are matters for the Federal Court.[127] While the Commonwealth may graciously accredit State courts and tribunals for *NTA* purposes,[128] claimants could still go forum-shopping for sympathetic federal adjudicators remote from the effects of fashionable rulings.

The proper tribunals for native title claims are the State Supreme Courts. The Federal Court was set up just twenty years ago to administer Commonwealth legislation, perhaps in the hope that it would construe it more generously than our traditional courts. Federal Court appointments quietly proliferate in Canberra, and attract less professional scrutiny than Supreme Court nominations. Surprise appointments are not rare.

Most members of the Federal Court were appointed by the monochrome federal governments of 1983-1996. The title of federal "Justice" is too often used to accredit special-purpose tribunals short on law and long on social engineering. Several federal judges consider themselves immune from the self-restraint which the judiciary normally observes in matters of politics. One who would no doubt relish a leading role in native title matters frequently and freely pontificates on highly political subjects.

The State courts comprise a broader selection of lawyers appointed by a wider variety of governments. The Supreme Courts are the only courts with all-round experience of major criminal and civil litigation. Such common law jurisdiction as the Federal Court possesses was annexed from State courts by self-serving interpretations of a quaintly named "pendant jurisdiction".

The Federal Court's patchwork of civil jurisdiction is based on broad-brush statutes such as the *Trade Practices Act*, well described by a distinguished State judge as more like the terms of reference for a roving Royal Commission than a definition of legal rights. Sweeping discretions

breed loose jurisprudence and judicial adventurism. The Federal Court took "judicial review", a strictly limited form of appeal, so close to second-guessing the Government that even the Mason Court felt bound to call a halt.[129] In an area like native title, where the law is vague and the chances of obtaining favourable evidence are so much on the claimants' side,[130] it is vital to have a broad spectrum of judicial opinion and a rigorous, apolitical examination of evidence.

While the Bill would wind back some of the free-wheeling procedures in native title cases,[131] which have already spawned some bizarre practices,[132] it would still allow the Federal Court to ignore the rules of evidence "to the extent that the court ... orders"[133] -- a "Clayton's rule" if ever there was one!

The Federal Court is not the appropriate forum for litigation of this kind[134] -- especially if it develops (as well it may) an informal cadre of "specialists" promoted from native title tribunals or kindred legal aid bureaux.

Native title is not a child of the federal Constitution or of any Commonwealth statute. Native title parades as common law, and the High Court has recently and expressly declared that the common law cannot be turned into a law of the Commonwealth.[135] (In a moment of delightful unconscious irony, the Court explained that this would improperly "confer legislative power on the courts"!) Native title affects a great deal of land vested in the States, and land titles and land management are quintessential State concerns.

10. "The Hindmarsh Proposition"

The spirit of Hindmarsh still walks abroad, and now offers the High Court a golden opportunity for judicial legislation. In a pending challenge to a federal law passed to save taxpayers yet another forensic meditation on "secret women's business", the Court is asked to decree that laws based on the Commonwealth's "race power"[136] are valid only when they bestow *benefits* on the race in question.

The secret women, it seems, have a bottomless legal aid fund. If the Court agrees with them, the logical consequence would be that federal laws with respect to Aborigines could only be amended so as to maintain or increase special benefits for that race. If that is good law, *any* federal government will have to think long and hard before it ever uses the "race power" again! The Hindmarsh Proposition would create a unique exception to the rule that a power to enact legislation includes power to repeal it, and would pave the way for a root and branch attack on the present Bill.

It will be interesting to see whether the Hindmarsh Proposition is a mite too adventurous for a High Court under reconstruction. Hints that the Court may be resigning itself to a more modest legislative role appear in *Thorpe v. Commonwealth* (No. 3)[137] (*pace* Justice Toohey, Australia has no "fiduciary duty to the original peoples of this land") and *Kruger*[138] (former Northern Territory laws affecting the "stolen children" were not invalid and are not now legally actionable).

The Hindmarsh Proposition ignores the history and intent of s. 51 (xxvi) of the Constitution. Unpalatable as it may be, that clause was not designed solely for the creation of special benefits. A prime object was to control immigration by Chinese, Pacific islanders and others.[139] It appears that Sir Samuel Griffith had the repatriation of Queensland's "Kanaka" labourers in mind.[140]

In 1967, amid the warm glow and inevitably limited foresight accompanying the race power referendum,[141] Percy Joske, a constitutional lawyer, observed:[142]

> "The assumption that legislation with respect to the people of a particular race would be to give them benefits may well be erroneous, since the historical reason for including a provision in the Constitution was to give the Commonwealth authority to deal with the

problem of Chinese and Kanaka labour, the restriction of which was one of the motivating causes of federation."

The question received some attention in High Court judgments in l982[143] and 1983,[144] several years after the *RDA* arrived.[145] In *Koowarta v. Bjelke-Petersen*, Gibbs CJ observed:[146]

> "It would be a mistake to suppose that [the race power] was included ... only for the purpose of enabling the Parliament to make laws for the special protection of people. ... Such laws might validly discriminate against, as well as in favour of, the people of a particular race."

And Stephen J. remarked:[147]

> "The content of the laws which may be made under [the race power] are left very much at large; they may be benevolent or repressive ..."

Wilson J. recognised[148] that there are now political limits to the use of the power, but he did not assert as a legal principle that it can only be a source of privilege:

> "In these days one would not readily contemplate the use of the power to the detriment of the people of a race; nevertheless ... even when it is used for wholly benevolent and laudable purposes it remains a power to discriminate."

It should be noted that these statements related to a purely negative policy to minimise grants of Crown leases to Aborigines. The judges in *Koowarta* may have been even less attracted to the Hindmarsh Proposition if they had been dealing with a complex of benefits and controls such as the present Bill. Even if the present Court were inclined to accept the Proposition, would it be a judicial function to chop the Bill into pieces, sort them into "benefit" and "detriment" piles, and conduct some sort of political weigh-in? The Government's position is that overall the Bill is beneficial, although the Constitution does not require it to be so.[149]

Most people would agree that "race" laws are a more delicate political exercise in 1997 than they were in 1901, but the Hindmarsh Proposition goes much further. It asks the High Court to say that something which several Justices accepted in the 1980s (namely, the possibility of a "detrimental" race law) is a breach of the Constitution in 1997.

It is not enough to say that an exception regarding the "Aboriginal race"[150] was removed from the race power in 1967. All that follows is that Aborigines are now no more exempt from its operation -- positive or negative -- than the people of any other race. It would be better if there were *no* "race power" at all; it is odd that we have a racial principle in the Constitution and a pious horror of any such thing in the *RDA*. Hence, one supposes, the temptation to avoid embarrassment by confining s. 51 (xxvi) to occasions when gifts are given. But ordinary statutes, whatever their moral or political appeal, cannot override the Constitution.

In a dissenting judgment in *Koowarta,* Murphy J. made the long leap from the view that non-beneficial uses of the race power are undesirable to the legal conclusion that they are unconstitutional,[151] characteristically proceeding by assertion rather than demonstration. But in the very next year Mason J. accepted that the power may be used not only to "protect" but also to "regulate and control".[152] Deane J, a vehement member of the majority in *Mabo,* said this in 1983:

> "The [race] power ... remains a general power to pass laws discriminating against or benefiting the people of any race. Since 1967, that power has *included* a power to make laws benefiting the people of the Aboriginal race."[153]

Clearly s. 51(xxvi) does include the power to confer special benefits upon Aborigines. But it does not follow -- and Deane J. did not suggest -- that the special benefits *exhaust* the ambit of the power.

In the same case Brennan J. said:[154]

> "No doubt [the race power] in its original form was thought to authorise the making of laws discriminating adversely against particular racial groups The [deletion of] ... the words other than the aboriginal race' was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial. The passing of the *Racial Discrimination Act* manifested the Parliament's intention that the power will hereafter be used only for the purpose of ... conferring benefits ...".

There are two suggestions here: (1) That in voting for a transfer of Aboriginal affairs from the States to the Commonwealth, Australians intended (and somehow implicitly enacted) that never again could the Commonwealth "control and regulate" Aborigines as such; and (2) that the *RDA* is an enactment which cannot be amended because in its 1975 form it has some quasi-constitutional status. What tangled webs our oligarchs weave from the wool of international conventions! However, even Justice Brennan went no further than to speak of special benefits as the "*primary* object of the power".

The High Court was created as a court of law, and at law the *RDA* is a non-constitutional provision which cannot tie another Parliament's hands.[155] Indeed, s. 7(2) of the existing *NTA*[156] quietly amended the *RDA* by excluding its censorship from provisions validating Crown grants of 1975 - 1993.[157]

Some see magic in the fact that s. 51(xxvi) speaks of laws "for" a chosen race.[158] Let us hope that not too much of our money is spent on legalistic torture of that humble preposition. We have noted recent authorities which admit that the race power cuts each way. The very same preposition ("for") appears in s. 122 of the Constitution,[159] which has repeatedly been dubbed "as large and universal a power ... as can be granted".[160] Even Murphy J. could not imagine how s. 122 could be made any wider.[161]

In s. 122 "for" means "with respect to", and it is difficult to see a legal reason for interpreting s. 51(xxvi) any differently. After all, the Constitution does not say: "The Parliament shall have power to make laws for ... the people of any race". No: the race power is governed by the same all-embracing phrase which precedes all the other grants of federal power in s. 51 of the Constitution: "*with respect to*". Wisdom in the use of the race power is a matter of morality and politics, not law.

Supporters of the Hindmarsh Proposition contend that any departure from the *RDA* is a breach of the international agreement on which it is based.[162] But this overlooks the fact that neither the *RDA* nor its parent treaty obliges the Commonwealth to adopt "special measures" in favour of Aborigines or people of any other race. Still less does it require the indefinite retention of such measures, if adopted.[163]

It appears that the Hindmarsh case will be heard in May next year.[164] In that event the Chief Justice, soon to retire, is unlikely to be involved. But in any event, the principles of apprehended bias which he and his colleagues so rightly emphasise[165] counsel him not to sit; a near relative is one of the keenest supporters of native title and is now actively promoting the Hindmarsh Proposition.[166] I say nothing of the composition of the Court in *Mabo* Mark I.

If the Bill is recognisable when it leaves the Senate it will face unpredictable litigation[167] and political turbulence. The native title lobby is probably as well funded and well-organised as any

major political party; witness the almost daily stream of media items, most of them in grievance mode -- alleged wrongs of the fathers are now the currency of the sons. How much of the residue (if any) will the High Court leave intact? Will it forge ahead regardless of expense, uncertainty and social strain or discreetly withdraw, murmuring that *Mabo* did seem like a good idea at the time?

Endnotes:

1. *Mabo v. Queensland* (No 2) (1992) 175 CLR 1.

2. *The Australian,* 7 June, 1993: *Mabo Sparks Battle Over States' Rights.*

3. Constitution, s. 51 (xxxi).

4. *Loc. cit.,* at 75-76.

5. (1996) 141 ALR 129.

6. *Revisiting Mabo: Time for the Streaker's Defence?* in *Upholding the Australian Consitution,* Proceedings of The Samuel Griffith Society, Volume 7 (1996) 111 at 120.

7. *Federal Government's Response to the Wik Decision: The Ten Point Plan,* Canberra, 4 June, 1997 at 7, quoting an estimate of the Bureau of Resource Sciences; *Native Title Amendment Bill* 1997 (Explanatory Memorandum), p. 86.

8. (1996) 141 ALR 129 at 260 (Kirby J.).

9. See e.g., Ron Castan, *The Australian,* 10 January, 1997: *Wik Hysteria all on basis of Nothing.*

10. (1996) 141 ALR 129 at 261, 285.

11. During argument in the *Waanyi Case*, quoted in *Courier Mail,* 22 March, 1996: *Judge Criticises Court's Inaction*. *Waanyi* was a monumental waste of money which bogged down in points of procedure.

12. Second Reading speech of the Attorney-General (Williams, QC), 4 September, 1997.

13. *Courier Mail,* 20 September, 1997: *Wik Panic Swamps State with Land Claims.* ("Forty per cent of Queensland is now subject to native title claims.")

14. *The Australian,* 25 June, 1997: *High Court to Lose Liberal Judge*; *Sydney Morning Herald,* 25 June, 1997: *PM Gets Chance to Fashion New High Court*.

15. For the sake of brevity "State" includes "Territory" unless otherwise indicated.

16. *Amending the Native Title Act* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 8 (1997) 210 at 229:

"It seems unlikely that the government would brave the political passions and the righteousness, real or contrived, which [outright extinction] would provoke. A less radical step would be to define some of the essential concepts which *Mabo* and the *NTA* now leave up in the air .... an attempt might be made to define connection with the land."

17. See e.g., *Courier Mail,* 23 April, 1997: *Angry Borbidge Warns PM of Lawyers' Banquet*; *Sydney Morning Herald*, 25 April, 1997: *PM Isolated: Wik Talks End in Chaos*; *Courier Mail,* 29 April, 1997: *Talking Tough Gets Nowhere*; *Courier Mail,* 5 May, 1997: *Howard Risks Back Bench Revolt*; *Courier Mail,* 7 May, 1997: *Nationals Give Howard's Plan Nought Out of Ten*.

18. *The Ten Point Plan,* 4 June, 1997, pp. 11-12.

19. But as all compensation claims would be against federal or State governments, there would not be the same opportunities for extracting "over-award" payments which now exist in private dealings with would-be developers; consider the Century Zinc mine affair and s. 33 of the present Act, under which a settlement may include a share of profits, income or product. This cannot occur if the matter is taken to arbitration (s. 38), but a private developer may not be able to wait so long.

20. Evidently even the national Government is now in thrall to the major sports-entertainment industries. For examples of boycott threats, see *Weekend Australian,* 6-7 January, 1996: *Black Australia's Game Plan*; *The Australian,* 15 May, 1996: *Perkins warns of Sydney 2000 Turmoil*; *Sydney Morning Herald,* 19 August, 1996: *Aborigines Call for Games Boycott*; *Sydney Morning Herald*, 12 December, 1996: *Olympics Chaos Warning*; *Courier Mail,* 8 February, 1997: *Games Boycott Warning*; *The Australian,* 10 June, 1997: *Blacks No to Olympic Peace Claim*.

21. *Courier Mail,* 10 June, 1997: *Judges Must Stay Out of Politics*.

22. *The Australian,* 11 July, 1997: *How the Wik Plan Can Work*.

23. *Weekend Australian,* 25-26 July, 1997: *Don't Fence Us Out*. (Gatil Djerrkura, ATSIC chairman.)

24. *Courier Mail,* 17 May, 1997: *Howard Blasts "Wild" Wik Claims.*

25. *Weekend Australian,* 31 May - 1 June, 1997: *Pearson Admits Strategic Blunder*.

26. *Courier Mail,* 9 September, 1997: *Law Rewrite Sweeps Away Rights.*

27. *Courier Mail,* 9 October, 1997: *Native Title Forum Ends in Row Over Bias Claims.*

28. *Courier Mail,* 12 September, 1997: *ALP Push to Block Wik Plan*.

29. *The Australian,* 17 July, 1997: *Coalition Flags Referendum in Wik Impasse*; *Courier Mail,* 28 June, 1997: *Coalition Stands Firm on Native Title Law*.

30. *The Australian,* 28 April, 1997: *An Irate State Wants the Wik Word from Howard*.

31. Proposed ss. 22A-22G.

32. The Commonwealth cannot unilaterally validate acts of the States: *University of Wollongong v. Metwally* (1985) 158 CLR 447; *Western Australia v. Commonwealth* (1995) 183 CLR 373.

33. On the Second Reading of the original Bill, Prime Minister Keating stated:

"I draw attention ... to the Government's view that under the common law past valid freehold and leasehold grants extinguish native title": *CPD* (Representatives), 16 November, 1993, p. 2880.

34. "The High Court has ... held that native title is extinguished by valid government acts ... such as the grant of freehold or leasehold estates."

35. *Native Title Act* 1993, s. 47, which makes special arrangements for native title claims over pastoral leases held by the claimants. According to s. 47(2), "any extinguishment" by the granting of the lease is to be disregarded for this particular purpose.

36. *The Australian,* 4 April, 1997 (letter from Ian Donges, NSW Farmers Association, Sydney): "Noel Pearson told the Rural Press Club in November, 1993 ... I rule that out categorically because there is a facility now available for us to purchase land under the Land Fund, and to convert into native title, pastoral leases' "; *The Australian,* 15 April, 1997: *Howard Toughens Stance on Wik* (claim by Deputy PM Fischer); *The Australian,* 22 April, 1997: *Pastoralists the Biggest Losers in Wik,* quoting Mr D McDonald, National Party federal president: "Pearson's tune has changed dramatically since 1993, when he saw no purpose in litigating for native title on pastoral leases."; *Courier Mail,* 30 April, 1997: *No Room to Go It Alone in Search for Wik Solution*.

37. *Courier Mail,* 28 December, 1996: *Land Battle* (David Solomon, quoting Noel Pearson).

38. I.e., before the *Wik* decision on 23 December, 1996.

39. Proposed ss. 23A-23E, 23J, 249C.

40. Proposed ss. 23A, 23F, 23G-23J.

41. (1996) 141 ALR 129 at 141, 207-208, 218, 276.

42. *Courier Mail,* 27 September, 1997: *Native Title Claims to be Slashed by Schedule,* quoting Mr Larry Acton of the United Graziers' Association. See also *Courier Mail,* 1 October, 1997: *Farmers to Walk Away if Wik Law Altered*.

43. *The Australian,* 27 August, 1997: *National MPs Lose Wik Race to Protect Leases*. Conceivably a test case could be brought for a declaration that the leases in question are, after all, "exclusive".

44. *Courier Mail,* 27 September, 1997: *Native Title Claims to be Slashed by Schedule*.

45. Explanatory Memorandum, p. 39.

46. Supplementary Explanatory Memorandum, *Native Title Amendment Bill* 1997 at 5.

47. Proposed s. 23C(1) (b)

48. As defined in proposed s. 23B.

49. Proposed s. 23J.

50. Proposed ss. 24GA -- 24GE ("Future Acts and Primary Production"). These provisions do not enable a lease to be upgraded to freehold or to exclusive possession. Concurrence of the relevant State will usually be required.

51. Proposed s. 24GB.

52. Proposed s. 24GA.

53. E.g., to cut timber, or to remove sand, gravel or rock: Bill, s. 24GE.

54. See *Native Title Act* 1993, s. 238. (Total or partial revival of native title rights affected if and when the overriding "act" is removed.)

55. Proposed s. 44A(3).

56. Proposed ss. 44B(1), (2), (3).

57. Proposed s. 44D.

58. Proposed s. 44A(4).

59. *Weekend Australian,* 26-27 April, 1997: *Leases Already Restrict Graziers' Use of the Land*.

60. *Native Title Act* 1993, s. 213(2); proposed s. 44F.

61. *North Ganalanja Aboriginal Corporation v. Queensland* (1996) 185 CLR 595; *Northern Territory v. Lane* (1995) 138 ALR 544.

62. Proposed ss. 62, 190A, 190B; and see especially s. 190B(7). Emphasis added.

63. *Mabo* (No. 2) (1992) 175 CLR 1 at 59 per Brennan J.

64. *Ibid,* at 70.

65. *Ibid,* at 110; note the qualification, "at least".

66. *Ibid,* at 188 (Toohey J.).

67. *Re Northern Territory of Australia* (1995) 119 FLR 239. See also the Federal Court in *Pareroultja v. Tickner* (1993) 42 FCR 32 at 39.

68. *Sydney Morning Herald,* 22 October, 1996: *Mine Negotiations are Dead, Says Perkins*.

69. Geoffrey Partington, *Determining Sacred Sites* (1995), *Current Affairs Bulletin,*Vol. 71, No. 5, 4.

70. *Courier Mail,* 15 January, 1997: *Missions Too Remote Says MP*.

71. *Courier Mail,* 24 April, 1997: *Time for Realism in the Wik Debate.*

72. *The Australian,* 27 March, 1997: *Wik Will Damage Nation*; *Sydney Morning Herald,* 29 March, 1997: *Strong Language in Wik Debate.*

73. *The Weekend Australian,* 28-29 December, 1996: *Title Fight* (emphasis added).

74 *Courier Mail,* 27 August, 1997: *Nats Support PM's Wik Plan.* "We don't want to have the absurd situation ..... of people who have never been on the land in 2 generations lobbing in from Inala [a Brisbane suburb] ....."

75. *Courier Mail,* 13 September, 1997: *No Easy Answers* (Gatil Djerrkura).

76. *Courier Mail,* 1 October, 1997: *Farmers to Walk Away if Wik Law Altered* (Larry Acton); see also *Courier Mail,* 13 September, 1997: *No Easy Answers* (Don McGauchie, National Farmers' Federation).

77. *Courier Mail,* 23 June, 1997: *A Mining Town in Its Death Throes*.

78. For cases in which the right to negotiate would not apply, see proposed sections 24FA (no claim lodged), 24GB (primary production extensions), 24GD (off-farm acts), 24GE (rights for third parties over leases), 24HA (management of air and water), 24IA (lease renewals, etc) , 24JA (government reservations of land or water), 24KA (public facilities), 24LA (low impact acts) , 26A (approved mining exploration) , 26B (gold and tin dredging), 26C (opals and gems), 26D (renewals of mining leases), 251C (acts within a town or city area).

79. Explanatory Memorandum, pp. 145-146, 153, 154, 158. *Native Title Amendment Bill* 1997, ss. 24EB, FA, GB, GD, GE, HA, IA, JA, KA, LA and 26A, 26B, 26C.

80. Unless "approved" (exempted) by the federal Minister.

81. An anomalous contradiction in terms -- hence the quotation marks.

82. *Native Title Act* 1993, s. 38.

83. *The Australian,* 2 May, 1997: *Rebels Support Century*; *Courier Mail,* 3 May, 1997: *New Call for Mine Package*; *Courier Mail,* 6 May, 1997: *Borbidge Set to Rule on Deal for Century Mine*; *Courier Mail,* 7 May, 1997: *Go Ahead for Mine of the Century*; *Courier Mail,* 21 July, 1997: *The Road to Respect*. The deal included substantial shares in two large grazing properties, a "positive discrimination" employment policy, the exclusion from the site of white workers who have not passed through a "cultural awareness programme", "culturally appropriate birthing facilities" and expenditure of $30 million by the State government.

84. *Courier Mail,* 17 May, 1997: *Gulf Aborigines Divided Over Century Zinc Mine Spoils*. "In the process of obtaining NT approval for the Century mine, Gulf communities have been left divided and bitter ... Much of [the initial cash payment of $2.5 million] will be absorbed in administration costs." A controversial and lucrative "consultancy agreement" was allegedly backdated for the benefit of the "consultants". On ill-controlled "consultancy" fees in this area, see e.g., *Courier Mail,* 15 April, 1995: *Police Inquiry into Blacks' Committee*; 21 October, 1996: *Perkins' Mine Deal Branded Gold Digging'*; 25 May, 1996: *Aboriginal*

Leader in Row Over $10 Million Gift'; 3 April, 1996: *Opening Pandora's Box*; 12 April, 1996: *Rort Row Puts Legal Service at Risk*.

85. *Sydney Morning Herald*, 26 July, 1997: *First Native Title Agreement Gives Go-Ahead for Gold Mine*.

86. *Cape Flattery Silica Mines Pty Ltd v. Commissioner of Taxation*, unreported, 28 July, 1997, Federal Court, Spender J. The payout was agreed under the compensation provisions of the *Mineral Resources Act* 1989 (Qld), but the court's ruling would seem to be applicable to compensation agreements made under the native title legislation as well. On this occasion the Hopevale Aboriginal Council received almost $400,000 and lawyers who arranged the deal (no litigation involved) received almost $50,000.

87. See e.g., ATSIC Social Justice Commissioner: *Native Title Report, July 1995 - June 1996*, AGPS, Canberra, 1996, pp. 18-20.

88. Bills Digest No. 51, *Native Title Amendment Bill*, Parliamentary Library, Canberra (1997) 53.

89. Explanatory Memorandum, p. 151; *Racial Discrimination Act* 1975, s. 8(1); Schedule, Article 1, para. 4 (special measures).

90. Explanatory Memorandum, pp. 151-2; Bill, s. 53.

91. Second Reading speech, 4 September, 1997; Explanatory Memorandum, p. 360. This date is the date of introduction of the 1996 Bill, which was intended to operate from that time.

92. *Maxwell v. Murphy* (1957) 96 CLR 261 at 267; *Cardile v. Nominal Defendant (Qld)* (1978) Qd R 132.

93. Proposed ss. 26A, 26(2)(b), 26(2) (d), 26(2) (e), 26B and 26C.

94. Proposed s. 190A(3). This would get over one difficulty created by the *Waanyi* decision, *loc. cit.*.

95. Explanatory Memorandum, pp. 148, 153, 154.

96. E.g., when seeking a "retention lease" for a deposit not yet commercially viable.

97. Explanatory Memorandum, p. 149.

98. Proposed ss. 35, 36.

99. Proposed s. 36A.

100. *Native Title Amendment Bill* 1997, ss. 26(2) (e) , 26D. Query the position if authority were given to mine different or additional kinds of minerals.

101. Explanatory Memorandum, p. 101.

102. J R Forbes, *Mabo and the Miners* in Stephenson & Ratnapala (eds), *Mabo: A Judicial Revolution,* University of Queensland Press (1993) 206 at 211.

103. P Keane, *The Ramifications of the Wik Decision* in *Refresher* (Journal of the Queensland Bar Association), June, 1997, No. 53 at 15. (Mr Keane appeared as counsel on the *Wik* appeal as Solicitor-General for Queensland.)

104. Indigenous land use agreements, area agreements and alternative procedure agreements.

105. See e.g., *Courier Mail,* 23 March, 1994: *Aboriginal Leader Calls for Mine Joint Ventures*; *The Australian Financial Review,* 18 September, 1995: *How to Make Native Title Work* (Noel Pearson).

106. *The Australian,* 11 February, 1993: *How to Kill the Golden Goose*; *Sunday Mail* (Brisbane), 7 March, 1993; ABC Television, 9 October, 1995 (Gordon versus Pearson); *Sunday Mail* (Brisbane), 7 April, 1996: *Aboriginal Bureaucrat Under Fire*; *Sydney Morning Herald,* 12 April, 1996: *Splinter Group Seeks Native Title*; *Courier Mail,* 27 August, 1996: *Native Title Claim over Hinchinbrook* ("Aboriginal groups around Queensland highlighted their concerns about the operation of native title representative bodies at the federal parliamentary joint committee."); *Majar v. Northern Land Council* (1991) 37 FCR 117.

107. Cf. J R Forbes, *Mabo and the Miners -- Ad Infinitum?* in M A Stephenson (ed.), *Mabo: The Native Title Legislation,* University of Queensland Press (1995), 49 at 53: "Bureaucratic nature being what it is, it will not be surprising if an oligopoly of native title brokers commends itself to the central government."

108. Second Reading speech, 4 September, 1997.

109. Explanatory Memorandum, p. 324.

110. Explanatory Memorandum, pp. 314-315; proposed s. 203FE.

111. Explanatory Memorandum, p. 313.

112. Explanatory Memorandum, p. 314.

113. J R Forbes, *Revisiting Mabo: Time for the Streaker's Defence?* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 7 (1996), 111 at 133, note 55.

114. ATSIC, *Proposed Changes to the Native Title Act 1993: Issues for Indigenous Peoples*, November, 1996, p. 28.

115. *Courier Mail*, 17 May, 1997: *Gulf Aborigines Divided Over Century Zinc Mine Spoils.*

116. *The Australian,* 11 August, 1997: *Uranium Millions fail to Help Aborigines.*

117. ABC Radio, *PM*, 3 October, 1997. Transcribed from audiotape.

118. *Weekend Australian*, 4-5 October, 1997: *Mediator Quits to Fight Wik Plan*; *Sydney Morning Herald*, 4 October, 1997: *Tribunal Member Quits in Wik Protest*.

119. J R Forbes, *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.

120. *The Australian Financial Review*, 13 June, 1997: *Flood Stands Down After Attacking PM's Wik Plan.*

121. *Courier Mail*, 4 April, 1997: *$180,000 Fee for Failed Mine Mission*.

122. J R Forbes, *Revisiting Mabo: Time for the Streaker's Defence?* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 7 (1996), 111 at 116-117.

123. Proposed Schedule 5, clause 18.

124. This does not mean that every native title will be treated as equivalent to freehold: Explanatory Memorandum, p. 226.

125. See e.g., *Re Minister for Mining and Energy of WA: Future Act Appln WF 96/11-11*, Native Title Service [100,046] at p. 52,074: "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."; *Re Minister for Mining and Energy of WA: Future Act Appln WF 96/3 and WF 96/12*, Native Title Service [100,048] NNTT, Perth, 17 July, 1996 (Sumner, O'Neil and Neate, Members): "... Aboriginal people can be compensated for such things as being unable to complete initiation rites, inability to gain and enjoy full tribal rights ... inability to partake in matters of spiritual and tribal significance."

126. Proposed s. 50 (2A)

127. *Native Title Act* 1993, s. 81.

128. *Native Title Act* 1993, s. 13 (3); proposed s. 207B.

129. See *Australian Broadcasting Tribunal v. Bond* (1990) 170 CLR 1.

130. J R Forbes, *Proving Native Title* in *Upholding the Australian Consitution*, Proceedings of The Samuel Griffith Society, Volume 4 (1994) 31 at 42 ff; *Revisiting Mabo: Time for the Streaker's Defence?* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 7 (1996) 111 at 112 ff; *Amending the Native Title Act* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 8 (1997) 210 at 224 ff.

131. *Native Title Act* 1993, ss. 82, 83, 86.

132. Such as special-gender courts and "restricted" evidence: *State of Western Australia v. Ben Ward and Ors*, unreported, 8 July, 1997, Fed Ct (Full Ct).

133. Proposed s. 82(1).

134. At any rate where onshore areas are concerned.

135. *Western Australia v. The Commonwealth* (1995) 183 CLR 373 at 487, declaring s. 12 of the present *NTA* invalid.

136. Constitution, s. 51 (xxvi), upon which the current amendments are largely based: *Western Australia v. The Commonwealth* (1995) 183 CLR 373: "The Parliament shall have power to make laws ... with respect to the people of any race for whom it is deemed necessary to make special laws".

137. (1997) 71 ALJR 767, a single-judge decision of Kirby J.

138. *Kruger v. The Commonwealth*, High Court, 31 July, 1997.

139. Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 622; Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd edn, 1910) 462; R R Garran, *Prosper the Commonwealth*, Angus & Robertson, Sydney (1958) 54-55, 149-150; G Sawer, *The Australian Constitution and the Australian Aboriginal* (1966-67) 2 *Federal Law Review* 17, 18-25; Michael Coper, *Encounters with the Australian Constitution*, CCH Australia (1988) at 28 (albeit reluctantly); P H Lane, *Commentary on the Australian Constitution*, Law Book Company (1986) 188-189.

140. *National Australasian Convention Debates*, Adelaide (1897) 832. See also Griffith's views on undesirable immigration in *National Australasian Convention Debates*, Sydney (1891) at 703. "The [first federal] election in Queensland had been fought as a referendum on the coloured labour question ...": C M H Clark, *A History of Australia*, Volume V, p. 194. Section 51 (xxvi) was mentioned as one basis for the deportations under the *Pacific Islands Labourers Act* 1901 (Cth) in *Robtelmes v. Brenan* (1906) 4 CLR 395 at 415.

141. Enabling it to be used in relation to Aborigines as well as other races.

142. *Australian Federal Government* (1967) 225.

143. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168.

144. *Commonwealth v. Tasmania* (1983) 158 CLR 1.

145. Interestingly enough, the *Racial Discrimination Act* offers no definition of race. The opponents of the present legislation rely upon section 10 of that Act:

"If by reason of ... a law of Australia or of a State persons of a particular race ... do not enjoy a right that is enjoyed by persons of another race .... or enjoy a right to a more limited extent ... then, notwithstanding anything in that law, [they] ... shall, by force of this section, enjoy that right to the same extent .....".

There is no doubt that Aborigines are a "race" for the purposes of s. 51 (xxvi): *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 at 186; *Commonwealth v. Tasmania* (1983) 158 CLR 1 at 180, 243, 273, 318.

146. (1982) 153 CLR 168 at 186.

147. *Ibid*, at 209.

148. *Ibid*, at 244.

149. *Courier Mail*, 18 October, 1997: *Government Admits Wik Laws Will Go Before Court*.

150. In s. 51 (xxvi) of the Commonwealth Constitution.

151. (1982) 153 CLR 168 at 242.

152. *Commonwealth v. Tasmania* (1983) 158 CLR 1 at 158.

153. (1983) 158 CLR 1 at 273, emphasis added.

154. *Tasmanian Dam Case* (1983) 158 CLR 1 at 242.

155. *South East Drainage Board v. Savings Bank of South Australia* (1939) 62 CLR 603.

156. "7(1) Nothing in this Act affects ... the *Racial Discrimination Act* [but] ... (2) Subsection (1) does not affect the validation of past acts by or in accordance with this Act."

157. *Native Title Act* 1993, ss. 14-20.

158. Cf. *Koowarta* (1982) 153 CLR 168 at 242 per Murphy J.

159. "The Parliament may make laws *for* the government of any territory ..." (emphasis added).

160. *Spratt v. Hermes* (1965) 114 CLR 226 at 242 per Barwick CJ. See also *Attorney-General for WA; ex rel Ansett Transport Industries (Operations) Pty Ltd v. Australian National Airlines Commission* (1976) 138 CLR 492 at 504 and 512.

161. (1976) 138 CLR 492 at 531.

162. *International Convention on the Elimination of All Forms of Racial Discrimination*. And see (Cth) Parliamentary Joint Committee on Native Title, Hansard record, 24 September, 1997, p. 248.

163. *RDA*, s. 8(l); Schedule, Article 1, paragraph 4.

164. *Courier Mail*, 2 October, 1997: *Law Experts Tear Down 10 Point Plan on Wik*.

165. *Stollery v. Greyhound Racing Control Board* (1972) 128 CLR 509; *R v. Watson; ex parte Armstrong* (1976) 136 CLR 258; *Livesey v. NSW Bar Association* (1983) 151 CLR 288.

166. *Weekend Australian*, 6-7 September, 1997: *Power of Race* (Bernard Lane).

167. *Courier Mail*, 18 October, 1997: *Government Admits Wik Laws Will Go Before Court*.

Chapter Three

Two Rules of Law?

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

The interests of the Aboriginal peoples of Australia had for decades been of scant concern to most Australians, but the whirligig of time has now placed those interests in the centre of the political stage. The questions of what rights and privileges should be accorded to them have provoked bitter and divisive controversy. Claims which not long ago would have been ridiculed as wildly extravagant are now given serious consideration. Some of the claims that will be discussed in this paper, if fully accepted, would tend to destroy the integrity of Australia as a nation.

The claims which will be discussed are of a political, rather than a material kind, although in the ordinary course of affairs it often happens that an argument of political principle carries with its acceptance the prospect of pecuniary advantage. Stated in descending order of significance, those claims are for the recognition of Aboriginal sovereignty, the right of the Aboriginal peoples to self-determination and the recognition of Aboriginal law.

The claim that sovereignty resides in the Aboriginal peoples has been rejected by the High Court.[1] However, in some quarters it is still argued that it should be recognised that the Aboriginal peoples are sovereign, or ought to be granted sovereignty, at least in some parts of Australia. One argument is that the acquisition of sovereignty over Australian territory by the British Crown was illegal, because it resulted from the wrongful dispossession of the Aboriginal peoples. Colonisation, it has been said, was "a process of domination, subjection and genocide".[2] Statements of this kind do little justice to the courage, endurance and enterprise of those men and women who carried out the process of colonisation, and as a result created some of the world's great democracies; but whatever views may be held nowadays, it cannot too often be repeated that "nothing is more unfair than to judge men of the past by the ideas of the present".[3] The destruction of Aboriginal society in Australia occurred not because it was planned or intended, but because it proved to be an inevitable consequence of the collision which occurred between the culture of the colonists, who came from what was the most technologically advanced country in the world, and that of the Aboriginal peoples, whose society, well adapted though it may have been to local conditions, was that of the Stone Age.

It is understandable that the Aboriginal peoples should be embittered by what occurred, although it is difficult to see how reconciliation is advanced by constant reiteration of the evils of the society with which one seeks to be reconciled. On the other hand, the assertion that the British occupation of Australia was illegitimate, or at least morally wrong, seems to be remarkably effective as propaganda in persuading the general public to support claims for Aboriginal rights. I doubt however that such support extends to claims to the recognition of Aboriginal sovereignty.

The decisions of the High Court are also inconsistent with the further argument that there remain some areas of Australia -- tribal areas perhaps -- where Aboriginal sovereignty has not been extinguished, but survived and coexists with the sovereignty of the Commonwealth; or alternatively, that the Aboriginal peoples should be regarded as a domestic dependent nation enjoying limited sovereignty. The concept of a domestic dependent nation was developed in the United States, to take account of the fact that treaties had been made between the white settlers

and certain Indian tribes, but for at least one hundred years it has been settled law in the United States that the so-called nations are not independent, but are subject to the laws made by Congress. There was no similar reason to regard the Aboriginal peoples of Australia as a domestic dependent nation.

A further difficulty with all the Aboriginal claims to sovereignty is that it is doubtful whether sovereignty as understood by European jurisprudence existed in Australia before white settlement. That question need not be discussed, for if Aboriginal sovereignty did exist it has been extinguished.

Overlapping these claims -- and giving more reason for concern -- is the assertion that the Aboriginal peoples are entitled to the right of self-determination. The right of all peoples to self-determination has been recognised by international conventions. The concept of self-determination is difficult to define, but up to the present the right has been understood as limited to the peoples of former colonies which have regained their independence, although the situation of the peoples of East Timor and Irian Jaya suggests that the principle has not been uniformly applied even in that situation.

An argument now advanced is that the right of self-determination should also be exerciseable by peoples living within the framework of an existing nation or state, and thus by the Aboriginal peoples of Australia. It is argued that this will be the next development of the doctrine by the United Nations.

Although it seems unlikely that the great powers would agree to the application of the principle of self-determination in a way that would infringe the territorial integrity of a sovereign state, one must be hesitant to predict the attitude of the various committees of the United Nations, to which claims for self-determination might be brought pursuant to international obligations ill-advisedly incurred by previous Australian governments.[4] However, there is no doubt that any claim by the Aboriginal peoples to determine their own political status, and to assert a right to sovereignty or independence, must be rejected as contrary to the interests of Australia as a whole.

On the other hand, a claim by the Aboriginal peoples to pursue their economic, social and cultural development within the law, and to take part in the decision-making processes which affect themselves, in the same way as other Australians may do, and within the legal structure of the nation, must of course be supported. It is only reasonable that the Aboriginal peoples should be involved in the processes of making the decisions that affect their health, education and financial position, and should indeed make those decisions whenever that is practicable.

An attempt to involve them in this way was made by the creation of the Aboriginal and Torres Strait Islander Commission, although it appears that that attempt has not been successful. It may well be appropriate to establish separate local government bodies in areas in which Aboriginal or Torres Strait Islander peoples reside, so that those peoples could join in controlling the local government bodies in the same way as other inhabitants of local government areas can do. All this must however be done within the ordinary law.

Just as any attempt to put the Aboriginal peoples outside the Australian nation must be firmly opposed, so should any attempt to grant Statehood, or any degree of autonomy, to any particular group of the Aboriginal peoples. Those peoples do not occupy a uniform situation in Australian society. The criteria for determining who is an Aboriginal person for statutory and administrative purposes are broad and flexible. Only a small degree of Aboriginal descent will suffice if the person genuinely identifies himself or herself as an Aboriginal and is accepted as such in the community in which he or she lives.[5] Thus many people will be regarded as Aboriginals

although they had some ancestors who were not Aboriginal, and indeed although they are predominantly of European descent.

The Aboriginal peoples and Torres Strait Islanders now comprise about two per cent of the total population; the number has increased in recent years since more people of mixed descent now claim to be Aboriginal. Many of these Aboriginal peoples live in urban areas; only a minority live under tribal conditions. It seems safe to infer that a large proportion of the persons classed as Aboriginal are of mixed descent, and that only a small proportion maintain their traditional lifestyle. Even those who maintain that lifestyle will be likely to have had some contact with Europeans, which will have affected their culture and traditions to a greater or lesser extent. Others have abandoned the traditional lifestyle and follow the same customs as other Australians; some of this class have become very successful. Others dwell in country towns or in Aboriginal communities where traditional laws and customs have little or no place.

It would obviously be impracticable, as well as unjust, to grant sovereign or dominant power to the Aboriginal peoples in areas, such as country towns, in which persons entirely of European descent were as numerous as the descendants of the Aboriginal peoples, many of whom would themselves have had European ancestors. In other words, the only areas in which it would be possible to consider the grant of autonomy, whether in the form of Statehood or otherwise, would be those sparsely settled areas such as Arnhem Land and parts of central and north-western Australia, and perhaps the islands of the Torres Strait and some other islands off the coast of northern Australia. The grant of autonomy, either total or limited, in those areas would create a serious risk for the future of Australia.

One of our great natural advantages, and one that has played a part in enabling Australia to enjoy peace and stability of a kind not commonly seen elsewhere, is the fact that our ancestors achieved their goal of a nation for a continent and a continent for a nation. Experience elsewhere has shown that associations of states, federal or otherwise, do not endure when one state is composed of persons distinctly different in race, religion or culture from those of another. Yugoslavia and the former USSR provide recent examples. The future existence of Australia would be put at risk if statehood or any other form of autonomy were granted to small communities, chosen on the grounds of race, in areas of great strategic importance to this country. The risk that in the future a hostile power might obtain a foothold in such areas must surely be obvious.

The argument that Aboriginals were not subject to the ordinary criminal law was raised early in the 19th Century and accepted by one or two quixotic judges, but the contrary position was established by a decision in 1836.[6] However, not unnaturally *Mabo*[7] raised new hopes that the existence of Aboriginal law should be recognised. In that case it was said that the native title which the Court there held to exist had its origin in the laws and customs of the Aboriginal peoples, and that its nature and incidents must be ascertained by reference to those laws and customs. Thus, it has been argued that the Court had recognised that the traditional laws and customs of the Aboriginal peoples continued to be preserved and recognised by the law.

However, it was held in *Mabo* that native title could be extinguished by the valid exercise of power by the Parliament or Governor in Council of Queensland, and there is nothing in the decision that casts any doubt on the fundamental doctrine that the statutes of the Commonwealth apply to all Australians, including Aboriginals, and that the statutes of the States apply to all Australians within their respective jurisdictions. Some statutes passed after the *Racial Discrimination Act* 1975 of course will be invalid if they are inconsistent with that Act.

The High Court has more recently, in the case of *Walker v. New South Wales*,[8] rejected the notion that the Parliaments of the Commonwealth and the States lack the power to legislate over the Aboriginal peoples, and has held that enactments of those legislatures apply to all inhabitants of the Commonwealth or State unless some are expressly excluded. It was accordingly held that if the customary criminal law of the Aboriginal peoples survived British settlement, it has been extinguished by criminal statutes of general application. The same must be true of statutes on such subjects as succession and matrimonial causes, to take only two examples. It is most unlikely that it would be held that, except in relation to native title, any of the tribal laws of the Aboriginal peoples has survived the overriding effect of the general statute law.

Nevertheless it is still argued that Aboriginals should be subject to their own traditional laws, and not to "white fella law" as it is derogatively called. It was pointed out in *Walker v New South Wales*[9] that it is a basic principle that all people should stand equal before the law. However, supporters of the view that the traditional law of the Aboriginal peoples should still be applied argue that the application of European law brings about only formal equality, and that true equality embraces difference. This argument appears remarkably similar to the separate but equal doctrine which was formerly applied in the United States but has since been discredited as racially biased.

The essential principle that all people are equal before the law does not mean that the law must treat all people alike. It may, for example, give special benefits to widows or war veterans, or impose special disabilities on bankrupts or convicted felons, or require a higher standard of care from persons engaged in dangerous activities than from others. Differentiation of this kind is consistent with principle when it is made on rational grounds, to meet a particular need, reward merit or discourage anti-social behaviour.

It would however be contrary to basic principle to grant special rights to, or impose special obligations on, people simply because they belonged to a particular race, and irrespective of individual need or desert. It would be wrong to place all the members of the disparate class constituted by the Aboriginal peoples in a separate situation under the law. It is involved in the rule of law that rights and obligations are derived from the law that covers the whole community, and the notion that special classes of society should have laws of their own belongs to an early and outmoded stage of legal development.

Recent history has shown, and current events continue to illustrate, how dangerous it is to discriminate on the ground of race. Discriminatory laws which are benevolent in intention can easily become paternalistic -- something that is now deeply resented -- and once discrimination is accepted on the ground of race it is easy for the discrimination to cease to be benevolent. The *Racial Discrimination Act*, which gives effect to the *International Convention on the Elimination of All Forms of Racial Discrimination*, admits an exception to its ban on discrimination on the grounds of race. The Convention provides that:

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring special protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of special rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

The members of the Aboriginal race, like all other people in Australia, are entitled to the protection which our law gives to human rights and fundamental freedoms, and it is not

necessary in order to secure to those peoples the equal enjoyment of human rights and fundamental freedoms that they should be governed by their own traditional customary law. Further, it is clear that the Convention would not justify the maintenance for an indefinite period of a special body of law for a particular racial group.

Serious difficulties of a practical kind would arise if it were sought to apply Aboriginal customary laws to persons of the Aboriginal race. One question would be whether such laws should be applied only to members of the Aboriginal race living in tribal conditions, or whether they should be extended to all members of the Aboriginal race in the wide understanding of that expression which, as I have said, has been accepted, including those living in cities, country towns and communities artificially created from groups of Aboriginal persons of different tribal origins.

There are further practical difficulties. The customary laws were not uniform amongst all the groups or clans into which the Aboriginal peoples were divided, although no doubt the different customs had common characteristics. Some of the Aboriginal customary laws would be quite unacceptable in a modern society. For example, they were enforced by punishments which included beating, spearing and even death. They required "pay back" which might involve a violent assault on an innocent relative of a wrongdoer. Traditional marriage laws enabled a man to have several wives. Marriages were arranged by the betrothal of infants, and young girls were required to marry old men, whether the girls wished it or not. It is quite obvious that, if it were decided to recognise Aboriginal customary laws, it would be necessary to modify them so that those which were regarded as contrary to current conceptions of human rights and acceptable behaviour were not applied.

As everyone is aware, the Aboriginal peoples are by no means the only considerable section of Australian society which consists of persons who might claim to be entitled to special treatment on the grounds of race, origin or religion. There are many more Australian residents who were born in Asia than there are persons of Aboriginal descent. There are about as many persons born in Yugoslavia. There are many other significant racial groups, including South Sea Islanders. There are persons practising a religion whose members elsewhere are governed by religious laws. Although it can no doubt be argued that the Aboriginal peoples stand in a special situation, it would be foolish to fail to recognise that, if they were given the right to be governed by their own traditional laws, similar claims might well be made by other sections of society.

Moreover, some Aboriginal customary laws are secret. In some cases, the secrets may be disclosed only to women and in other cases only to men. It is a fundamental principle of our law that a court may not hear evidence or receive submissions from one side which are not disclosed to the other. Already attempts have been made to persuade the courts to give effect to the customary Aboriginal laws of secrecy, and to hold that a man could not receive evidence of women's business or a woman hear evidence of men's business.[10]

These attempts have met with some success, but with great respect, the wisdom of embarking on this course must be doubted. If these customary laws were applied, the results would be absurd as well as unjust: it would mean that in some cases only a male judge or a female judge (with male and female counsel respectively) could hear the case. In other cases two judges, one of either sex, might have to decide the matter, neither being free to disclose some secrets to the other, and trial by jury would be impossible. The truth is of course that Aboriginal traditions of this kind are inconsistent with the proper conduct of contemporary legal proceedings.

Further, much of Aboriginal customary law would be so inappropriate to the situation of those Aboriginal people who now live in cities and towns that it would be demeaning and unjust to

subject them to it against their will. One suggestion that has been made is that Aboriginal customary law should be applied when all parties, being Aboriginal persons, consent. The proposition that citizens should have the right to choose that they should not be governed by the ordinary law is quite unacceptable. The truth is that if Aboriginal customary law were to be given recognition, the whole body of that law could not be recognised, but selection and modification would be necessary, and those laws which were to be applied could not be made applicable to all of the Aboriginal peoples but only to some.

It would not be inconsistent with the principle of equality before the law that, where members of the Aboriginal race have special needs, those should be recognised by special rules laid down by the law. An example is provided by the judge-made rules which are designed to ensure that Aboriginal persons are sufficiently protected during interrogation by the police.[11] Such rules may be justified, not because the persons protected are of a particular race, but because they have special disabilities of language, education, or understanding.

Further, the law is flexible enough to allow the courts to consider the special situation of an Aboriginal party where that is relevant. For example, if provocation is in issue in a criminal trial, and the accused is an Aboriginal person, the question is whether an ordinary Aboriginal person, living in the conditions of the accused, would have been led to act on the provocation, and not whether a white person would have so acted.[12] The courts have shown sensitivity to the Aboriginal belief that a dead body should not be mutilated, by ordering that no autopsy should be performed in cases where the death was not suspicious.[13]

In sentencing, also, all the circumstances, including the situation of the offenders, must be considered. As the courts have recognised, the sentencing of Aboriginal offenders presents particular difficulties. One difficulty arises from the fact that a tribal or semi-tribal Aboriginal person may have received, or may be likely to receive, a traditional punishment for the offence. If the accused has in fact been physically punished before he comes to court, that would be a matter that could properly be considered by the judge in imposing a sentence, just as a judge could properly consider the fact that a white accused had been assaulted and seriously injured by a relative of the victim.

Judges, in an attempt to do justice in discharging the difficult role of sentencing tribal and semi-tribal Aboriginal persons, have gone further. In one case, at least, a judge suspended sentence to allow for the infliction of tribal punishment, but the error of that course was demonstrated when the members of the tribe declined to inflict a penalty.[14] In other cases, judges have held that the punishment imposed should recognise the probability that tribal punishment will be enacted.[15]

There are dangers in speculating in that way. Although the courts have emphasised that they are not to be taken as sanctioning tribal retribution, their actions do obviously recognise, rather than attempt to discourage, the practice. It is clear enough that a court should not direct that a traditional punishment be imposed, or make an order conditional on the traditional punishment taking place; and with great respect to the experienced judges who have followed the practice of taking into account the possibility of tribal punishment, it may be doubted whether that course is consistent with the rule of law. On the other hand, if the Aboriginal community can contribute to the rehabilitation of the offender in other ways, that should obviously be taken into account.

Another difficulty that arises in sentencing is caused by the dilemma that on the one hand, the courts wish whenever possible to avoid putting an Aboriginal person in prison, and on the other hand, recognise that there might be a public backlash if such a person commits a serious offence and is not properly punished. Clearly the ordinary criminal law is capable of facing these difficulties. It has rightly been held[16] that the same sentencing principles are to be applied to

Aboriginal persons as to all others, but that in applying them consideration must be given to any special factors that exist only by reason of the fact that the offenders are Aboriginal persons.

It is neither necessary, nor desirable, to apply to the Aboriginal peoples the rules of their customary law rather than the general law. National unity and the principle of equality before the law should not be sacrificed to sectional interests, and in any case the economic and social position of the Aboriginal peoples is not likely to be improved by doing so.

No doubt the Aboriginal peoples should be encouraged to take pride in their culture, and to develop and adapt it to modern conditions, but it must be hopeless, in this space age, at this time of accelerating social change, to endeavour to preserve, as if fossilised, a system of laws that developed to meet the needs of a primitive nomadic society. The attempt to uphold Aboriginal customary law is one aspect of the notion that the Aboriginal peoples will benefit if they continue to be treated as a class separate from the rest of the community, which must necessarily be a dependent and disadvantaged class. Surely it is better, in their interests and the interests of Australia, that they should be encouraged and assisted to take their place as equal members of Australian society, subject to, and protected by, the laws that apply to all of us.

Endnotes:

1. *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1, at 31-2, 78-9, 121; *Coe v. The Commonwealth (No. 2)* (1993) 68 ALJR 110, 114-5.

2. *Majah: Indigenous Peoples and the Law* (1996) ed. Bird et al, p. 1.

3. Cited Tuchman, *The March of Folly* (1984) at p. 4.

4. For example, the *First Optional Protocol to the International Covenant on Civil and Political Rights.*

5.

See *The Commonwealth v. Tasmania* (1983) 158 CLR 1 at 274; *Gibbs v. Capewell* (1995) 128 ALR 577.

6.

R v. Murrell (1836) Legge 72.

7.

Supra, n. 1.

8.

(1994) 182 CLR 45.

9.

Ibid.

10.

WA v. Minister for Aboriginal Affairs (1994) 54 FCR 144; *Norvill v. Chapman* (1995) 133 ALR 226; and see *The Australian*, 21 October, 1997.

11.

R v. Anunga (1976) 11 ALR 412, 414-5.

12.

Jabarula v. Poore (1989) 42 A Crim R 479.

13.

Green v. Johnstone (1995) 2 VR 176; Re *Unchango*, unreported 19 August, 1997.

14.

R v. Wilson Jagamara Walker, unreported: see *The Australian*, 2 October, 1997.

15.

E.g., *Neil Inkamala Minor* (1992) 59 A Crim R 227.

16. *Fernando* (1992) 76 A Crim R 58.

Chapter Four

Romantic Solutions to Practical Problems

Professor Austin Gough

The indigenous affairs policies being pursued in North America and Australia represent attempts to interrupt the endless flow and displacement of human populations in history, by legislating to introduce fixed immovable points; it is almost like trying to stop the rotation of the earth. Anticolonial theorists give the impression that they would like to see all races retreat to the boundaries they occupied at the beginning of the 15th Century, or possibly in 6000 BC, with compensation being paid all round.

Present generations would gladly offer compensation to Sitting Bull, Chief Joseph of the Nez Perce, and the Australian Aborigines of the earliest culture contacts for the injustices and broken promises inflicted on them; but we have to deal with the more complicated problem of open-ended rights to compensation inherited by descendants, a problem that calls for reason as well as sympathy. The question of what might be owed to the descendants of the people who occupied North America and Australia when Europeans first arrived (and who were themselves not necessarily the first inhabitants) is being decided, unfortunately, in circumstances not the least conducive to rational debate.

In the first place, without any debate at all we find ourselves locked into a counter-historical rule that prior occupation of territory confers permanent inalienable title and control, a perpetual cause that keeps land forever in the possession of designated clans. It is a curiously aristocratic principle to be endorsed so enthusiastically by the New Left. Applied, say, to Scotland it would mean that land once trodden by the highland chieftains would have to remain always in the possession of their descendants, who would have a perpetual right to negotiate on the use of moorlands, fisheries, towns, mines, and any other land uses not yet envisaged.

Secondly, decisions are being made against a background of late 20th Century romanticism, which has taken the form of a loss of confidence in Western civilisation and a need to express guilt and self-abasement before non-Western societies. In their despair over what they see as the greedy materialism of their own societies, salaried Western intellectuals like to cherish the belief that pure and uncorrupted spirituality exists somewhere in the world.

With the decline of conventional religious belief in the late 20th Century, people were glad to be rid of the concept of Hell, but have been reluctant to abandon Heaven, a place of serenity and ultimate wisdom originally inhabited by angels. This deep spiritual yearning has been satisfied by romantic anthropology, which has created a popular vision of the Edenic state of indigenous societies in the Americas and Australasia as they were before the arrival of Europeans.

In the past decade the most surprising people have been expressing admiration for the strength and purity of traditional cultures and ancient superstitions. Lawyers and social scientists who, as students in the 1960s and '70s, expended a lot of energy in defying their own elders, and who have since maintained their rage against all survivals of tradition in their own society, easily become intoxicated by secrets, myths and "the wisdom of the elders". The more determined admirers are not disturbed by the dysfunctional side of traditional cultures: they prefer to see the obscurantism, the lack of personal freedom and initiative, the treatment of young women and the

incessant clan warfare as subtle and mysterious phenomena, in touch with the rhythms of the earth and reflecting values long since lost by our own shallow civilisation.

In the widely accepted Manichean vision of Pacific and Australasian history, the Europeans with their crude, ignorant, materialist, exploitative, philistine culture -- a "brutal, troubled culture" in Noel Pearson's phrase; according to an article in the *Encyclopaedia of Aboriginal Australia* we are "the European boat people" with our "ersatz cultural stew" -- this coarse unsavoury lot blundered into the region at the end of the 18th Century, trampling underfoot the gentle, delicate, complex, culturally rich and sophisticated societies of the indigenous populations.

This powerful fable has a firm grip on the Australian media: some journalists seem not to understand, for example, that *all* existing cultures are, after all, 50,000 years old. (You don't have to be a purblind Eurocentrist to find something fishy in Phillip Adams' recent remark that "the didgeridoo has as important a place in music as J.S.Bach".)

It has become a commonplace that the historical clash on this continent between two cultures at very different stages of development must be seen essentially as a great racial injustice, and that reparation has to be made on the inherited basis of race. The idea is made more potent by the fashionable doctrine that all understanding and all attitudes are products of one's race, gender and class, with race being by far the main determinant.

It doesn't seem so long ago that liberal idealists looked forward to a gradual blurring of racial distinctions, and spoke of integration and intermarriage as unambiguously good things. The cover picture on a famous issue of *Time* magazine only twenty years ago was a composite photo showing the racially blended "American of the future".

This liberal current has been reversed: the orthodox view now is that every ethnic group (other than Caucasian) has an absolute right to preserve its own racial identity and its sense of Pan-Africanism, negritude, or aboriginality. We have come a long way since Martin Luther King expressed the hope that his children would be judged not by the colour of their skin, but by the content of their character; today skin colour is all-important.

At the end of a century filled with the harsh lessons of racial conflict, and at a time when genetic research and DNA technology are making it clear that there are profound similarities between races rather than profound differences, it seems extraordinary that a liberal multi-ethnic society such as Australia is still making laws distinguishing one race from the rest, and discussing amendments to the Constitution to make this racial distinction permanent.

It isn't altogether a cliché to say that indigenous policies have reached a fork in the road. Indigenous people from the Inuit to the Warlpiri have shown, in negotiations with governments and with mining, logging and pastoral companies, that what they want for the next generation are the benefits of modern education, housing, medical and municipal services, access to jobs, investment capital and scope for individual initiative, and legal protection for women and families. There is very wide recognition that these are benefits created by Western civilisation; traditional societies never provided them in the past and will not do so in the future. Pragmatic negotiators recognise also that taking full advantage of the tangible benefits entails accepting the responsibilities of citizenship in a modern state, and that this can be done without indigenous people having to turn their backs altogether on their spiritual traditions.

At the same time, however, the lawyers, academics and bureaucrats who are too easily accepted by governments as leaders and representatives of Aboriginal opinion are rejecting the concept of integration, and heading defiantly in the opposite direction towards a separatist mirage which will do no more for Aboriginal people than Islamic separatism is doing for the people of Iran and Algeria.

The Keating-Tickner period in Aboriginal affairs created a team of media-wise zealots whose careers depend on continually emphasising racial and cultural differences. They have been encouraged to mount a campaign of truculent metapolitics, stressing the gulf between "we" and "you people" -- "If Australians don't get it right by 2000, we'll give you a lot of trouble" -- and firing off volleys of contemptuous and defamatory rhetoric about whitefellas, lynch mobs, white supremacists and genocide. The high profile militants and their supporters in the legal profession, the media and the universities seem determined to ensure that our most obvious racial conflict will last for ever: if Australia is carrying a burden of unutterable shame, an Original Sin which can never be expiated, the penance for it must take on the quality of eternal punishment.

Nobody stops to ask how it can be in the interests of Aboriginal people to be set permanently apart, as a refractory and unassimilated element at arm's length from Australian society, or to ask how an essentially separatist Aboriginal policy can survive in the multi-ethnic Australia of the 21st Century.

A multi-ethnic democracy will find it hard to accommodate separate legal, financial, administrative and cultural arrangements for one particular minority, based not on need but frankly on race; it is hard to imagine that in thirty years' time there will be much patience with the bizarre racial arithmetic which dictates that a man who is one-eighth Aboriginal and seven-eighths Irish is not an Irish-Australian but an Aborigine, with an identifiable set of qualities and special rights. (A racial test is equally repugnant whether it is applied to impose a penalty or to confer a benefit.) There will be well-justified resentment if the preamble to a revised Constitution mentions Aborigines in language which the High Court might take as an invitation to interpret legislation against the interests of non-Aboriginal Australians.

Apart from the counter-productive policies being pursued in the area of native title, there are two very striking examples of the apparent wish of the current generation of "representatives" to lead Aboriginal people in the directions which will cause profound regret in the future.

Like Islamic fundamentalists, many indigenous activists feel that they can best defend their traditional cultures by denigrating Western culture and Western science. In their suspicion of the prevailing "colonialist" culture in Australia they have welcomed the intellectual doctrine, slightly out-of-date but still influential in universities, that there is no such thing as objective knowledge, only different knowledges; and, of these, both women's knowledge and indigenous knowledge are superior in every way to the crass scientific thinking of the West with its naive faith in empirical data and linear reasoning. The political value of this supposed clash of irreconcilable cultures was obvious in the Hindmarsh Island affair, but anti-scientific mysticism of this kind has been especially devastating to archaeology, a field in which until a few years ago Australia was producing results of world-wide importance.

Archaeology is a benign science which has been of profound benefit to indigenous groups in many parts of the world by revealing the long perspectives of their pre-history. In Australia the scientific archaeology begun by John Mulvaney in the 1950s has given Aborigines the knowledge of 40,000 years of human occupation, a priceless political symbol, and uncovered scores of important sites, hardly a single one of which was previously known to modern Aborigines, much less venerated.

Archaeology is a natural field for cooperation between races, and for many years Australian archaeologists did enjoy very good relations with Aboriginal communities. But we are now repeating the dismal experience of archaeology and palaeontology in North America: activists are asserting their ownership and control over all evidence of human habitation, however ancient, on the grounds that they are the traditional custodians -- a view endorsed with uncritical

enthusiasm by the ABC. Given the vast changes in climate and geography over tens of thousands of years, and the endless movement and replacement of populations, their claims of direct descent from people who inhabited their localities 25,000 years earlier are almost astronomically improbable.

Ill-informed and ideologically confused governments have cooperated by passing a series of *Heritage Acts* conceding, in practice, that the self-appointed spokesmen for the present generation of Aborigines are the legal owners of remains five times older than the Pyramids, and that all ancient remains must be classified as Aboriginal remains and made subject to the religious beliefs of modern Aborigines. The result has been that some of the most important research collections in the country have been handed over, with government approval, to Aboriginal collectives, quite often to be destroyed or reburied in order to prevent further research.

When the archaeologists have argued that very ancient material is part of the general history of humanity, of equal interest to all races, and that preserving excavated remains will allow them to be examined with techniques still being developed, they have been told by prominent Aborigines that they are "mad scientists" and "white supremacists practising cultural genocide". Not one of the well-known tertiary-educated Aborigines in public life or the universities has said a word in defence of archaeology, or expressed even the slightest reservation over the melancholy fate of the Kow Swamp collection or the La Trobe University research project. In such cases reconciliation means that the representatives of science retreat in disarray, abandoned by governments, the courts, and the media.

Behind the claims of ownership over all ancient remains there is a broader theme of the ethnic control of research. Nationalists have always believed that only an Italian can understand the Italians, only an Englishman can write English history, only a Russian can understand the Russian Revolution. (The more sophisticated version is that only a non-Italian can understand the Italians.) But to give this belief the force of law is a totalitarian gesture.

German theorists in the 1930s declared that "only the Folk can study the Folk", and more recently some Third World governments have expelled European anthropologists on the same principle. Indigenous movements are now extending the principle to archaeology, and are arguing that ancient remains can be studied only by the indigenous people who happen to live today in the same region: applied to the 5000-year-old body of a man found in the Austrian Alps a few years ago, this would mean that the remains could be studied only by Austrians -- or destroyed by Austrians.

There have been suggestions that all excavations and palaeontological research should be left for Aboriginal scientists of the future; but the zealots find even this undesirable, because archaeology produces unpredictable results. The evidence for successive migrations into the continent, and the rapid progress in techniques for extracting and analysing fossilised DNA, are in potential conflict with claims of continuous occupation of territory by particular groups, and with the belief expressed by some Koori authorities that Aborigines originated in Australia and are *sui generis*.

Some have doubted the desirability of Aborigines studying white sciences at all: this is essentially the position taken by Black Studies courses in American universities, and I have heard the argument used to justify the channelling of Aboriginal students into supposedly "appropriate" university subjects. The same argument is used by Islamic authorities about the necessity for purely Koranic education: it is a prescription for condemning Aborigines, in Peter Howson's phrase, to "imprisonment within an anthropological museum".

The other conspicuously wrong turning has been the revival, with the approach of a new millennium, of the Keating-period rhetoric about self-determination being only a step towards the higher goal of separate Aboriginal sovereignty -- indigenous people "never ceded sovereignty to the invaders"; Australia must "restore an Aboriginal polity and land base".

Sovereignty on a designated territory is an unlikely outcome in Australia, given the intensely local and territorial nature of Aboriginal societies, but sovereignty in the form of a state within a state, implying dual citizenship and some legal immunities, is being put forward so eloquently by Henry Reynolds, Frank Brennan and others that sections of the media are beginning to believe in it. A reporter on *The Australian* wrote recently that on questions like euthanasia some tribes already can deal with an Australian government "as one sovereign nation to another".

It would be easy to dismiss talk about sovereignty as no more than a negotiating tactic, but we are likely to hear a lot more about it in the next few years because of developments in North America. In October-November, 1996 a United Nations working group debated a *Draft Declaration of Indigenous Rights* which represents the high point of the separatist case, going beyond self-determination to develop, in effect, a doctrine of indigenous supremacy.

Politicians with heart conditions should perhaps not read this document; it should carry a health warning. Any sovereign people receiving it from another sovereign people could be excused if they mistook it for a declaration of war. The terms of the Declaration are harsher than the reparations modern states have imposed on their defeated enemies; it resembles a triumphal proclamation by one of the ancient kings of Assyria.

The message embodied in its forty-five articles is that indigenous people have an absolute right to set up their own chosen form of government on territory equal in size and quality to the territory their ancestors lost, with all costs to be paid in perpetuity by the state.

On the one hand they can decide how far, if at all, they will be subject to the state's laws and institutions, and on the other hand they can exercise a decisive influence in the political life of the state, with a virtual right of veto over major decisions. (The Declaration seems to envisage guaranteed racial seats in Parliament, as advocated in Australia since 1993.) The state must agree not to pass any law that indigenous people find undesirable, and must give full legal protection and financial backing to indigenous cultural activities. Mick Dodson, who was present at the session when it was debated, was reported as saying that the Declaration is only a beginning, a minimum standard from which greater claims will flow in the future.

There is an even clearer lesson for Australia in the 1996 Report of the Canadian Royal Commission on Aboriginal Peoples, which amounts to a blueprint of what the UN *Draft Declaration* might mean in practice.

Canada has roughly 700,000 people of various degrees of descent from indigenous Iroquois, Cree, Kwakiutl, Inuit and other tribes -- 2.5 per cent of the population -- as well as 130,000 Métis who are of mixed Indian and French descent. Expenditure on Indian affairs is $11.6 billion a year: on an individual basis, this is 57 per cent more than the government spends per head on other Canadians, although the figure is inflated by the cost of providing services to remote areas. People of indigenous descent also enjoy a number of tax exemptions.

As one of the consequences of the so-called Charlottetown Accord, a proposal was drawn up to give Indians a high degree of constitutional independence and to increase expenditure on Indian affairs. It was put to a referendum in a year of economic recession and failed in every Province. The Royal Commission in 1996 urges the Canadian government to try again, this time by proclamation without a referendum.

The Report is a monument to political romanticism. Almost every page makes a point of the moral and functional superiority of Indian cultures; the Commissioners seem reluctant to allow Western liberal values, or white people in general, even an oblique hint of credit for anything. There is no analysis or questioning of the guiding principle that, because their ancestors or part-ancestors occupied the land in the 18th Century, the present generation of Indians own the whole of Canada: the Indian affairs budget is taken to be their rent.

Instead of proposing a more secure and fruitful integration of Indians into Canadian society, the Commission recommends that they secede, for all practical purposes, into as many as sixty tribal "nations" on traditional territories, each with its own political and legal system and its own autonomous social policy. Indians living in cities (over half of the total) could be expected to owe allegiance to their respective tribal governments, and would be partly or wholly exempt from Canadian laws. The Commission describes this as a Third Order of Government, alongside the federal and Provincial (State) governments, in which each Indian nation would control the full panorama of government functions and expenditure, with overall control by an indigenous Parliament, the House of First Peoples.

This proposed balkanisation of Canada is envisaged as being permanent. There would be no trial period or sunset clause. For the next twenty years, the Commission says, there would have to be an increase of between $1.5 and $2 billion a year in the already large budget to meet the land claims and setting-up costs of the new nations, but after twenty years they could be expected to be self-supporting and would require no further Canadian subsidies.

Not surprisingly, the Report has been greeted with scepticism. Who will run these new states? Where will the administrators and technicians be found? The main revenues in the long term are supposed to come from land, especially from timber and mining enterprises, but in 1996 there were only five qualified foresters and ten geologists of Indian race; and Indian militants, like the more doctrinaire zealots in Australia, are in favour of separate and "appropriate" education with an emphasis on indigenous knowledge and the use of native languages.

There is broad public sympathy in Canada, as there is in Australia, for attempts to resolve the practical problems of indigenous society, which are similar to those afflicting Australian Aboriginal communities. However, there is not much doubt also that independent self-government in separate nations would make the problems worse, and infinitely harder for any Canadian government to tackle.

In a rare moment of realism, the Royal Commissioners themselves admitted that the poverty and second-class citizenship of indigenous people in the past has been the result of their isolation from the Canadian mainstream. The extreme ethnic militarism which dictates that the Indian population should fragment into as many as sixty "nations" would mean in practice that too few of them could provide a viable range of modern services or a satisfying variety of employment. Instead of doing anything towards bringing indigenous people up to the economic and social level of other Canadians, separation would almost certainly put them further behind. Ancestral land held communally will do nothing for individual enterprise.

These problems are exacerbated by the policy of First Nation activists which states that all Indian education in future has to be racially "appropriate", stressing the revival of Indian languages and, as far as possible, replacing white models of knowledge with indigenous knowledge -- a view uncritically admired by the Royal Commission.

It is worth mentioning some of the other fundamental questions that have been raised in the Canadian press, because they have some relevance to the current situation in Australia. The main national newspaper, the Toronto *Globe and Mail*, for example, has made the point that, although

Canada is still constitutionally bound by treaties which have existed since the 18th and 19th Centuries, it is not a good idea to delegate legislative or police powers to groups defined by race, especially when the group itself can decide who is eligible for membership.

It has been noted that the Royal Commission is asking taxpayers to support Indian "nations" which would be, in effect, foreign countries without real obligations to Canada or to Canadian public opinion. The Commission defines "nations" as "political and cultural groups with values and lifeways distinct from those of other Canadians". That is precisely the point, say the critics: independent Indian nations would not necessarily be democratic or committed to liberal social values.

After hearing submissions from the First Nation leaders, the Royal Commission recommended that the new Indian nations could exempt themselves from some of the provisions of the Canadian *Charter of Rights and Freedoms*, which guarantees the rights of the individual, rights of dissent, and the equality of women. Indigenous groups have expressed some concern that they might have to leave the protection of liberal Canadian society and place themselves under the rule of traditionalist Indian zealots.

The Canadian Prime Minister, Jean Chrétien, had himself served as Minister for Indian Affairs for several years: he is a well known patron of Indian art, and has an adopted son of Indian blood. The Minister, Ron Irwin, was a lawyer for indigenous land claimants, and had made himself popular with grass-root Indian activists by taking money from the Department of Indian Affairs and distributing it directly to local bands or communities, in effect by-passing the Indian native leadership: several of these bands had elected Mr. Irwin as an honorary chief.

Irwin retired from politics at the election this year, which the Government won, but the new Minister, Hon. Jane Stewart, is forging ahead with the already established policy of gradually winding down the Department of Indian Affairs and negotiating directly with individual nations or bands to establish Financial Transfer Agreements (FTAs). The Indian government concerned receives guaranteed funds for a fixed time, and agrees to take responsibility for a range of functions and powers rather broader than the usual powers of municipal government; within negotiated guidelines it can exercise its own discretion on how the money is to be spent.

A good example of this practice is the five-year FTA signed in August this year with the Big Island nation of Ontario: according to the Government's press release, the funding is to be used for "elementary and secondary education, operation and maintenance of roads, sewers and water, sanitation, social assistance, housing, economic development and First Nation governance". (This last category includes day-to-day policing.) An outside observer might have reservations about including education in the powers delegated under FTAs, because of the distinct possibility that some of the race-obsessed rhetoric of First Nation activists will find its way into the school curriculums. In other respects, however, the FTAs appear to provide good opportunities for Indian groups to generate their own sources of revenues in the future.

FTAs are being negotiated against a background of several problems. In many communities there is resentment, sometimes verging on mutiny, against the leaders of the Indian nations for spending too much time on First Nation politics and allowing their local affairs to be mismanaged.

At the Stony Reserve in Alberta, for example, which has 3,300 residents, the hereditary chief John Snow has been in office for 30 years and has a high profile on the national scene. The reserve has earned several hundred million dollars in the past few years from oil and gas reserves, and received $20 million a year from the Government: yet in the financial year 1996-97 it managed to accrue a deficit of $5 million, and 60 per cent of the adults are on welfare, despite

the fact that the reserve is close to Calgary and to several tourist resorts where there are plenty of jobs available. The government has insisted that the leadership of the reserve go through some form of electoral process, and has called in Cooper and Lybrand to manage the finances.

Many of the reserves, of course, are extremely well managed and have no problems; but as a result of cases such as the Stony Reserve, the Government is including in FTAs a requirement for transparency and accountability in management, rules against nepotism and mechanisms for the recall of elected officials. The provincial governments are increasingly insisting that the very large amounts paid as compensation for land claims -- one such claim covered the city of Vancouver -- must be used to establish the Native American communities on a properly sustainable basis and to create permanent employment.

Section 35 of the *Constitution Act* of 1982 commits future Canadian governments to the dubious principle that groups defined by race have an inherent right to self-government. The present federal Government's problem is to decide what self-government is to include in practice. Apart from the powers delegated under FTAs, the government has said that, for the sake of preserving the coherence of Canadian society, it will not delegate power over the criminal code, the control of borders, immigration or treaties and postal and banking services. There is a further category of powers that the federal Government cannot delegate on its own initiative without formal agreement from all the Provinces: the administration of justice, prisons, environment and fisheries, labour and training regulations, marriage and divorce legislation, and, significantly, the *Charter of Rights and Freedoms.*

For several years the leading Australian activists, ATSIC, and legal academics concerned with Aboriginal studies have been strongly influenced by First Nation politics in North America; and Senator Herron and his department have studied the Canadian situation in particular at first hand. The Canadians have said that they have learned something from the Australian example, and we can certainly learn something from theirs. But a change of government in either country could take indigenous affairs out of the hands of practical reformers and put it back once again under the influence of romantic enthusiasts.

Chapter Five

The Chattering Classes at Prayer: Constitutional Conferences and Conventions

Padraic Pearse McGuinness

Preparations for the celebration of the centenary of the Australian Constitution were desirable and necessary, and the process inevitably fell into the hands of those most concerned with the Constitution, the constitutional lawyers. Since 1990, when a conference was arranged in Melbourne to commemorate the Australasian Federation Convention of 1890, and a subsequent conference in Sydney to commemorate the first Australian Convention of 1891, there has been a series of conferences which have taken upon themselves the title of "convention", so as to emulate the conventions of the 1890s, as well as a number of supplementary conventions.

These have been mainly the work of the Constitutional Centenary Foundation (CCF), which came into being with the support of Commonwealth and State governments after the Sydney conference. Its chairman is Sir Ninian Stephen, Governor-General 1984-89 and former Justice of the High Court, and its deputy Chairman is Cheryl Saunders, Professor of Constitutional Law at Melbourne University and head of that institution's Centre for Comparative Constitutional Studies. Professor Saunders was one of the main moving spirits of the earlier meetings, and since its inception the most significant influence in the CCF.

The CCF was founded chiefly to organise celebration and discussion of the constitution-making of a hundred years ago, and also to discuss proposals for changes and reforms to the Australian Constitution. Inevitably, both because of its creation under a Labor Government inclined towards eventual transition to a republican form of government for Australia, and because of the popularity of republicanism in academic circles and amongst the political élites, the republican issue has dominated much of the debate. This was accentuated from 1993 when Paul Keating, as Prime Minister, appointed a committee under Malcolm Turnbull to examine ways of achieving a transition to a republic. Originally, Sir Ninian was asked to head this committee, but he declined -- in part because, having sworn an oath of loyalty to Queen Elizabeth II and served as her viceroy in Australia, he felt it inappropriate to head a committee which was intended to come up with proposals for her removal.

For whatever reasons, the committee as eventually constituted was committed to a rapid transition, preferably so that the centenary of the Constitution would be celebrated as the moment of transition to a republic. While its report was a useful summary of the issues, from its publication nearly all public discussion centred around its favoured model of a republic, one in which most existing features of our Constitution would remain, other than the replacement of the existing Monarch and Governor-General by a Head of State who would be a President elected by a two-thirds majority of the Houses of Parliament, and removable in the same manner. At the same time there was, and has been since, a great deal of debate about the powers of the presidency.

In all this debate two things have emerged. First of all, there has been a distinct trend towards electoral support for a transition to a republic at some time in the future (not necessarily during the present Queen's reign, or even before her death), and this can certainly by now be said to enjoy definite majority support, though the majority may be only two or three points above 50 per cent. Second, there has always been an overwhelming majority of those in favour of a

republic -- and probably the same is true of the electorate as a whole in the event of a decision for a republic -- who insist that a President must be elected by the people. That is, there is clear and strong opposition to a republic in which the President would be appointed or elected by some behind-the-scenes deal between Government and Opposition in which the people are not consulted.

This has for quite some time been recognised by the realists of the republican movement. Most recently, the fact that any proposal for a republic with a President not directly elected by the people would be unlikely to receive majority support has been stated by the most powerful numbers man of the Labor Party, Senator Robert Ray. But it is clear that the overwhelming feeling of those who have dominated the process of advocacy and preparation for a republic is that they must get their way, such that a stuffed shirt must get the job. An experienced politician, or a popular nominee from outside the establishment of the élites, would never be acceptable.

This fundamental agenda has dominated the whole process of the centenary conferences, called conventions, which have taken place since the report of the Turnbull committee. These conferences have been organised by the CCF, and their composition largely determined by its Board and by the various State-based organising committees which have worked with it. In effect, they have become selected groupings reflecting the orthodoxies of the political élites, replete with the kind of academics, lawyers, journalists, judges (retired or not), bureaucrats and young people of the *bons enfants* kind -- the respectable, obedient and well-behaved young who conform to the ideas of the current establishment. There has been some unorthodoxy, and even some quite sincere attempts on the part of the CCF and its organising committees to introduce a degree of diversity. Some dissidents have been given a run, even though there have been some quite serious attempts to silence protests about the way the whole thing has been put together.

The two most recent exercises in this genre have been typical of the direction the whole process has been going. These were the "conventions" held in April and September, 1997, in Adelaide and Sydney respectively, shadowing the 1897 conventions of elected delegates. The use of the terms "convention" and "delegate" in the case of the recent meetings has been an indication of what has been going on.

There has been an attempt to give an air of legitimacy to these conventions, as if they had some kind of democratic credentials or other authority behind them; to this has been added the apparatus of syndicates or working groups with rapporteurs, plenary sessions, resolutions and a final communiqué. The reality is of course that the final communiqué and the resolutions have no status or authority whatsoever, and are persuasive only to those who want to pretend that the new conventions have some kind of standing. They have some standing, of course, since many establishment figures have attended, contributed to and endorsed them; but since there is no popular authority involved, there is no reason why the electorate as a whole should have any more regard to their proceedings than to those of a university seminar or, to borrow the jargon of the '60s, a "teach-in".

The partially-elected Constitutional Convention, the postal ballot for which, with voluntary voting, takes place this coming December, will have rather greater claim to authority. But this will be confined to the issue of republic versus monarchy, although there will be valiant efforts by some delegates to drag other issues into debate.

Thus the conventions were set up as charades. Those few at them who challenged their proceedings and the unrepresentative nature of their participants were greeted with considerable hostility, especially by those republicans present who accepted only one interpretation of any constitutional issue (for example, whether the Governor-General can properly be referred to as

our Head of State); who would contemplate only the stuffed-shirt model for appointment to a presidency; and who, above all, would not accept that there might be some debate as to when, as well as to whether, it might be appropriate for Australia to become a republic. There were indeed a few thugs who did their best to discredit and harm professionally any dissidents.

All this had unfortunate results. With all the well-meaning people present, it was to be expected that the proceedings would amount to a kind of secular prayer meeting, with high ideals, vision for the future and agreement on the nature of our Constitution all leading to an uplifting consensus on the future. In effect, the idea was to determine the nature of any future constitutional proposals to be put to the people in the context of the centenary, and to ensure that this would reflect the preferences of the Australian Republican Movement and its fellow travellers. Since the overwhelming majority of the participants selected were from various elements of the political class who could be relied upon to favour republicanism along the favoured lines, along with the rest of the orthodox politically correct agenda of the last 15 years, with a few tame monarchists thrown in to give the impression of diversity, the outcomes were predetermined.

This was clearest of all at the Adelaide meeting in May. It should be said at the outset that, talking afterwards to some of those responsible for the selection of participants and the determination of the agenda, there seems to have been an undue influence from the politicians, bureaucrats and legal profession of South Australia, certainly still the most politically correct of all State establishments these days. It is as if total dependency in economic terms on the Commonwealth somehow encourages self-indulgence and unreality in political terms.

The composition of the conference was overwhelmingly upper middle class, professional, and totally unrepresentative of public opinion. None of the large and growing constituency of Mrs Pauline Hanson, cannibal or not, was present. By contrast, a smaller minority party, the Australian Democrats, was more than proportionally represented. It seemed to be they who persistently referred to the untried and untested South African Constitution, which was for some mysterious reason appended to the background papers circulated to invitees, as a model for Australia. This Constitution, though unexceptionable in its high moral sentiments, is enthusiastically supported by many who have only a very unclear conception of the rule of law.

The concerns of youth were represented by intelligent, highly presentable young people who had been selected by teachers and other adults, and who had gone through the mill of earlier school or other conventions and thus were able to present the views of their elders as if they were the views of the young. Some of us were praying for a few revolting Trotskyites or anarchists to present the views of the unorthodox young, who are always the source of new thinking; anything but clean-cut, carefully coiffed young intoning "Tomorrow belongs to Me".

Some of the propositions presented to the plenary meeting, which reappeared in some form in the final communiqué of the convention, were adopted unanimously, some with strong dissent; some were rolled, since they expressed an unfashionable scepticism about the High Court or support for a strong federal system. The result was that a totally unrepresentative assembly produced a totally meaningless summary of the views of the people who organised the convention.

Some of the future challenges were indirectly stated. Thus "access to the law", which emerged from a working committee of which the rapporteur was the Chief Justice of the Western Australian Supreme Court, the Hon. David Malcolm, really meant that legal aid in the form preferred by lawyers ought to be part of the Constitution. There was a strong phalanx of lawyers, as always at such meetings, voting for their professional advantage, as well as many longwinded academics.

The second day of the convention was devoted to putting together various constitutional "principles" which should underlie a Constitution for the 21st Century. There was a concerted attempt by various groups, most notably members of the Australian Republican Movement, to bring the issue of republicanism and rejection of the British monarchy to the forefront at all times. And everywhere there were shopping lists of the kind which various special interests, like local government, will try to introduce into the ten days of the partially-elected Constitutional Convention.

The most sensible of the speeches made to the convention was that of Associate Professor Campbell Sharman, of Western Australia, who summed up:

> "Constitutional reform is not about enshrining wish-lists or pompous phrases about the future -- although a little pomposity at the beginning of a Constitution is quite acceptable. Nor, in my view, is it to respond to challenges, however exciting and revolutionary they may appear to be. Constitutional reform should be about fixing practical problems that affect the operation of government. The guiding light must be to ensure that people get what they want most from government: open, honest and accountable government that is responsive to the wishes of citizens."

Needless to say, Sharman's words were ignored.

Everybody was in favour of democracy, equality and special treatment and recognition for Aborigines. Indeed, as was frequently observed, everybody was in favour of motherhood -- and this was the predominant spirit of the discussion. Not everybody was in favour of federalism. The old nostalgia for centralism still flourished, but at least one of the main supporters of unitary government, Gough Whitlam, was realistic enough to observe that since there was Buckley's chance of convincing the smaller States, whose consent would be necessary, to vote in favour of the abolition of the States, the conference might as well forget about it.

Perhaps the low note of the conference was the official dinner, sponsored by the AMP Society, whose representative delivered a 15-minute commercial to the assembled diners. Perhaps we might end up with the AMP Constitution of Australia. He was accompanied by a decidedly non-vegetarian meal, a troupe of Aboriginal dancers in red nappies, and a young and resolutely politically correct choir. It was really an appalling demonstration of patronising behaviour towards Aborigines, in which de-culturated and politicised Aborigines participated.

The dinner was dignified by an oration from Emeritus Professor Geoffrey Bolton, currently at work on a biography of Sir Edmund Barton, who also entered the contemporary political cockpit by suggesting that it was the custom of those in the past who had disagreed with High Court judgments to accept the "umpire's decision" unprotestingly, by contrast with the uncouth nature of comments on contemporary decisions of the Court. Reactions in labour movement circles to such decisions of the High Court and the Privy Council as those on bank nationalisation, on section 92 generally, or the Barwick High Court's decisions on income taxation avoidance schemes, were not mentioned.

The nature of the recommendations/resolutions of the conferences was unsurprising. Read one politically correct agenda and you've read them all. Three days of discussion led to proposals like, "Australia will be governed by the rule of law". It was repeatedly asserted that Australia should be a democracy. Since there were no advocates of dictatorship, Communism or fascism present, this occupied an inordinate amount of discussion time.

The real issue before the conference was of course that of a republic. Malcolm Turnbull and his acolytes brought this up at every opportunity, and did their best to persuade the meeting that it should produce a strong recommendation to the forthcoming partly-elected Constitutional

Convention that we should proceed immediately to the sacking of Queen Elizabeth and the Governor-General and the replacement of the latter by an appointee of the federal Parliament. While just about everybody agreed that a republic was inevitable (few advocates of monarchism were invited; many of those decided that they had better things to do), there was at least some doubt as to the kind of republic we ought to end up with. Most versions sounded uncannily like the present system, but with no politicians.

The Sydney convention in September was not as bad as the Adelaide convention, which was the chattering classes at their triumphal and sentimental worst. Indeed, it was clear that there had been a learning process going on -- or perhaps simply the high tide of political correctness had passed -- and a certain awareness of reality was creeping in.

A clear demonstration of irrelevance of these non-elected and unrepresentative conventions to actual political issues was provided by one participant, who proposed in a working group meeting that the preamble to the Constitution should include a commitment to a form of assimilation of immigrants, who should be expected to learn English, not form enclaves and conform to Australian customs. This proposition, which would be endorsed by at least 80 per cent of the electorate (including immigrants), would hardly have commanded three votes at the convention. Not surprisingly, it was quickly passed over.

On the other hand it was surprising that one proposition was almost unanimously rejected. This was moved by an Aboriginal participant, and proposed that the Constitution should recognise Aboriginals as a sovereign people entitled to self-determination. It almost won by default, since it seemed that no one would have the courage to point out how unacceptable a proposition it was -- but when somebody (I) finally did, there was a relieved and decisive rejection. It would have been passed by acclamation in Adelaide. Many participants, including some strong defenders of free speech, later observed how objectionable this kind of proposition would be, but admitted that they did not dare speak up against it -- a pitiable fact.

Similarly, although both Aboriginal and ethnic participants were opposed to the proposal that there be a clear and unqualified right of free speech stated in the Constitution, despite their fears and sensitivity the majority of the convention insisted that we could trust the courts to deal with abusers, and that it was not safe to limit the right of free speech in principle. There had earlier been some debate as to whether basic values of the community should be included in the Constitution, but this also was wisely passed over, since it is impossible to define or obtain unanimous agreement on such values.

The generally more sensible and fruitful tone of the proceedings was assisted by the absence of the republic issue from the main debate -- the organisers had decided that, since this was to be dealt with at the official Convention, it was pointless to waste time on it in Sydney. Those who think constitutional reform is mainly about imposing their own model of a republic on a reluctant community were thus side-lined.

There was little or no argument against a proposal to replace the oath (affirmation) of loyalty to the person of the monarch which is appended to our Constitution with a new oath of loyalty and support for our Constitution and laws. Since this would allow for a continuation of a constitutional monarchy drawing its authority from the people, the one or two monarchists present did not object.

This form of a loyal oath was also considered sufficient reason to agree, as just about every participant did, that the clause of the Constitution which forbids holders of dual citizenship from being members of Parliament should be dropped. However, it remains the case at present that there are numerous British and Irish passport holders sitting illegally in Parliament.

The chairman of the convention, Sir Laurence Street (former Chief Justice of NSW) at first nimbly shuffled aside the insistence of one eager Christian testifier that God should be invoked in a new preamble to the Constitution; more sophisticated religious present realised that this would be incompatible with the values of tolerance and diversity of views. An acceptable compromise, which would not offend the large number of believers in the community, was suggested by Mark McKenna (author of *The Captive Republic*) in an excellent jargon-free proposal for a new preamble which would reiterate for historical purposes the old preamble, with its reference to God. Even intolerant atheists have no difficulty in accepting that the founding fathers believed in God. But not the born-again: no compromise was allowed, and the meeting had to vote against the placing of the fundamentalist Christian God over all.

For the rest, the assembled worthies had a good time debating various more or less improbable reforms to the Constitution, like limiting the powers of the Senate, and in general playing at being parliamentarians. They sat comfortably on the padded benches of the NSW Legislative Assembly, below the bemused gaze of occasional troops of school children, who were no doubt disappointed that there was no shouting or screaming of abuse, the normal mode of behaviour of the NSW Parliament.

It is clear that the Constitutional Centenary Foundation is failing abysmally in its objective of educating the people of Australia to think like the political élites, but succeeding admirably in educating the political élites in the recognition of their total lack of sympathy with and disconnection from the feelings of the electorate.

In the event, the final communiqué of the Sydney so-called convention reverted to the same kind of empty cliches as the Adelaide convention.

Most of the criticisms of the nominated membership of next year's Constitutional Convention have been misplaced, coming as they do from those who are committed republicans, who believe that the most important of all constitutional reform priorities is the redefinition of our Head of State.

But on one count alone the complaints are justified. Who on earth thought that a group of young people consisting almost entirely of law students would be in any way representative of Australian young people, republican, monarchist, anarchist or purely indifferentist? All that can be said with any confidence about law students in general is that they will be motivated either by a kind of goofy belief in social reform by legal bullying, or by greed for future income and power (often both). They will mostly be polite, conscientious students, thoroughly accustomed to and happy about deferring to and being manipulated by their elders and mentors, and if they think of themselves as progressive it will be the "progressivism" of tedious professors and priests. If not, they would not be studying law.

The young who might have something useful to say now, or who will in the future prove to be the real innovators and agents of change, are not looked upon by their elders, whether baby-boomers or prematurely middle-aged Generation-Xers, as worthy of approval. They are the silent -- or if not silent, as yet not widely noticed -- dissidents.

At least the partly-elected Constitutional Convention might produce some surprises. The individual nomination fee ($500) was not so high as to preclude quite a few people throwing their hats into the ring. So the ballot will not be confined to the boring and predictable lists of the Australian Republican Movement and the Australians for Constitutional Monarchy. What is more, the method of voting, bitterly opposed by the Labor Party and its Democrat pilot fish, for the Convention will reduce the advantage of the organisations and their lists. A postal ballot makes a large ballot paper with many names and groups much more manageable -- we will in

general be filling it out at the kitchen table or study desk, or even at work, often in consultation with family and friends.

Voting will be as secret or as open as we want it to be. It can be done at leisure, and in the course of debate as to the merits of each group, candidate or combination. Apart from a few nationally known names (although many of these are not as universally known as they fondly think), much of the choice will devolve on group lists, which will be judged by many purely according to their names, and on the details of each candidate which will be distributed with the ballot papers. Unhappily, the great majority of the candidates who have nominated individually or in groups, including those who are part of the two major republican and monarchist groups, are ratbags.

In ordinary elections the great majority of voters vote for their preferred party. The requirements of actual knowledge are not great. It is sufficient to follow a ticket or pick a box on the Senate paper with the name of your preferred party. Much less will be known about the candidates for the Convention, and there will be no party labels. It is quite probable, nevertheless, that the Labor Party will endorse the ARM; the Liberal Party will endorse neither side.

Apart from that, what will we know about all these groups and individuals? The Electoral Commission will publish a booklet, to accompany the ballot paper, providing some information. But apart from excluding obscenity and unwanted references to other candidates, there will be no control over what they say about themselves. There is nothing except exigency of space to stop a candidate making any number of unsubstantiated claims about his or her credentials (and perhaps even sex or race). The examination of the claims and assertions of each candidate and group will have to be mainly the work of the media. Fair presentation of all these claims will impose a heavy burden of truthfulness and objectivity on everyone in the media, especially those who have already taken strongly committed positions in favour of any one proposal or group.

Probably, as the ballot approaches, each newspaper will publish its own form guide to the groups and candidates which will be used by many voters as they fill out their ballot papers. There will also be a barrage of propaganda, talk shows and debates on television and radio. We know already that the ABC, fair and impartial as always, will support the Australian Republican Movement and perhaps one or two independent republicans. The populist talkback shows will run hot, and their candidates will be unpredictable.

The greatest uncertainty will be the response rate to the giant ballot paper and the postal vote. It is a common experience for union postal ballots held by the Australian Electoral Commission to have a return rate of ballot papers as low as 5 per cent of the post-out. This will be the real touchstone of the value of the February Convention.

Chapter Six

Economic Integration and Federalism: Two Views from the High Court of Australia

Professor Bhajan Grewal

The title of my paper refers to a topic that must be obvious to most. My reason in raising it for discussion this afternoon lies in the ruling of the High Court of Australia, delivered on 5 August, 1997, in the *Ha v. New South Wales* case.[1] Although the case related to the constitutional validity of a business franchise fee, at the heart of the Court's ruling lie some disturbing views regarding the federal character of the Commonwealth Constitution. The purpose of this paper is to discuss these views and to examine how well they are founded in history and in modern theories of taxation and economic integration.

The *Ha Case* arose when the constitutional validity of the New South Wales business franchise licence fee on tobacco was challenged. The other States and Territories intervened in support of New South Wales, requesting a re-examination of the Court's definition of the term "duties of excise" within s. 90 of the Constitution.[2] The Court delivered a split decision by a majority of 4-3 and declared that the New South Wales licence fee was an excise duty, and hence unconstitutional.

An immediate consequence of this judgment was that it effectively invalidated business franchise fees on tobacco, petroleum products, and liquor in all States, as the constitutional objections accepted by the Court in the *Ha Case* applied equally to all these fees, which had been framed under similar legislative provisions. This wiped off the source of nearly $5 billion, or one-sixth, of total taxation revenue of the States.[3]

Another immediate effect of the ruling was that the Commonwealth government agreed to collect, under its own legislation, additional revenue from the same three commodities, and reimburse the States for the loss of revenue. The movement to this rescue package has not been altogether smooth. There has been confusion about the refunds of unconstitutionally collected revenue and pre-payments of fees covering the period after the Court's decision. Three manufacturers of tobacco had temporarily to suspend trading in their products and shares in the midst of such confusion. There was also uncertainty about the effect of the new arrangements on prices of the taxed products, especially in Queensland, where the State government had imposed no franchise fee on petroleum products but where the new Commonwealth taxation would apply just the same.

From Functional to Dysfunctional Federalism

The so-called rescue package will no doubt help stabilise the States' finances in the short run, although it cannot be, and is not presently intended to be, a long-term solution to the financial loss of the States.

A well-documented fact,[4] which is also shown in Table 1, is that the revenue raising power in Australia is extremely centralised. The share of tax revenue raised by the Commonwealth government is far higher than the corresponding situation in other major federations.

An appropriate degree of revenue decentralisation, to match the division of responsibilities for expenditure, is the critical precondition for a fully functional federalism. Given the current level of the States' financial dependence on the Commonwealth, it is clear that Australia today has a dysfunctional federalism. The latest rescue package of the Commonwealth will make the bad

situation worse, especially if it became a permanent feature of intergovernmental revenue sharing arrangements.

Table 1: Taxation Revenue by Level of Government in Major Federations

(Percentage share of total tax revenue, 1993)

Level of Government	Australia	Canada	Germany	USA
Federal	75.6	46.9	51.5	54.3
State	20.4	40.2	35.5	27.2
Local	4.0	12.9	13.0	18.5

Source: OECD (1996), *Revenue Statistics of OECD Member Countries, 1965/94,* Paris.

Financial domination by one level of government in a federation inevitably turns into concentration of political power in the hands of that government. This principle was the basis of the warning sounded by Alfred Deakin in 1902, when he said that financial provisions of Australia's Constitution had effectively tied the States to the chariot wheels of the central government.[5] It was also the message conveyed to the Parliamentary Labor Caucus in 1991 by the former federal Treasurer Keating when he said:

> "The national perspective dominates Australian political life because the national government dominates revenue raising, and only because the national government dominates revenue raising.'[6]

Contrary to Deakin's assertion, however, the Constitution of Australia did not establish a dysfunctional federalism. The constitutional assignment of tax powers could not have, by itself, created the extreme fiscal dependency of the States on the Commonwealth. Except for the customs duties and excise duties, both of which were assigned exclusively to the Commonwealth, the States had access to all other taxes.

Table 2: State Taxation 1901-02 and 1909-10

($ Million)

Six State Revenue	1901-02	1909-10	% change
Income Tax	1.3	2.5	92
Probate & Stamp Duties	2.4	4.2	75
Land Tax	1.0	0.7	- 30
Other taxes	0.5	0.6	20
Total Tax Revenue	5.3	8.0	51
Memorandum Item: Customs & Excise Duties	17.8	23.2	30.3

Source: Mathews, R. L. and Jay, W. R. C., *Federal Finance,* Tables 7 and 8.

It is true that customs duties and excise duties were the dominant sources of revenue at the turn of the last century. Exclusive assignment of these to the Commonwealth accordingly created the need for financial transfers from the Commonwealth to the States. Nevertheless, the States continued to raise substantial revenues from public lands and their business monopolies (e.g., railways and tramways). As is clear from figures in Table 2, even revenue from their own taxes grew strongly in the early years after Federation.

Australia's federalism became dysfunctional after the Second World War for two reasons. The exclusion of the States from income taxation since 1942, which Deakin could not have anticipated in 1902, and the High Court's interpretations of excise duties in subsequent years,

which again he would not have known about, together created the extreme degree of revenue centralisation.

In the initial years of Federation, the High Court's decisions on excise duties were not unreasonably confining when, in the *Peterswald Case* (1904), for example, excise duties were interpreted as taxes paid on goods produced or manufactured in a State.

The Court's judgment in the *Parton Case* (1949)[7] extended the definition of excise duties so widely as to literally cover the whole field of commodity taxation other than customs duties. Since then, the line of authority built upon *Parton* has cast a long shadow over the subsequent cases involving State levies on commodities. This line of authority was re-opened for argument and became the central issue in the *Ha Case.*

Commonwealth Power over Policy: The Fundamental Dividing Issue

Unlike many previous split decisions, the battle lines between the majority and the minority judges were clearly drawn in this case, and the issues dividing the two camps became crystal clear. This is because all the majority judges held one view in reaching their judgments, just as all the minority judges also held only one view for their dissenting judgment.

The majority judges reaffirmed the authority of *Parton* on two issues that were critical to this case. The first issue related to the scope of Commonwealth power as intended in the Constitution. The second involved the definition of duties of excise. The dissenting judges rejected the authority of *Parton* on both issues.

There was no disagreement between the judges on the point that the meaning of excise duties must be determined according to the purpose of s. 90 in the Constitution. There were, however, fundamental differences between them about the precise purpose of that section. These differences flowed from their conflicting interpretations about the intended scope of the Commonwealth power over economic policy.

According to the dissenting judges, an objective of the Constitution was to establish a customs union along with inter-colonial free trade, and the fiscal provisions of the Constitution were designed to achieve this outcome. To this end, the purpose of s. 90 was to build upon the assignment of tax powers that had already been specified by s. 51(ii).

Specifically, the role of s. 90 was to *add exclusivity* to the Commonwealth power over customs duties and excise duties. In the absence of such exclusivity, the Commonwealth's power to establish the common external tariff could have been jeopardised if a State imposed excise duties on, or granted bounties to, locally produced goods. The need for exclusive power over excise duties arose, according to this view, in conjunction with and after the imposition of customs duties, not independently of them.

Once this purpose of s. 90 is accepted, there is no need to extend the Commonwealth's exclusive power beyond the taxes imposed on goods when produced or manufactured. As the minority judgment explains, this is because "a tax imposed upon some latter step which fell indiscriminately upon locally produced and imported goods -- a step in the distribution of goods, for example -- would not operate to impair any policy of protection to be found in an external tariff in respect of those goods".[8] On this basis, the dissenting judges found that the New South Wales business franchise fee was not a duty of excise.

The majority judgment is based on a different interpretation of the scope of the Commonwealth power, according to which it was intended that the Commonwealth Parliament have exclusive power over not only customs and excise duties, but also any other commodity taxes. The genesis of this interpretation is found in the *Parton* judgment, in which Justice Dixon said:

> "In making the power of the Parliament of the Commonwealth to impose duties of customs and of excise exclusive it *may be assumed* that it was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action. A tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon its manufacture or production.'[9]

Thus, on the basis of an assumption, Justice Dixon's formulation cast a wide net for Commonwealth power over taxation and policy. This is followed by the assertion that all types of taxes on a commodity have the same effect. The majority judgment embraced both the assumption and the assertion.

Baseless Foundation of the Division

The dissenting judges point out that there is no basis for this assumption in s. 90, or elsewhere in the Constitution or in history.[10] They argue that if this indeed had been the intention, it would have been logical and simple to insert such a provision in s. 51, which deals with the assignment of expenditure functions and tax powers in the Constitution.

Regardless, however, the *Parton* formulation has been transformed by some judges in recent cases into a claim that the combined effect of ss. 90 and 92, taken together with ss. 51 (ii), 51 (iii) and 88, is to create "a Commonwealth economic union, not an association of States each with its own separate economy".[11] This claim is the key to the majority reasoning in the *Ha Case*, and to the categorical rejection of that reasoning by the dissenting judges.

The precise meaning of the so-called economic union is not explained in the majority judgment, although the concept has played a key role in it. An important implication drawn from this concept is that no State action or tax should impair or undermine Commonwealth policy. The second part of the statement quoted in the previous paragraph also suggests that the implied reference is to Commonwealth policy over State economies.

The structure of the majority argument should now be clearly stated. The assumption of an economic union serves as a rationale for the claim that a wide and dominant role for Commonwealth policy was intended at Federation. This in turn serves as the basis for asserting that exclusive and unlimited Commonwealth powers over taxation of commodities were required to fulfil that role. Since exclusive Commonwealth power over customs duties had been already assigned, a way had to be found for bundling together all the remaining commodity taxes into the prohibition of s. 90. This was found by another assertion saying that the effect of a tax on any step in the distribution of a commodity is the same as that of a tax on its production or manufacture. This assertion would allow the labelling of a tax on any step in the distribution of a good as a duty of excise.

Thus, it is clear that the key to this argument is the assumed nature of Commonwealth power. It will be shown below that the assumption was itself based not on historical facts, but on certain hypotheses advanced in the 19th Century regarding the long-term future of federalism, which have since been proven to be baseless.

But first let us look at Australia's constitutional history. It should not be forgotten that Australia is one of the few federations that were formed as a result of voluntary and democratically approved decisions made by the constituent Colonies. There is no evidence to suggest that the Colonies intended the formation of an economic union in which the States would surrender to the Commonwealth the power over development of their local economies and communities. There is plenty of evidence to the contrary.

Thus, for example, when the Draft Constitution was put to popular vote in the referendums of the 1890s, those who were opposed to it raised many issues in each colony. The fear that the Draft would lead to the establishment of a union was not one of these concerns, simply because there was no such intention in the Draft.[12]

In 1927, the Royal Commission on the Constitution of the Commonwealth considered whether a federal type of Constitution should be retained or whether a unitary type should be adopted. It recommended the retention of the federal constitution.[13] In 1944, the Commonwealth unsuccessfully sought to increase its power over the economy through a referendum on Post-war Reconstruction and Democratic Rights.[14] If Australia's Constitution had already established an economic union, none of these initiatives would have been necessary.

It is highly likely that, in making the assumption in *Parton*, Justice Dixon was reflecting the anti-federalism sentiment that had gained currency during the inter-war and the post-war years. Even two decades before *Parton*, he had expressed views that were consistent with those of the political theorists of the 19th Century who were convinced that, as a form of government, federalism was destined to fail. For example, when giving evidence before the Royal Commission on the Commonwealth Constitution (then as Mr Dixon), he said, in part:

> "A federal form of government represents a compromise, and the theory upon which it rests as a political device includes the supposition that it will serve during a period of transition, while people separately governed may find it possible to unite more closely under a less rigid constitution."[15]

The Report of the Royal Commission was reviewed in *The Economic Record*, November, 1929, by Sir Kenneth Bailey, then a Professor of Jurisprudence at the University of Melbourne, who added the following commentary on Mr Dixon's evidence:

> " Federation is only an interim solution at best', he seems to say to the majority. It isn't worth bothering about minor amendments. Leave the Constitution alone until Australia is ready for a unitary system'."[16]

There were many others at the time who held similar views. In the latter part of the last century, an influential group of political theorists, including such well-known names as Alexis de Tocqueville and James (Lord) Bryce had proclaimed the ultimate demise of federalism. Putting across similar conclusions, Harold Laski's influential paper *The Obsolescence of Federation* was published in 1939, more than ten years after Mr Dixon's evidence before the Royal Commission but well before his judgment in *Parton*. In Australia, a distinguished political scientist, Gordon Greenwood published a major book in 1946 in which he also put forward the view that Australia should move to a unitary system of government.[17]

Although all these writers were proclaiming the end of federalism, the reasons for their conclusions were varied and in some cases mutually inconsistent.[18]

Thus, for example, while Tocqueville's view was based on his belief in "the inevitable spread of equality among human beings", Bryce was convinced of the unifying effects of the easier and cheaper communications, commerce and finance. Laski, on the other hand, approached the issue from an ideological perspective. For him, federalism was fundamentally flawed, as it was incapable of dealing with the issues raised by giant capitalism. He regarded the State governments (in the United States) as mere creatures of capitalist enterprises. He is reported to have said that Delaware was merely a pseudonym of the du Ponts, and Montana little more than a symbol of the Anaconda Copper Corporation.[19]

By the time of *Parton*, in 1949, the Great Depression and the Second World War had exposed the weakness of the State governments in dealing quickly and effectively with major crises, further cementing the superiority of a unitary government. The influence of Keynesian economics was also spreading fast through Australia, Great Britain, Canada and the United States. In Australia, this was reflected in the release of a *White Paper on Full Employment* in 1945. As Mathews and Jay explain, the federal structure of government must have appeared to many as a drawback at the time:

> "In a unitary government such as Great Britain, there were no constitutional difficulties in the way of exercising these new functions [for maintaining high levels of employment]. In Australia, however, the residual functions of government rest with the States. The Referendum of 1944 was an attempt to overcome this problem ...'[20]

Thus, a feeling of frustration, despair and antagonism towards State governments was common in those years.[21] Many people, who were in positions of power and influence, must have felt the urge to nudge federalism along towards what they believed to be its inevitable demise. As it has turned out, the assumption made by Justice Dixon in *Parton* became much more than such a nudge.

Federalism, however, did not disappear; not only has it survived, but in recent years it has also been hailed as the preferred form of government in comparison with a unitary system. The professed virtues of federalism are many. In addition to the enhanced accountability and participation by people in the political process, these include greater ability to combine diversity with unity, greater scope for escaping the tyrannies of the monopoly of central government, and greater opportunities for competition among governments where people can "vote with their feet".[22]

Unlike the early literature on economic stabilisation that developed in the wake of the Keynesian *General Theory*, and which suggested certain advantages of a unitary government, modern theory of fiscal federalism is built upon a disaggregation of three main functions of government, namely stabilisation of the economy, redistribution of income and wealth, and allocation of resources. Primary responsibility, though not an exclusive role, for the first two of these functions is assigned in this theory to the national governments. The allocative function is assigned mainly to subnational governments, by virtue of the potential benefits for accountability and efficiency noted above.[23] In this manner, federalism is able to combine the virtues of diversity and uniformity.

In the post-war period, the recognition of these virtues, combined with the spread of democratic institutions around the world, has contributed to a significant trend towards political and fiscal decentralisation in many countries.[24] In contrast, as we have noted above, federalism in Australia regressed into greater centralisation during the same period, assisted by, among other factors, the High Court's interpretations of s. 90.[25]

The upshot of this section is that Justice Dixon's assumption in *Parton* was based not upon historical facts but upon certain hypotheses about the long-term future of federalism, which had gained currency at the turn of the 19th Century and again in the years immediately following the Second World War. These hypotheses have since been proven to be unfounded. Indeed, the benefits of federalism are now increasingly being recognised around the world. Therefore, whatever the merits of that assumption in the 1940s, there can be little justification for it in the 1990s.

Economic Integration and Coordination of Taxation

The spread of political and fiscal decentralisation in the post-War period, and the recent growth in the number of international agreements for establishing free trade areas, customs unions, common markets and other forms of economic co-operation, have been accompanied by the development of a substantial literature that deals with the coordination of taxes within an integrating fiscal space.[26] The principles derived from this literature can also be usefully adopted for tax coordination within federations.

The formation of a customs union always requires, as it did at the time of Federation in Australia, the replacement of internal customs duties with uniform centralised customs duties. Taxation of commodities by subnational governments also needs to be coordinated to ensure that the integrity of the uniform customs duties is maintained, and that resource allocation is not adversely affected by geographic differences in tax rates. Various alternative approaches are available for such coordination, depending on whether the taxes in question are imposed on the production or sale of commodities.[27] But total exclusion of subnational governments from the field of commodity taxation has no special justification in the theory of tax coordination.

It is not only in the theory of economic integration that there is a definite place for non-discriminatory commodity taxes at the middle level of government. Indeed, such taxes are an important feature of the tax structures of other major federations, where subnational governments derive a significant share of their tax revenue from general taxes on commodities.

In denying commodity taxes to the State governments in Australia, the High Court has contributed to the perpetuation of a lop-sided tax structure in this country. As can be seen in Table 3, three-quarters of State revenue is raised from narrow-based taxes - almost exactly opposite to the situation prevailing in other major federations.[28]

Table 3: Composition of Tax Revenue of Middle Level Governments

(Percentage of total taxation receipts, 1993)

Broad-based Taxes	**Australia**	**Canada**	**Germany**	**USA**
Taxes on personal income	-	44.8	50.7	31.8
General taxes on good & services	-	22.9	30.2	32.5
Taxes on pay-roll or workforce	24.0	-	-	-
Total broad-based taxes	**24.0**	**67.7**	**80.9**	**64.3**
Narrow-based Taxes				
Taxes on specific goods & services	16.1	14.8	1.9	16.9
Taxes on use of goods & services	28.5	6.0	5.3	8.0
Taxes on immovable property	7.7	2.7	-	2.0
Taxes on financial & capital transactions	23.8	-	2.2	0.6
Other Taxes	-	8.8	9.7	8.1
Total Narrow-based Taxes	**76.0**	**32.3**	**19.1**	**35.7**

Source: OECD (1996), *Revenue Statistics of OECD Member Countries, 1965/93*, Paris.

It should be noted that the minority judgment in *Ha* is remarkably consistent with the above theoretical principles, and the practice in other federations. The majority view, however, favours absolute centralisation of commodity taxes, which would not only eliminate the need for tax coordination but also pave the way for centralisation of economic policy.

Definition of Duties of Excise

It has been noted already that the argument of the majority judgment would not be complete without a description of excise duties that is wide enough to embrace all taxes on commodities that are not customs duties. It has also been noted that such a description existed in Justice Dixon's judgment in *Parton*, and has been now reaffirmed in *Ha*.

The minority judges noted that the description of excise duties in *Parton* had been widely criticised, including recently in McLeod,[29] and in Mathews and Grewal.[30] They further argued that the description is wrong. They agreed that a tax imposed by a State on the production or manufacture of a commodity would reduce tariff protection for that commodity. But they argued that the effect would not be the same if a State tax is imposed at a later step in the distribution of the same commodity and the tax falls indiscriminately on domestic production and the imported supply of that commodity.[31] This is because such a tax would raise the price of both imports and domestic supply uniformly and leave the tariff protection unchanged.

In rejecting the wider description of excise duties, the minority judges were quite categorical:

> "It is plainly incorrect to assert that a tax upon a commodity at any point in the course of distribution before it reaches the consumer has the same effect as a tax upon its manufacture or production."[32]

I have discussed several criticisms of the *Parton* definition of excise duties in some detail elsewhere.[33] In addition to the above, I have shown that the assertion on which that definition is based breaks down when it is applied to State taxation within a federation. Given that the sole purpose of that definition is to settle the assignment of commodity taxes in a federation, this is a major failure of that definition.

The argument of my criticism runs as follows:

> "In a federation, the interjurisdictional effect of a tax on production or manufacture of a commodity will be quite different from the effect of a tax on another step in its distribution, say its sale. Consider a commodity which is produced in one State (A) but is sold and consumed in another State (B). A tax on its production, imposed by the government of State A, will be shifted through increased price over to the consumers of that commodity who are in State B. In contrast, a tax on retail sales of the same commodity will be both levied and collected by the government of State B. Assuming that each State government spends its tax revenue only for the benefit of its own residents, the production tax would effectively allow public expenditure of State A to be financed by a tax on the residents of State B, whereas the sales tax involves no such interjurisdictional shifting of tax burden."[34]

A major objective of any scheme of assignment of taxes in a federation must be to minimise the opportunities for tax exportation and the flight of the tax base from one State into another.[35] Minimisation of tax exportation can be achieved by designing subnational taxes on the destination principle (i.e., taxes are imposed on sales of commodities instead of production).

Tax base flight can be minimised by concentrating subnational taxation on goods or activities that are relatively immobile between jurisdictions (e.g., taxes on land instead of capital). If distances between the borders of particular States make it worthwhile, taxes on sales may be susceptible for avoidance through shopping trips into low taxing areas. However, the scope of such avoidance can be, and generally has been, minimised through harmonisation of tax rates across jurisdictions. Experience in Australia and elsewhere shows that despite initial temptations for tax competition, long-term interest of the stability of subnational revenues eventually prevails to make such harmonisation possible.

It is worth noting in the present context that, on both these criteria, the business franchise fees levied by the States on tobacco, liquor and petroleum products were superior taxes. The fees were levied on the destination principle, and were no longer causing serious interjurisdictional movement of sales, particularly after the rates had been fairly well harmonised through consultations between the States in recent years.

In summary, there can be no doubt that the assertion about the same effect of different taxes on a commodity is wrong on several accounts, the most important of which is that it does not hold as far as the effects on the shifting and exporting of the tax burden from one State to another in a federation are concerned.

Summary and Conclusions

The *Ha Case* provided, as we have seen, a long overdue opportunity for a review of the line of authority based on *Parton*. A majority of the full bench of the High Court has, however, reaffirmed that authority. As a result, the States have lost a major source of tax revenue. The direct effect of the Court's decision on the State finances, and on the fiscal balance between the Commonwealth and the States, is clearly disappointing.

The reasoning on which the *Parton* formulation is based has been shown to be lacking in support from history and contemporary economic theory. It turns out that the formulation is essentially a backward-looking interpretation as it is based on unsubstantiated and outdated hypotheses about federalism, which have no relevance in contemporary thought on the subject. Thus, it is also disappointing that a valuable opportunity has been lost for putting the judicial interpretation of the constitutional assignment of tax powers on a modern footing.

There is, however, some new light in the *Ha Case*.[36] The unanimous views of the three dissenting judges have exposed many weaknesses of the *Parton* formulation. They have helped bring out the important fact that the critical issues in this case are about the economics of taxation and economic principles of integration of separate political entities into closer groupings. Their reasoning in the minority judgment also shows that, once the economic issues are properly analysed and understood, there should be no constitutional impediment to the States imposing non-discriminatory taxes on the distribution or sale of commodities.

Such an interpretation, if successful, would go a long way in restoring the fiscal health of Australia's currently dysfunctional federalism. It would also open the way for a sensible process for introducing tax reforms, including the State taxes, which until now have been virtually ignored from the agenda for tax reforms.

In short, the facts are:

- the Constitution established a customs union within a federal structure, not a single economic union assimilating the States;
- the prohibition on excise duties imposed by s. 90 is limited to discriminatory taxes on commodities that undermine the Commonwealth power over tariff protection, but is no wider than that; and
- there is no constitutional objection to non-discriminatory State taxes on commodities.

The High Court must sooner or later recognise these facts. The longer this recognition is delayed, the longer it will take for Australia's fiscal federalism to realise its full potential and for its tax structure as a whole to be reformed.

Endnotes:

1. *Ngo Ngo Ha & Anor v. State of New South Wales & Ors* and *Walter Hammond & Associates Pty Limited v. New South Wales & Ors* (1997) 146 ALR 355.

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

3. In 1995-96, the States and Territories raised $4,889.4 million from these three business franchise fees, nearly 54 per cent of which was raised from tobacco and 31 per cent from petroleum products.

4. See, for example, Australian Constitutional Convention (1984), *Fiscal Powers Sub-Committee Report to Standing Committee*, Melbourne and Mathews, R L and Grewal, Bhajan, *The Public Sector in Jeopardy: Australia's Fiscal Federalism from Whitlam to Keating*, Centre for Strategic Economic Studies, Victoria University, Melbourne (1997).

5. Alfred Deakin, *The Chariot Wheels of the Central Government* (1902), as reproduced in W. Prest and R. L. Mathews (eds) (1980), *The Development of Australian Fiscal Federalism: Selected* Readings, ANU Press, Canberra, pp. 13-18.

6. P. J. Keating, Address to National Press Club, Canberra (1991).

7. (1949) 80 CLR 229.

8. (1997) 146 ALR 355 at 383.

9. *Ibid*., at 369, emphasis added.

10. *Ibid*., at 388.

11. *Ibid.*

12. See John Quick and Robert R Garran, *The Annotated Constitution of the Australian Commonwealth*, pp. 206-228 (the 1901 edition reprinted by Legal Books, Sydney, 1995).

13. See K. H. Bailey, *The Report of the Royal Commission on the Constitution of the Commonwealth* (1929), as reproduced in W. Prest and R. L. Mathews, *loc. cit*., p.85.

14. See R. L. Mathews and W. R. C. Jay, *Federal Finance: Australian Fiscal Federalism from Federation to McMahon* (1972 edition reprinted by the Centre for Strategic Economic Studies, Victoria University, Melbourne, 1997) for background of this referendum, pp.182-183.

15. Quoted in K. H. Bailey, *op. cit*., p.91.

16. *Ibid.*

17. Gordon Greenwood, *The Future of Australian Federalism: A Commentary on the Working of the Constitution*, Melbourne University Press, Melbourne (1946).

18. The following paragraph is based on the excellent summary provided in Albert Breton, *Centralization, Decentralization and Intergovernmental Completion*, The 1989 Kenneth R. MacGregor Lecture, Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario (1990).

19. *Ibid.*, p.3.

20. R. L. Mathews and W. R. C. Jay, *loc. cit.*, p.182.

21. Alice Rivlin notes that in the United States of America, many "began to regard the States as anachronisms that might eventually fade away from the American governmental scene". *Reviving the American Dream: The Economy, the States and the Federal Government*, The Brookings Institution, Washington, DC (1992), p.92.

22. See Charles Tiebout, *A Pure Theory of Local Expenditures* (1956), Journal of Political Economy, 64, pp. 416-24; R. A. Musgrave (ed.), *Essays in Fiscal Federalism*, The Brookings Institution, Washington, DC (1965); W. E. Oates, *Fiscal Federalism*, Harcourt, Brace, Jovanovich, New York (1972); B. S. Grewal, Geoffrey Brennan and Russell Mathews (eds), *The Economics of Federalism*, ANU Press, Canberra (1980); and G. Brennan and J. Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution*, Cambridge University Press, New York (1980) for economic perspectives on federalism as a system of government.

23. See W. E. Oates, *op. cit.*, for the classic statement of these principles.

24. See A. Breton, *loc. cit.*, and World Bank, *World Development Report 1997: The State in a Changing World*, Oxford University Press, New York (1997), for citations of several studies showing this trend.

25. See Russell Mathews and Bhajan Grewal, *loc. cit.*, for a detailed discussion of this process of centralisation.

26. According to the World Trade Organisation, *Regionalism and the World Trading System*, Geneva (1995), 98 regional integration agreements had been notified to GATT between 1947 and 1994. It is neither possible nor necessary to cite even all the major references here. For a representative sample, see C. S. Shoup (ed.), *Fiscal Harmonization in Common Markets*, Columbia University Press, New York (1967), volumes 1 and 2; F. Machlup, *A History of Thought on Economic Integration*, Columbia University Press, New York (1977); D. Swann, *The Economics of the Common Market*, Penguin Books Australia, Second edition (1972); and literature cited therein.

27. For the purpose of coordination, commodity taxes are separated into origin based and destination based taxes and different coordination procedures are required for each category. See Richard A. Musgrave, *Fiscal Systems*, Yale University Press, New Haven (1969), pp. 270-291, for example, for detailed discussion.

28. See Bhajan Grewal, *Vertical Fiscal Imbalance in Australia: A Problem for Tax Structure, not for Revenue Sharing*, Centre for Strategic Economic Studies Working Paper No. 2 (1995), where vertical fiscal imbalance in Australia is discussed as a major problem for the country's tax structure.

29. McLeod, *State Taxation: Unrequited Revenue and the Shadow of Section 90* (1994), *Federal Law Review*, 22, pp. 484-492.

30. *Loc. cit.*, pp. 508-512, 782.

31. *Ibid.* p.385.

32. (1997) 146 ALR 355 at 385.

33. Bhajan Grewal, *State Taxation and the High Court: Whither Australian Fiscal Federalism?,* forthcoming.

34. *Ibid.* p.7.

35. See R. A. Musgrave, *Who should Tax, Where, and What?* in Charles E. McLure Jr. (ed.), *Tax Assignment in Federal Countries* (1983), distributed by ANU Press, Canberra.

36. See Bhajan Grewal, *The Australian Financial Review,* 12 August, 1997: *New Light in High Court Ruling,* where the positive aspects of this judgment were first suggested.

Chapter Seven

Labor and the Constitution: Forty Years On

Hon Peter Walsh, AO

> "A Labor Government should make more use of the external affairs power to extend its legislative competence, in particular by implementing conventions and treaties ... the High Court would not be prone to invalidate Commonwealth legislation in such fields."[1]

In 1957 Gough Whitlam delivered in Melbourne the Chifley Memorial Lecture, which he called *The Constitution **versus** Labor* (emphasis in original). The Chifley Lecture, plus Whitlam's 1961 Curtin Memorial Lecture, *Socialism Within the Australian Constitution,* and his report, *Labor Policies and Commonwealth Powers,* to Labor's 1963 Commonwealth Conference, were published by the Victorian Fabian Society in 1965 under the title *Labor and the Constitution*. In both length and substance the 1957 Lecture was the most significant. The others were footnotes to it.

It should surprise nobody who remembers or has read about that era, that Whitlam's views were unapologetically socialist and centralist. But unlike the British Labour Party before Kinnock, his socialism did not focus on nationalising industry. Two reasons can be cited:

> "Members of the Parliament must accept the permanent necessity of seeking the peoples' consent (i.e., amend the Constitution) before they can nationalise an industry."

and:

> "Socialists are now more concerned with the creation of opportunities than the imposition of constraints."[2]

These beliefs might seem somewhat inconsistent with this view:

> "In some instances, achievement of planned targets will require nationalisation where an industry is extremely inefficient and where efficiency requires a monopoly in the industry."[3]

But Whitlam had a two-pronged strategy for achieving his objectives, constitutional amendment if/when it was feasible and extending Commonwealth ownership/control in ways permitted by the existing Constitution.

By today's standards Whitlam's economic policies were highly interventionist. He explicitly favoured agricultural marketing boards, and their attempts to achieve price stabilisation and "equalise losses on the export market". Though Gough probably did not know, price stabilisation schemes could also wipe out potential gains as well as "equalise losses" on export markets. In the early 1950s -- just a few years before Gough spoke -- export parity for Australian wheat was around or above one pound a bushel (nearly $1,000 a tonne in today's terms and values). Both wheat and egg marketing were heavily regulated and subject to pooling and price equalisation schemes. Wheat worth twenty shillings a bushel was diverted from export markets and sold to domestic poultry farmers for eight shillings a bushel. Eggs surplus to domestic sales were then dumped on export markets at prices below the value of the wheat stuffed down chooks' necks to produce the eggs.

Whitlam also wanted to control private investment decisions by regulation; maintain, for competitive reasons, Commonwealth ownership of the Bank, TAA and Shipping Commission; and extend it into insurance, possibly publishing, and other new areas as the opportunity arose.

Lest the bourgeois Left in today's Labor Party, which posthumously -- in the political sense -- has adopted Whitlam as its own, becomes too euphoric, he also said:

> "It will soon be desirable for the Commonwealth to coordinate new methods of generation and conservation in the less developed parts of Australia by granting assistance for nuclear power stations and desalination plants."[4]

Whitlam's expressed preference for economic development was not atypical of his views either in 1957 or very much later. The Whitlam Government in 1975 gave the all clear for mining the 5 or 6 billion dollars worth of mineral sands on Fraser Island. The Fraser Government reversed that decision. The 1975 ALP Federal Conference Platform committed the Party to develop a government owned uranium mining and enrichment industry in Australia. Had Australian coal been less abundant or cheap, there is little doubt the Platform would also have advocated nuclear power stations. (Bombs, however, were never fashionable.)

Also in 1975, Deputy Prime Minister and Trade Minister Jim Cairns went to Iran to flog off uranium to the Shah!

In the 22 years since, those bits of hard history have been buried or falsified. The Keating Government belief that pastoral leases extinguished native title -- explicitly stated and politically endorsed in both the Second Reading Speech and the Preamble to the 1993 *Native Title Bill* -- have been buried or falsified in less than four years. So much so, that the Howard Government's post-Wik attempts to shift policy part way towards the Keating Government's policy position, is denounced by Labor as racist and unconscionable. The media in general, the A.B.C. and the Canberra Press Gallery in particular, who applauded in the Senate the passage of the 1993 Bill, now applaud Labor's newer and very different position, but deny that it is different. A totalitarian regime is apparently not an essential prerequisite for the falsification of history. A media sufficiently biased, lazy or ignorant, but politically correct, can apparently do the job.

Though he mentioned the Commonwealth's unconstrained power over tariffs, Whitlam made no judgment about their merits. Viewed against the 25 per cent tariff cut in 1973, that omission may have been significant. Was Gough a closet international free trader way back in the '50s?

Whitlam saw centralism as an appropriate, or perhaps the only feasible response to a variety of post-War problems, some of which are problems still. His preference for it was not absolute. He believed that urban public transport should be managed not by the States, but by city or regional government.

In regard to industry and economic development, he believed that State governments rarely had enough countervailing power to ensure that the public interest would prevail over the interests of large, vertically integrated and often foreign-owned private companies. If a national government had insufficient countervailing power, which he believed applied to pharmaceuticals, national governments should coordinate their policies under the aegis of the World Health Organisation.

His belief that State governments, especially in Queensland and Western Australia, lacked fiscal power to develop their natural resources, led him to suggest that Western Australia should hand over the Pilbara and Kimberley areas to the Commonwealth -- as South Australia had previously handed over the Northern Territory.

In regard to social services, he noted with satisfaction that the 1946 referendum had removed "any constitutional limitation on the Commonwealth's power to provide social services in cash", but lamented "the very great limitations on its ability to provide social services in kind".[5]

When the Constitution was drafted, "State Governments spent nothing on housing, next to nothing on health and very little on education". Consequently, the Constitution had nothing to say about which tier of government should provide and pay for these services. Whitlam could see "no reason why they should not be coordinated, planned and financed on a national basis".

Another constitutional void not foreseen, because the industry was not foreseen, was the control and application of user pays principles to interstate road hauliers. Forty years on, that matter has still not been properly resolved.

That Whitlam clearly recognised the defect now known as "fiscal imbalance", is demonstrated by this passage:

> "State Governments of all political complexions constantly pass the financial buck to the Commonwealth and it passes the administrative buck to the States. The electors do not know which Government is responsible and lose faith in the parliamentary system.'[6]

In context that passage concerns housing, but it was equally applicable to Whitlam's views on education, health and transport. His centralist views led him to consider Commonwealth policy takeovers, not an increased State own revenue base and commensurate State responsibility.

Followed to their logical conclusion, these beliefs deny the States any functional reason for existence. That, coupled with an expanded system of regional government administration financially dependent on the Commonwealth, was Whitlam's ideal. Chifley, according to his biographer the late Professor Crisp, had similar views.

Unlike Chifley, Whitlam in government substantially implemented that policy via the Department of Urban and Regional Development's Growth Centre and Urban Land Council programmes, which became sink holes for the rapid disposal of public money.

The opening quotation in the paper shows Whitlam to have been well aware of the potential provided by the external affairs power, United Nations conventions and a compliant High Court for extending Commonwealth power without the tiresome and uncertain referendum route. History has confirmed his judgment. I suspect, however, that the policy areas in which the High Court took upon itself the power to amend the Constitution, would have surprised him.

Whitlam's centralist ambitions were focused on economic planning and social services. I doubt that he envisaged the external affairs subterfuge would be used for Commonwealth takeovers of criminal law, land use and forestry management. When it happened, he may or may not have approved, but the Whitlam of 1957 and some time beyond -- a strong advocate for economic development and growth -- would have been distressed by the Commonwealth's misuse of the external power to impose Green extremists' anti-growth policies on the States. The extremists are politically astute enough to know that the Commonwealth will not overrule State governments' economic vandalism (e.g., the NSW ban on mining Lake Cowal), and State governments cannot overrule Commonwealth vandalism (e.g., banning exploration and mining at Shoalwater Bay). They know that economic sabotage is maximised if both State and Commonwealth governments dabble in "environment" policy, and they can shop around for the best deals.

Later generations of centralists would go much further than Whitlam. *He* advocated national centralism, using UN Conventions to transfer power from the States to the Commonwealth. *They* want global centralism, using UN Conventions to transfer power from national governments to international bureaucracies elected by no-one and responsible to no-one.

The most recent example is the frantic push to adopt, at once, legally binding "greenhouse" emission limits -- a response to highly speculative and rapidly changing "scientific" predictions beaten up by self-serving propagandists and bureaucrats. Australian compliance would raise this fundamental question: while the Commonwealth could impose a carbon tax, how could it

directly enforce emission limits on the States? Presumably the High Court would discover the way.

An earlier example of an attempt to shift political power offshore was the recommendation in the report on the separation of Aboriginal children from their parents -- which the chattering classes call genocide -- to enact, as statute law, the UN Convention on genocide. Ironically, a consequence of doing that could be that the report's chief architect, Sir Ronald Wilson, who was a member of the board of Sister Kate's Home in Perth at a relevant time, would be charged with being an accessory to genocide. Hmm. Tempting.

While we play these silly games, the most serious defect in our present federal system -- fiscal imbalance -- is not addressed. In the last 20-odd years two attempts have been made to do something about it. The first, Malcolm Fraser's New Federalism, was ditched by its architect when Labor won the NSW election in May, 1976. The second, Bob Hawke's 1991 attempt to end Commonwealth/State duplication, was sacrificed at the altar of Paul Keating's Prime Ministerial ambition. Hawke's attempt was more serious than Fraser's, but at the very time he raised it, his Government was setting up three new Commonwealth agencies -- the National Food Authority, a Commonwealth Environmental Protection Agency, and a National Child Care Accreditation Council -- which duplicated functions already performed by the States.

A fundamental principle of responsible government in any system is that each government must raise the money it spends. The present system, which in Whitlam's words allows the States "to pass the financial buck to the Commonwealth and it passes the administrative buck to the States", should no longer be tolerated.

Gough Whitlam's preferred solution, Commonwealth funding and complete policy takeover of health, education, housing and transport, is not politically viable. The States will not "wither away", and a referendum to abolish them will not be carried.

If that is accepted, the only feasible solution is to abolish all Commonwealth payments to the States -- other than equalisation grants -- and give the States access to a much broader tax base, which realistically means income or consumption tax. Modern opinion (i.e., Gareth Evans a few weeks ago), contrary to Gough Whitlam's 1957 belief,[7] is that the Constitution does not preclude State retail sales taxes.

Despite their rhetoric to the contrary, the States will not really welcome that policy. But they will have no choice. And, if their deliberate long term erosion of their own payroll tax base is a reliable indicator, they will dabble in mutually destructive competition for base political reasons. They will probably offer more mutually destructive bribes -- as distinct from efficiency driven lower charges -- to industry. But no system is perfect.

In a Federation in which interstate migration is common, some degree of educational curricular uniformity is desirable. Uniformity of product labelling and quality control is highly desirable. But the Commonwealth's role should be restricted to that of honest broker convening interstate meetings. A Commonwealth bureaucracy *à la* the National Food Authority, consistently exceeding its budget appropriation, is not needed. In the early to mid 1980s the Commonwealth performed such a role in the National Energy Council, which achieved uniform energy efficiency labelling for electrical appliances.

The continuing contest for power between Commonwealth and State governments, coupled with inadequately defined responsibility inflicts, as Whitlam noted, moral damage on the polity. It has also spawned large Commonwealth bureaucracies which deliver no actual service in areas like education and health.

More recent Commonwealth incursions in State territory have exposed its technical incompetence. To appease Green extremists, it abused its export power to dictate forest management policy to the States. In early 1995 it banned logging in an additional 500 forest coupes, ostensibly because of their "high conservation value", whatever that means. These coupes included forest plantations, football fields, an airstrip, rubbish dumps and gravel pits. The grid reference for one placed it in Bass Strait. State authorities actually knew what they were doing. The Commonwealth did not. In time it could assemble the necessary expertise to duplicate another State function. But why?

The incessant quest for extension of Commonwealth power, into both State and new territory, is driven by several factors: common power lust; pressure groups seeking more sites in which to pursue their demands, e.g., two "equal opportunity" shops are better than one; pressure from otherwise barely employable or unemployable activists seeking sinecures for themselves; and too many otherwise superfluous Ministers inventing reasons to justify their own existence.

The last problem has recently got worse. The Hawke Government was into its third term before the Ministry was expanded to 30. The Howard Government reached that milestone of decadence in just 19 months. The Hawke Government had no Parliamentary Secretaries until its fourth term. The Howard administration, ostensibly committed to small government, already has 11.

Finally, all of the changes recommended here do not require constitutional amendment. All that is needed is political will in the Federal Parliament.

Endnotes:

1. E G Whitlam, *Labor and the Constitution*, pp. 28-29.
2. *Ibid*, p. 56.
3. *Ibid*, p. 37.
4. I*bid*, p. 60.
5. *Ibid*, p. 15.
6. *Ibid*, p. 20.
7. *Ibid*, p. 25.

Chapter Eight

The Nature of Aboriginal Identity

Pastor Paul Albrecht, AM

For the purposes of this address I am assuming there is a distinct Aboriginal identity, in the sense that any discrete social group can be said to have an identity. My address falls into several parts. The first, and major part, focuses on the nature of the Aboriginal identity. The second looks at some of the factors which have impacted most on this identity, and asks what remains of it. The final part of my address points to the implications of this identity, without however going into detail.

A few moments of reflection will indicate that to deal with all aspects of the Aboriginal identity would require rather more time than has been allocated for this address. Hence I have restricted myself to highlighting aspects which continue to influence the way Aborigines respond to today's world, and which therefore need to be born in mind when devising strategies to deal with Aboriginal disadvantage in its many forms.

Who is an Aborigine? It seems to me that this is the first question which needs to be answered when attempting to define the nature of the Aboriginal identity.

Soon after receiving the invitation to address you tonight, I remember picking up *The Advertiser*, the Adelaide daily of 19 July, 1997. Splashed across its front page was a picture of a middle-aged white woman, with the following story line: "For 44 years Kathy Burgemeister thought she was white. Now she has declared herself Aboriginal. And she is proud of it."

Inside, it gave a truncated family tree which seemed to suggest, and I advisedly say seemed to suggest as the detail was very sparse, that her parents were Australians; that of her grandparents, her grandfather was Swedish and her grandmother Australian; and that, of her great grandparents, her great grandfather was Aboriginal (his name would suggest, of dual Aboriginal/White descent) and her great grandmother was Irish.

The Advertiser went on to say:

> "[Since learning of her Aboriginality'], Mrs Burgemeister said she had met many Aboriginal people who had begun to fill in her family history. She had visited special' sites of significance, including several on the Coorong, where she felt spiritual attachment."

The current federal Government definition makes it possible for Mrs. Burgemeister to claim to be an Aborigine, since that definition is, a person descended from the original inhabitants of this land who chooses to identify as an Aborigine, and who is accepted as such by his/her own group. This definition makes Aboriginality purely and simply a matter of race. So any person whose genealogy includes an Aborigine, or a person of dual Aboriginal/White descent, can claim to be an Aborigine. This creates the confusing situation where people who still live largely according to their Aboriginal traditions are equated with people who for all intents and purposes live as White Australians, and look like White Australians.

When unrelated to other factors, for someone to call him or herself an Aborigine, is really of no great consequence. It's no different from other Australians who draw attention to their ethnic origins by calling themselves Irish, Scottish, German, Greek, Italian, Vietnamese, or whatever. While this may cause some pique among those who believe that all of us should simply call ourselves Australians, I believe this only becomes divisive when people of different ethnic

backgrounds demand special treatment from their fellow Australians, because of their ethnic origins.

Aboriginal identity in the past, i.e., pre-settlement, was not predicated on the basis of race. Nor was it predicated on the basis of an Aboriginal nation, since Australia never was an Aboriginal nation. The small Aboriginal land-owning clans that lived scattered over the Australian continent never thought of themselves as belonging to some larger federation, or making up a nation. The clans did not even have single authority figures like chiefs.

In fact, if the Arrarntic language speaking groups are anything to go by, it is doubtful that the clans even had a generic word for people'. In the Western Arrarnta dialect, the Arrarnta word *relha* is used now as a word for people collectively, i.e., men, women, children, youths, etcetera. But this usage of the word seems to have resulted from contact with Whites. I was alerted to this possibility when doing some translation work in another Arrarntic dialect. The people speaking this dialect had had less contact with Whites, and had no word for people. They had words for children, men, women, old men, grandchildren, etcetera, but no inclusive word for people.

Again, if the Western Arrarnta are anything to go by, people belonging to the various land-owning clans appear to have identified themselves collectively by the major totemic site on their land. For example, the major totemic site of a land-owning clan to the west of Hermannsburg is called *Lthalalthuma*. The people belonging to this clan would in the past have referred to themselves as *Lthalalthumarinya*, *Lthalalthuma* being the name of the major totemic site, and the suffix *-rinya* denoting belonging to.

However, while there does not appear to have been an inclusive word for people, the Western Arrarnta language, for example, is rich in personal pronouns which indicate social relationships and social distinctions For example, if I wanted to say "my wife and I", to be correct I would have to use the dual form *ilantha*, which not only means the two of us, but also indicates that she is of a different class, and of a different moiety, and from a different land-owning clan. (I will have more to say about the Western Arrarnta classificatory system later.)

If I wanted to say "my brother/sister and I", to be correct I would have to use the dual form *ilirna*, which not only means the two of us, but also indicates that we are of the same class. If I were to say "my father and I", to be correct I would have to use the dual form *ilaaka*, which again not only means the two of us, but also indicates that we stand in a father-son relationship.

The same kind of distinctions apply to the use of we, us and you (plural). The younger generation of Arrarnta speakers no longer use all these pronouns as the older generations did. However, the existence of these pronouns, and their use by the older generation, point to the fact that in the past speakers had to be aware of their relationship with each individual member of the audience, or with the people of whom they were speaking. Even today, people often address others, or speak of others, by using their class name, rather than what we would term their personal name, because their class name is a short-hand term for their relationship with the other person.

The foregoing brief remarks point to the direction in which we must look to discover the Aboriginal identity. These are land and kinship. And to these must be added a third, namely *tjurrunga*. *Tjurrunga* is a generic Arrarnta word which, depending on its context, refers to the objects representing the ancestral spirit beings; the rituals these beings instituted to maintain the orderly functioning of the world and the increase of its flora and fauna; the rituals commemorating the pre-history travels and activities of these spirit beings, and so on.

These then, the land, the *tjurrunga*, and kinship, are the foundation blocks of the individual and corporate Aboriginal identity. These three are indivisible, and in a sense form a larger entity.

Common to all three are the ancestral spirit beings who shaped and now "sleep" in this world, who via their totemic off-spring maintain the flora and fauna and human beings, and who gave to men the rules concerning kinship and social organisation. I will be taking up the matter of land, *tjurrunga* and kinship in greater detail later in my address.

The more traditional Aborigines' definition of who is an Aborigine reflects this. They define as an Aborigine a person who knows his "law" and lives according to it. ("Law" is the generic English term Aborigines use now to denote the totality of their culture, comprising land, *tjurrunga*, kin, actual and classificatory). Whether a person is Aborigine or White, or of dual Aboriginal/White descent, is considered irrelevant. Crucial is whether the person knows the "law" or not.

Traditional Aborigines cannot conceive of a person who no longer knows his "law", his language or his country, as being an Aborigine, in the sense that they apply it to themselves. If one or another of their relatives has lost his language and his culture, this in no way invalidates their relationship. But for them, it does raise serious questions concerning their relatives' claim to Aboriginality, because for them Aboriginality is not a matter of race (they never saw themselves as a race), but of knowing the traditions and observing them.

This "law" of which Aborigines speak establishes and defines their corporate identity vis-a-vis other groups. The culture of any discrete group of people (society) contains the customs, values, institutions, etcetera of that group of people. So if we are seeking to establish the Aboriginal identity, it is in their culture that we must seek this corporate identity. This is not to suggest that the Aboriginal culture and Aboriginal identity are identical. Rather, it is the recognition that the Aboriginal culture is the only means by which we can access their corporate identity.

While the various Aboriginal land-owning clans in Central Australia have established and maintain their own identities vis-a-vis other Aboriginal land-owning clans, by such things as subtle changes to what may otherwise be a common language, by small changes to the way they cook kangaroos, and so on, yet one can speak of an Aboriginal identity because of a shared *weltanschauung* and life style which pre-dated any human efforts to domesticate animals and engage in even subsistence agriculture.

Australian Aboriginal societies, except for those along the northern Australian sea coast, were physically isolated from other societies, and appear to have changed very little over the centuries. Most other societies in the world, which lived in close proximity to each other, changed and developed at a fairly even rate under the stimulus of new ideas and technology. When White settlers came to Australia, they arrived with a form of social organisation, economic system and technology so different from that of the local hunting and gathering societies, that the ways of life of the two groups were mutually unintelligible. They have remained largely mutually unintelligible to this day, because of the conceptual divide.

I previously said that land, *tjurrunga*, and kinship are the three important segments of Aboriginal culture which determine and provide the content of Aboriginal identity. I also said that they are indivisible, so that discussion of one necessarily leads to discussion of the others. However, since I have to begin somewhere, I begin with land.

Much is made of the Aborigines' attachment to their land, and of their need to be on their land for their well-being. There can be no doubt of the importance that Aborigines attach to their land. However, much of what is said, or reported on this subject in the media, gives the impression that the Aborigines' attachment to their land is genetic, something they were born with; something they have even when they are brought up in a white urban setting, without any

knowledge of their own language, and without any in-depth knowledge of the mythology relating to their land.

The Aborigines' attachment to their land has nothing to do with genetics, but everything to do with learning, and the subsequent internalisation of the knowledge that has been passed on. Aborigines were/are animists, believing that the ancestral spirit beings (also known as totemic ancestors) who were active at the dawn of time, are still to be found in the land they shaped and fashioned. They also reside in its flora and fauna, in the natural phenomena like thunder and lightning, in the sun, moon and stars, and in the humans to whom they gave birth.

It is these same spirit beings residing in the land, and in the people of that land, that give the Aborigines their unique attachment to their land, and their sense of oneness with the land. While our relationship with land can be described as an I -- It' relationship, theirs is an I -- Thou' relationship.

This relationship is taught by the adults and initially learned informally by the children. Then, after initiation, comes the more formal and in-depth instruction. Men who are prepared to apply themselves to the rigours of learning -- and I might add, who are prepared to accept the physical pain which is often inflicted as a part of the teaching process -- are eventually taught all the knowledge pertaining to their personal totem, and to the totems of their land.

The individual's identification with his own ancestral spirit being (totem), is complete, even transcending the time-frame between the pre-historical creative period when the ancestral spirit beings were active, and the present. I remember a man telling me the story of his ancestral spirit being, a certain snake. "He came from this place and travelled north", he said. "Then I went under ground and came up at this place. Here he saw this high hill and named it. Then I travelled on." This person's identification with his ancestral spirit being was complete in every sense.

Knowledge of, and access to the creative power of these ancestral spirit beings is via the *tjurrunga*. As mentioned earlier, *tjurrunga* is an Arrarnta generic term which covers the objects representing the ancestral spirit beings; the rituals instituted by these ancestral spirit beings; the words the ancestral spirit beings used to create, shape, heal; the engravings and ground paintings representing the ancestral spirit beings; and the stories and songs of the ancestral spirit beings.

Knowing the creative words used by their ancestral spirit beings is the most important knowledge each land-owning clan has. For the use of these words within the prescribed ritual, at the right place, guarantees the continuance of that particular species of flora or fauna or natural phenomena. It is this that maintains the universe and its flora and fauna. This is why the *tjurrunga* are said "to hold" (*errkuma*) the world. It is not surprising, then, that these words were closely guarded by the old men, the guardians of this knowledge, and only passed on to men when they were considered ready and worthy.

However, all the ancestral spirit beings weren't good. There were also evil spirit beings, who caused sickness and death. The words (chants) they used to cause sickness and death, in the pre-historical period of this world's history, are included in the genre known as *tjurrunga*. As such, these words (chants) are known to men who own these *tjurrunga* and have been instructed in their knowledge. They are therefore able to use these words to cause people to become ill, and also to die.

In Aboriginal eyes, there is no such thing as someone becoming ill for no known reason. When someone becomes ill, the question that comes to the Aborigines' mind is this: "Who was responsible? Who caused this person to be affected by *arrangkultha*, by the occult?" Aborigines will sometimes ask for the medical cause of sickness or death. They will accept this as something

the doctor has discovered, but their prior question still remains: "Who caused this person to become sick or die with this illness?"

However, the ancestral spirit beings also had words (chants) that they used to heal themselves when they had been injured, or had become sick as a result of having had *arrangkultha* worked on them. These words (chants) are also *tjurrunga*, and are known to those who own these words, or who have been taught them. The people in possession of these words are the *ngangkara* (traditional healers). Even today, any sickness which is assumed to have been caused by *arrangkultha* can only be treated successfully by a man or woman *ngangkara*. These people are therefore in great demand, and their services continually used, often in parallel with western medicine.

These ancestral spirit beings who were active at the beginning time, also laid down the rules by which the people they created, and to whom they had given life, were to live and regulate their inter-personal relationships. We can only briefly touch on some of these all-pervasive and important rules.

For the Arrarnta, and the land-owning clans extending as far north as the Northern Territory coast line, many of the rules detailing relationships, personal rights and obligations, marriage partners, etcetera, are encompassed in the class system of social organisation. The people who have this class system, called *arnparnintja* by the Western Arrarnta, are said to be living in the light, whereas those without it, e.g., the Pitjantjatjara, who live to the south of the Arrarnta, are said to be living in darkness. The reason why some live in the light and others live in the darkness is also explained by means of the relevant *tjurrunga*.

The class or *arnparnintja* model I will be using is the Western Arrarnta one. All the class systems with which I am familiar are variations on a single theme. This system places everyone at birth into one of 8 classes of people. It is not possible for a person to move from one class into another. The class you are born into is the class of person you will remain for the whole of your life. These classes are not hierarchically arranged, as for example, in the Indian caste system, where Brahmins are at the top of the social scale, and Untouchables at the bottom. Rather, each class in the Aboriginal system has equal value and is never used to allocate status.

The Western Arrarnta 8 classes are:

Panangka Purrurla

Pangarta Kamarra

Kngwarrea Ngala

Paltharra Mpitjana

These 8 classes are divided into two groups, called moieties, a French way of saying half. *Panangka, Pangarta, Kngwarrea* and *Paltharra* form one moiety and *Purrurla, Kamarra, Ngala* and *Mpitjana* form the other.

These two groups are exogamous, meaning they do not marry within their own group, but outside their own group, in the following manner:

Panangka marries *Purrurla*

Pangarta marries *Mpitjana*

Kngwarrea marries *Kamarra*

Paltharra marries *Ngala*

The class of the child born to a couple is determined by the class of the father. As indicated above, *Panangka* marries *Purrurla*. Now if the male is *Panangka,* and the female *Purrurla,* then the child will be *Pangarta.* However if the male is *Purrurla* and the female *Panangka,* then the child's class is *Kamarra*.

For purposes of land ownership and succession, another principle is related to the above, namely what the Western Arrarnta call *nyinhanga*. The word *nyinhanga* means father and son, and it operates in such a way that where a father is of the class *Panangka,* his children will be of the class *Pangarta.* In turn, if any of his children are male and marry, their children again will be of the class *Panangka.* Similarly the children of a *Purrurla* class of man will be of the *Kamarra* class. In turn, if any of his children are male and marry, their children again will be of the *Purrurla* class.

So the 8 classes of people form 4 *nyinhanga* groups. They are:

Panangka Purrurla

Pangarta Kamarra

Kngwarrea Ngala

Paltharra Mpitjana

These *nyinhanga* are very important, because these are the Western Arrarnta land-owning patriclans. In certain contexts land is spoken of as *Panangka/Pangarta* land or *Ngala/Mpitjana* land or *Purrurla/Kamarra* land or *Kngwarrea/Paltharra* land. For the Western Arrarnta these *nyinhanganhanga* perform much the same function as incorporated bodies do in our legal system. They continue irrespective of the individuals who may from time to time occupy positions in the body corporate.

This class system fits over the top of the normal kinship system of father, mother, brother, sister, uncle, aunt, cousin, etcetera. But the class system goes beyond what we call kin. It has the effect of including all people in the Western Arrarnta's social landscape, and determining his/her relationship to them, and theirs to him/her, and determining his/her rights and responsibilities vis-a-vis all other people, if and when they should happen to meet.

All the aspects of Aboriginal culture which I have mentioned, and others which I am still to mention, have implications, not only for the way in which Aborigines adapt to today's world, but also for the way they relate to White people.

As I just mentioned, the classificatory system determines an individual's rights and obligations vis-a-vis other people. In view of this, an Aborigine really has no idea how to relate to a White person who has no class. What is their relationship? What are their mutual rights and responsibilities? Since he does not know, and therefore cannot fit him into his social landscape, he is for all intents and purposes simply a part of the environment, and often treated as such.

I will illustrate this from events which actually occurred at Hermannsburg. In the '70s, in an endeavour to return authority to the Aborigines, we, the Finke River Mission, fostered the establishment of democratically elected Aboriginal Councils to take over responsibility for, and carry out many of the functions we had been performing. We thought we had done the right thing by the people, and that they would be happy with this development. Incidentally, they had readily agreed to the establishment of these Councils. Instead, relations between staff and

Aborigines deteriorated badly. Furthermore, staff found themselves being exploited and having unreasonable demands placed on them.

A lot of factors contributed to this development. In this context, I only want to mention one. Over the years the Aborigines had fitted the Mission staff into their social universe, with mutual rights and responsibilities. In establishing the Councils, the staff had altered this relationship, and the Aboriginal people were no longer sure of the staffs' place in their social universe. So no one felt any responsibility for the staff. The staff in a sense had become part of the environment, and the environment was what you exploited for your benefit without any sense of responsibility, apart from ritual obligations.

We learned from this fiasco. When staff were slotted into the social universe of the various family groups again, they, the staff, became part of the social universe. Relations improved. Exploitation and unreasonable demands fell off.

But to return to our subject, the authoritative nature of the rules laid down by the ancestral spirit beings can be gauged also from the language. No Aboriginal language that I know of has words for either/or. Aboriginal societies were not about personal choice for their individual members. They were all about living according to the rules laid down by the ancestral spirit beings.

Again, as far as I know, no Aboriginal language has words for please and thank you. Things were done for another person, not as a personal favour, but because the "law" demanded it. So there was no need for words like please or thank you. Individuals did what they had to do, or another demanded from them what, under the "law", they had a right to demand. This is not to suggest that no favour or gratitude was ever involved in transactions, just that normally actions were not rooted in favour or gratitude.

There are two other aspects of Aboriginal culture to which I want to draw attention, before moving on to land ownership. The first concerns the pre-pubescent socialisation of children. Most White people who interact with Aborigines soon notice that Aboriginal parents rarely discipline their children. Children are virtually allowed to do what they want. Even aggression, such as stone throwing by toddlers, is tolerated with good humour.

In the traditional setting, this created no problems. In fact, it helped to develop very independent, self-reliant individuals. Discipline was imposed on the children around the time of puberty, when their more formal education started with their initiation, and subsequent instruction in the knowledge and ritual of the clan. The latter took place over many years, and was integrated into the normal economic activity of the clan. It was during this period that unquestioned obedience to the "laws" of the clan was inculcated and internalised. The end result was a person who in all areas, apart from the "laws" of the ancestors, was freer than we are, but when it came to the "laws" of the group, more bound than we are.

The second aspect concerns the way in which privacy was accorded in close, open living arrangements. It was largely done through the rule of non-interference in other people's affairs, except as provided for in the kinship rules. There was no public comment on others' behaviour, unless your legitimate interests were threatened. Herein lies part of the reason why traditional Aborigines remain silent in the face of comments made by Aboriginal activists.

All the rules by which Aboriginal people lived are found in the *tjurrunga*, so it can be said that the *tjurrunga* played, and still play, the same role in Aboriginal societies that constitutions do in our society. While we have mechanisms to change our constitutions, their constitutions cannot be changed or amended by men, because they were given to men by the ancestral spirit beings. Hence they are eternal. Men may abandon them in part or whole, but they cannot change them.

The reverse side of this is that, for matters not covered by the *tjurrunga*, there are no laws. The implications of this are not difficult to see for Aboriginal societies confronted with adapting to new situations, and dealing with things like alcohol, for which there are no traditional rules.

The presence of the ancestral spirit beings in the land, in the flora and fauna and people, created an indivisible relationship between the land and its flora and fauna, the *tjurrunga* and people who belonged to the land. The ancestral spirit beings were deemed to have given discrete tracts of land to the patriclans who presently lay claim to these areas. The boundaries of the respective areas of land were determined by the points at which one clan handed the story of the wanderings of these ancestral spirit beings to another clan. Seniority in these clans, rules for succession, principles of land management, all were determined at the beginning of time by these ancestral spirit beings. These patriclans had responsibility to care for this land which had been deeded to them, and also for the performance of the rituals needed to guarantee the well-being of the land, the functioning of the universe, as well as the continuance of the species.

These patriclans, with certain provisos like the requirement to invite neighbouring clans to rituals celebrating the deeds of common ancestral spirit beings, kinship obligations, etcetera, had complete authority on their own land, and any visitors, even on ceremonial occasions, had to abide by the rules of the host group. This authority of the patriclans did not extend beyond their own land boundaries.

When disputes about land arose among Aboriginal patriclans, their common commitment to "laws" laid down by their ancestral spirit beings, e.g., that respective land boundaries coincided with the points at which they handed over the story (and its associated rituals) to the neighbouring patriclan, provided them with the legal framework within which to settle these disputes.

The objective of the foregoing has been to highlight the way Aborigines saw the world, understood cause and effect, and related to their land, and the way in which they organised themselves. It is these that fundamentally influenced and shaped their identity.

The culture which formed the Aborigines' unique identity, i.e., their association with the land and its *tjurrunga*, their form of social organisation, has taken something of a battering since White settlement.

To give a couple of examples: before the arrival of White settlers, fully initiated Aboriginal men would have seen themselves as not only maintaining the flora and fauna of their own estate, but also, in co-operation with other patrilineal groups, in jointly maintaining this world, and providing the food their group and other groups needed to survive.

Then White men came. They performed no rituals that they, the Aborigines, were aware of, and yet they appeared to have a constant and abundant food supply, unaffected by drought. From discussions I have had, the inability of the Aborigines' philosophy/economy to validate itself in the face of the settlers' philosophy/economy, impacted very powerfully over time.

Before the *Aboriginal Land Rights (Northern Territory) Act* 1976 became law, Aboriginal patriclans did not feel that their land was under challenge from other Aborigines. They did not "own" their land in White Australian legal terms. They may not even have been living on the land. But their Aboriginal rights to ownership, and all this entailed in Aboriginal terms, were not challenged by other Aborigines.

The *Aboriginal Land Rights (Northern Territory) Act* changed all that. As senior Aboriginal traditional owners are wont to put it, the Act put the Land Council between them and their land. Further, the Act amalgamated discrete parcels of land into Single Land Trusts -- an absolute no-no in Aboriginal terms. And as none of the patriclans received title to their own estate, they felt

as though they did not own their own land in White legal terms either. This perception was reinforced as they discovered that negotiations with another party, in relation to use of their land, were conducted by the Land Councils, often without reference to themselves. And so the people who in Aboriginal terms had responsibility for their land, found they were unable to exercise it. For all intents and purposes, they had been reduced to nobodies.

The change in life-style, from hunting and gathering to living in one location, impacted on the mechanisms for passing on knowledge. Some important knowledge about the ancestral spirit beings, and rituals to commemorate their travels and exploits, could only be taught at the sites where these events were originally deemed to have taken place. As Aboriginal people ceased wandering over their land, either because they were forbidden to, had abandoned their home land, or had simply become sedentary, some of this knowledge ceased being passed on, as it could not be passed on in an alien setting. As well, many of the young men showed a lack of interest in learning, because they could no longer see the value of the knowledge the old men wanted to pass on.

The effect of Missions and the Christian message on the Aboriginal culture is a topic in itself. Time constraints permit only a cursory look at the subject. That the Christian message had an impact on the Aboriginal culture goes without saying. However, to suggest that it destroyed the Aboriginal culture is not sustainable, as there is no evidence to support it. From my observations of the Central Australian scene, there is no appreciable difference in cultural knowledge between Aborigines brought up on Mission stations, and those brought up otherwise in contact with Whites. When it comes to cultural knowledge, the crucial element would appear to be the length of contact with Whites -- not the religious orientation of Whites.

In fact, a good case can be made out for the beneficial effects of Missions, and the Christian message they brought to the Aborigines. Where the Christian message was accepted, this helped fill the void being created by the inability of the fertility rites to validate themselves in the face of White technology and economy, a fact to which I have referred earlier.

Nor did the acceptance of the Christian faith necessarily affect other aspects of the culture. My observations lead me to accept an hypothesis which Wilbert Moore, a sociologist, has put forward, namely that changes in aesthetic forms and strictly supernatural beliefs can occur without necessarily causing changes in other parts of the social system. I quote:

> "However, another question must be considered, and that is whether certain standard components of cultures and societies are especially autonomous. Such relative autonomy would have two implications for the analysis of social change: relatively high and long insulation from the effects of other systemic changes, but, correlatively, fairly easy' autonomous changes, including those of external origin, owing to the meagre links to the balance of the system. Although the evidence relating to the independent variability of some standard components of social systems is extremely sketchy, it does appear that aesthetic canons and forms provide one such manifestation, and that strictly super-empirical components of religious belief represent another. To repeat, if these hypotheses are correct, it would follow that aesthetic forms and super-empirical beliefs would be only slightly affected by other social transformations, but by the same token might well exhibit changes that have little to do with their immediate social environment, and in fact possibly are a result of external influence. The loose connection with other role structures and ordinary patterns of behaviour means that relatively autonomous change might occur without a kind of systemic resistance' deriving from interlocking patterns." (Wilbert E. Moore, *Social Change*, p.75. Prentice-Hall of India(Private) Ltd. 1965)

In more recent years, alcohol more than any other single factor has had a deleterious effect on Aboriginal societies, by insidiously eating away at the very fabric of such societies. There are two major reasons why alcohol has such a detrimental effect. First, since there are no traditional rules regarding its use, and only rules instituted by the ancestral spirit beings have binding force, it has so far proved impossible for Aboriginal societies to establish new rules which its members consider binding. The second is that, as yet, there are no traditional or learned mechanisms for different land-owning clans to work together on social issues. And as most Aboriginal communities' are made up of different land-owning clans or remnants of clans, they have no mechanisms for arriving at an acceptable consensus for dealing with their alcohol problem.

With all that has happened, what then remains of the Aboriginal identity? Interestingly, despite the impact of the White technology/economy, against which traditional beliefs have been unable to validate themselves; despite laws like the *Aboriginal Land Rights (Northern Territory) Act*; and despite increasing social dislocation and breakdown, the basic *Weltanschauung* remains, and with it the original identity of the Aborigines. Their relationship to the land, their understanding of economy, their understanding of the causes of morbidity and mortality, are still fundamentally influenced and shaped by their traditional beliefs.

This has fundamental and far reaching implications for all programs devised to ameliorate Aboriginal disadvantage. Programs based on a White understanding of Aboriginal needs are going to continue to have some success among people whose Aboriginal identity is based primarily on race, and not culture. However, these programs are going to continue to be spectacularly unsuccessful among Aborigines who still have an Aboriginal *Weltanschauung*. The truth of this should by now be evident for all to see.

After years of quite substantial expenditure on programs to improve Aboriginal health and poverty, nothing has changed. And yet we continue to see Aboriginal health, or rather the lack of it, in terms of health clinics, sewerage systems, housing, career paths for Aboriginal health workers, etcetera, and not in terms of assisting Aborigines to work through the implications of their own belief systems.

The Government policy of establishing Aboriginal organisations to provide advice on matters Aboriginal is a recognition of the need to match programs to Aboriginal realities. However, most of the Aborigines who have accepted or sought membership of these organisations are those who have only a racial Aboriginal identity, and not a cultural one. Hence the programs they devise and support are really no different from the programs which White Australian advisers used to propose to government in the past.

For programs to have any chance of success, they have to address Aboriginal needs in ways with which Aborigines can identify, and then can incorporate into their ideological and social systems. If they cannot be incorporated, they will remain outside their systems, and remain spectacularly ineffective in dealing with Aboriginal disadvantage.

Chapter Nine

Reflections on Judicial Activism: More in Sorrow than in Anger

Professor Greg Craven

Judicial activism probably is a more popular topic of conversation in Australia now than at any time in its history. We live in an age of prevalent judicial controversy, where the doings of the courts are discussed almost as frequently and with as much venom as those of our more usual anti-heroes, the politicians.

Moreover, within this emerging pattern, our politicians are themselves viewing the activities of the courts with ever-increasing interest and mounting overt hostility. The consequence is that we appear to have entered a new constitutional era, in which the courts and the executive government regard each other with semi-permanent mutual suspicion from behind the battlements of purported constitutional principle.

Underlying all of this has been a dramatic change in judicial psychology, whereby some among the previously deferential judges have been transformed, and have transformed themselves, into self-conscious heroes of human rights, and have taken on the mantle of defenders of a supposedly cringing Parliament and populace against the pretensions of the executive heirs to the Stuart Kings.

What all this amounts to is a truly fundamental change in some of the most important constitutional suppositions and relationships operating within our Commonwealth. Inevitably, this shift is producing intense dislocation in our wider constitutional system, with different components of that system jostling with each other for power and influence within an increasingly unstable constitutional paradigm.

What this paper first seeks to do is to define the phenomenon of judicial activism. Secondly, the psychology which lies behind that phenomenon will be analysed. Thirdly, the paper will address the legitimacy of judicial activism within both constitutional and legal theory. Next, the paper will ponder the plausibility of activism on the part of the courts as an effective and efficient means of policy development. Finally, the paper will consider the dangers inherent in the present surge of judicial activism, dangers which are both manifold and manifest.

Of course, the irony of this paper and the whole current debate is that the vast majority of judges are not judicial activists. Many view the actions of their adventurous brethren with scarcely concealed horror, resenting each deviation from traditional judicial method far more bitterly than any public critic of the courts. Nevertheless, it is with the increasingly prominent activism of the confident and growing proportion of judicial activists that this paper is concerned.

The Notion of Judicial Activism

Judicial activism is one of those phenomena far more often talked about than defined. Indeed, one of the chief deficiencies in the debate over judicial activism is an enormous imprecision in the use of that term. This is compounded by the fact that there are, in reality, three essentially different processes which may in various contexts be regarded as constituting judicial activism.

The first, and certainly the most prevalent of these, relates to the common law. In this connection, a charge of judicial activism ordinarily will refer to the actions of a court in consciously developing the common law according to the perceptions of that court as to the direction the law should take in terms of legal, social or other policy. Activism on the part of

judges in this sense may be dramatic, or decidedly *sub fusc*. Thus, for example, the High Court of Australia has over the course of many decades made numerous gradual and entirely uncontroversial adjustments in such areas of the common law as torts and contracts, on the at least implicit understanding that such adjustments were necessary for the better effectuation of certain legal, social or commercial principles.

More dramatically, the Court has in recent times effected major changes of legal policy in both these areas of law, with overt and extensive reference being made to the desirability of the law operating so as to foster the achievement of certain social results. Similar movements have been observable in such areas as the administrative law, particularly in relation to natural justice.

Of course, the greatest example of judicial activism within the field of the common law in an Australian context occurred in the decision of the High Court in *Mabo*. In that case, the Court clearly effected fundamental changes in the common law of Australia, essentially on the basis that social necessity required the law to be developed so as to facilitate the recognition of some concept of native title.

The second, and rather less obvious form of judicial activism, concerns parliamentary enactments. Activism here ordinarily will be comprised in a court consciously adopting an interpretation of statutory language which goes well beyond the ordinary import of the words: either because the court concerned believes that such an extended interpretation is necessary to give effect to the true intention of the enacting legislature, or (perhaps more commonly) because the court wishes to frustrate an unpalatable legislative intention which appears all too clearly from the words.

Examples of a court throwing itself into a transport of enthusiasm for the effectuation of parliamentary intent are relatively rare, but some did occur in relation to the interpretation of taxation statutes as a delayed reaction to the perversely restrictive constructions applied to those statutes by the Barwick High Court. Rather more prevalent is the action of a court in consciously restricting the application of a statute by reference to its own view of socially desirable consequences. Good examples of such behaviour occur in relation to the ousting of a court's own jurisdiction by parliamentary enactment, where such legislative provisions typically are interpreted quite consciously by courts so as to frustrate their effect. In a different context, we already have noted the determination of the Barwick High Court to make the Commissioner of Taxation work heroically for his money.

It should be noted of such statutory judicial activism, however, that it often takes the quite legitimate form of a court applying common law presumptions against statutes being accorded particular meanings. Thus, for example, a court will not accept that a statute is intended to impose a fine or penalty without the clearest of words being used. To the extent that a legislature does not employ words of sufficient clarity, therefore, it will have only itself to blame if a court fails to give effect to its less than transparent intention. Much judicial interpretation of statutes which otherwise might be regarded as constituting activism is entirely unexceptionable on this basis.

The final context in which judicial activism may be said to arise is in relation to the interpretation of the Australian Constitution. What is involved here is a phenomenon best described as "progressivism". This is an approach to constitutional interpretation which essentially posits that the High Court should so construe Australia's constituent document as to continually up-date it in line with perceived community and social expectations, rather than according to its tenor or in conformity with the intentions of those who wrote it.

This form of judicial activism, which naturally has profound social and political implications, has taken the High Court by storm over the past decade. Thus, the Court cheerfully has invented an implied freedom of political communication (along with other associated freedoms), a freedom which in reality emerges neither from the words of the Constitution themselves, nor from the wildest imaginings of the Founding Fathers.

Of course, well before such rights fantasies were even a glimmer in the eye of the late Mr Justice Lionel Murphy, successive High Courts cheerfully had dismantled much of the structure of Australian federalism on the progressivist basis that it did not best serve Australia's constitutional needs, although this deconstruction admittedly was achieved under cover of a comforting literalism. Consequently, it would not be unfair to say that constitutional progressivism has been and is the most prominent form of activism practised by the Australian judiciary.

The Psychology of Judicial Activism

The fundamental point to be made here is that judicial activism always will be a question of degree, although the debate over its occurrence is none the less important for that. Thus, it is quite inevitable that an element of activism will be present within any judicial system: the real issue always will be as to the extent of such activism, and its prominence within the relevant legal construct. The answer to these questions in turn will depend on certain fundamental aspects of judicial psychology. By this is meant the general attitude of the judges as to their right and capacity consciously to make law, and even more fundamentally, their confidence in their title to be the ultimate or penultimate arbiters of social policy.

Traditionally, the psychology of Australian judges in this context has been very much against the free deployment of judicial activism. Australia's judges believed that their role, generally speaking, was not to make law but to interpret it. While they were prepared to acknowledge a limited role in the making of the common law, even this was approached with caution.

At least two reasons underlay this basic judicial caution. The first concerned matters of principle. The value of the separation of powers operates not only to protect judicial power from encroachment by the executive or the legislature, but also to segregate legislative power from the roaming fingers of appropriately-minded judges. Moreover, within a construct of constitutional democracy, there always will be problems of legitimacy attached to the exercise of legislative power by an unelected judiciary.

However, the reluctance of judges to involve themselves in policy went deeper than mere constitutional nicety, and was founded on certain basic political and social facts. Thus, the emergence of democratically elected Parliaments during the nineteenth Century, electorally responsible to the populace at large, was seen as precluding the judges in the most basic way from any real pretensions to power over the fundamental political and social dispositions of society.

This basic social perception was backed by the unanswerable fact that the exercise of political power by democratically unaccountable judges, in the face of an elected legislature which enjoyed the confidence of the mass of the population, not only was politically untenable, but from the point of view of the judges, politically and personally dangerous. In short, the conviction of the judges could be summed up in the immortal words, "we'll never get away with it".

Recently, however, there has been a fundamental shift in much of the judicial psychology of Australia. This shift may best be summed up as amounting to a form of judicial triumphalism. The central element of this judicial mind-set is encapsulated in the proposition that the judges should feel free to take control of the law, and to develop it in accordance with their perceptions

of the needs and desires of contemporary society. This proposition is in turn based on a series of assumptions, both positive and negative, concerning the right of the judges to take such action.

The assumptions which are positive in character chiefly concern the character of the judges themselves. Thus, an increasing number of our judges now are confident that they are clever, socially sophisticated, dispassionate and fully adapted to the role of analysing social trends and predicting the best legal response to those trends. Not surprisingly, the negative assumptions of these judges concern the institutions whose traditional constitutional boundaries will be transgressed by such judicial activism.

Thus, just as the judges see themselves as wise and objective, the democratic Parliament to which they previously deferred is now perceived as being composed of politicians who are stupid, venally populist, short-sighted and unethical. Consequently, in the competition between the judicial Adonis and the parliamentary Quasimodo, the judges cannot fail to be seen as the preferable source of legal policy- making.

In all this, these judges are strongly supported by large sections of the legal profession, although pockets of resistance are said to hold out not far from this room. One fascinating question concerns the reason for this fundamental change in judicial attitude to their own role in law-making, and in relation to the law-making activities of Parliament. This is not something that can be considered here, although I have addressed it at length in my Alfred Deakin Lecture earlier this month.

Briefly, many Australian judges now are besotted with the learning and legal style of the United States, where a free-wheeling Supreme Court wields a Bill of Rights to the destruction of any pervasive claim of legislative supremacy. Moreover, this obsession with curially enforced rights as a means of asserting judicial supremacy over legislature and executive is powerfully reinforced by the current international fashion for broadly framed guarantees of human rights. Finally, the need for the legal profession generally to re-invent itself from what has been seen as a privileged and unresponsive professional élite, into a modern, vibrant force for the protection of civil rights against governments, cannot be over-estimated.

Of course, appropriately-minded judges are wont to locate their new found enthusiasm for activism in an alleged decline of Parliament from Cromwellian protector of rights, to executive toady. The reality is, however, that today's Parliaments are not noticeably less interested in the protection of human rights than were their predecessors, as is evidenced by the passage of large quantities of rights legislation over recent decades. The more proximate reason for judicial activism in this country thus lies not in any deficiencies in the other arms of government , but in the psychology of the judiciary itself.

The Legitimacy of Judicial Activism in Constitutional Theory

The critical point here is that the legitimacy of judicial activism varies radically according to the context in which it occurs. Thus, it simply is not possible to stigmatise such activity as constitutionally or legally illegitimate unless one fully understands the circumstances in which it is being undertaken.

One critical aspect of this concerns judicial activism in the context of the common law. No issue of constitutional legitimacy arises concerning the capacity of the judges to develop the common law in line with their views as to desirable social or other policy, for the simple reason that the courts always have moulded the common law, and are perfectly entitled to continue so to do. Likewise, Parliament is fully entitled to indicate by Act that a development embarked upon by the judiciary constitutes the very latest in bewigged nonsense. Thus, not only is the judiciary free

to develop the common law, but Parliament is free to reject any such development. No element of constitutional illegitimacy conceivably is involved.

Of course, this does not mean that judicial activism in a common law context cannot be criticised on other grounds. One criticism which may be levelled at judicial activism in relation to a particular area of the common law matter is that it has failed to adhere to the requirements of common law technique; that is, that the law should be developed slowly, cautiously, and with great regard to precedent. This is a grave charge, but is one which goes to judicial methodology, not constitutional permissibility.

Another criticism of a given bout of judicial activism in respect of the common law may be that the policy result which it embodies ranges from the inadvisable to the suicidal. Again, depending upon the nature of the criticism, this may well constitute a grave defect in the judicial excursus in question. Moreover, the essential implausibility of middle-aged barristers as social arbiters might be thought to point to the frequency with which such a conclusion will be reached. Nevertheless, the issue is not a constitutional one, but simply one of policy and plausibility. In any event, no matter how bad the judicial depredation, it always may be reversed by statute.

Indeed, this is why much of the political criticism of the decisions of the High Court in *Mabo* and *Wik* is essentially wrong. Both of these decisions essentially involved the amplification of the common law as it operated upon the question of native title, rather than the interpretation of statute or the Constitution.

It is perfectly possible to argue, particularly of *Mabo*, that these decisions were inappropriate as a matter of common law method, in the sense that they altered the law too radically, too fast and with too little regard for precedent. It likewise is possible to argue that the legal principles which they embody are not good policy, on the grounds that they ultimately will not operate in practice to deliver promised benefits to Aboriginal people, just as it is possible to maintain that these principles represent a major advance in social justice.

However, it simply is not open to commentators to criticise these decisions on the grounds that they are constitutionally improper: whatever their legal sins, no issue of constitutional interpretation was essential to their holdings concerning native title, and they thus fall to be evaluated as common law decisions which it was well within the purview of the High Court to make.

This is an important point, as much of the debate over constitutional judicial activism proceeds from mis-assumptions concerning these two decisions, when the real basis for criticism of the High Court's performance as a constitutional activist lies readily to hand elsewhere.

As regards the issue of judicial activism in a statutory context, the simple position is that the courts are bound by both democratic and constitutional theory to give effect to parliamentary enactments. Consequently, a court in interpreting a statute has no right to the latitude that it quite validly might exercise in developing the common law. This follows inexorably from the fact that, whereas the common law is made by the courts themselves and is their creature, statutes are made by Parliament, and can be altered or unmade only by the legislature.

Consequently, where a court consciously pursues an "interpretation" of a statute that is in reality designed to substitute, for the intended operation of that statute, an operation which the court believes to be preferable, then the court in question is acting quite invalidly. Inevitably, therefore, judicial activism in a statutory context is a constitutional issue, striking as it does at the root of the relationship between the courts and Parliament. Nevertheless, it is by no means so serious an issue as the form of activism that we will now consider.

This is the constitutional variant of judicial activism that we already have noted as progressivism, being the notion that the court -- and most usually the High Court -- may substitute for the intended operation of the Constitution its own view as to the most socially desirable outcome in contemporary circumstances.

This form of activism is utterly unacceptable as a matter of democratic or constitutional theory. The Constitution, as Australia's constituent document, was drafted by delegates who (generally speaking) were popularly elected for the purpose, and was ratified by the colonial populations. It is amendable only pursuant to a rigorous democratic and federal formula contained in s. 128. The necessary consequence of this must be that it is entirely invalid for any court to seek to usurp the prerogatives of the Australian people by informally amending the Constitution in accordance with its own fancies as to what passes for good public policy.

Of course, this is precisely what the Court has been doing on a long term basis in relation to the Constitution's federal structure, and even more vigorously over the past decade through the interpolation of extraneous human rights into the Constitution's text. A number of arguments have been advanced from time to time with a view to justifying this behaviour. One of the more hopeful is that the Founders intended that the Court should operate in such a manner. Suffice to say, there is not the slightest historical support for this view, with every contemporary source redolent of an entirely contrary intention.

A second argument, turning on the nature of democracy, is that there is nothing inconsistent with democratic theory in seven unelected judges unilaterally moulding the shape of the Constitution, given that democracy is itself an imprecise and elastic conception. The answer to this would seem to be that while democracy is elastic, it is not infinitely so, and it is difficult to imagine a construct less supportive of popular democracy than the undermining of a popular mechanism of constitutional amendment by seven unaccountable public officials nominated by the executive of the Commonwealth.

A third justification often proffered for progressivism is that, without such beneficent action by the High Court, the "dead hand of the past" would render the Constitution unalterable. The difficulty with this argument is that the failure of proposals for constitutional alteration over the course of Australian history has in no sense been the result of some morbid dominance of the Founding Fathers, but rather stems from the very much alive determination of the Australian people to reject proposals to alter the Constitution.

Thus, what the High Court proposes to do is not to save us from the Founding Fathers, but from ourselves. The net result must be that there is no convincing argument of law, constitutional principle or democracy that possibly could be regarded as justifying the constitutional progressivism of the High Court.

It may be noted at this point that it has been the chief achievement of the constitutional Left to convince whole sections of the public that the debate over constitutional progressivism is effectively the same debate as that which has raged in the past over the general power of judges to make law. In reality, of course, the two are entirely different. No intelligent person now denies that judges do to some extent make law, most particularly in the common law context that has been outlined above.

But to say that judges cautiously may vary the common law, which they have themselves made, says absolutely nothing as to their right to alter the Constitution of which they, in the form of the High Court, are themselves merely creatures. Indeed, to argue from a permissive proposition about judge-made law in the context of the common law, to a defence of judicial alteration of the

Constitution, is a little like saying that homicide is generically justifiable on the basis that there do in fact exist certain narrow forms of lawful killing.

Thus, the notion of an unauthorised constitutional amendment by the judiciary is fundamentally different from any issue concerning the capacity of the courts to develop the common law. The judicial activism comprised in progressivism constitutes a basic attack on Australian notions of constitutional democracy, which, in the case of such purported constitutional freedoms as that of political communication, have been thinly disguised as constitutional implications with a view to paying derisory lip service to the interpretative process.

The Plausibility of Judicial Activism

Plausibility is an issue quite different from that concerning the legitimacy of judicial activism. The question here is not whether such activism is democratically, constitutionally or legally proper, but rather whether it is an effective means of promoting sound change to the law. In short, the issue is not whether judicial activism is appropriate, but rather whether it is efficacious.

The key to answering this question lies in an understanding of what occurs in practical terms when a judge determines to alter the law in line with his or her conception of what is or is not desirable. In essence, what will be involved is a judgment of legal policy: that is, a polycentric assessment of the diverse issues pertaining to economic, social, cultural and political considerations relevant to the formation of an intelligent opinion as to the desirability of a particular change in the law. Thus, it is vital to understand that the term "legal policy" is not merely a convenient euphemism for some intrinsically legal activity. Rather, it encapsulates a decision-making process that is deeply founded in wider, social and entirely non-legal considerations.

The critical question, therefore, is whether the judges possess the skills necessary to resolve issues of this type. The first point here must be that judges are chosen precisely because they have skills in an area quite distinct from such fields, namely, the law. Typically, judges have little or no experience of policy formulation, and it would be an amusing thought to imagine most High Court Justices attempting to make head or tail of the sort of documents usually utilised by the bureaucracy to inform itself in the taking of a policy decision, let alone seeking to intuit a comprehensive understanding of the process of rational policy formulation.

Thus, judges will not normally possess the wider skills necessary for policy creation. They generally will have no profound experience of economics, politics or administration. They will not be experienced in the field of policy analysis. They will have no understanding of the process involved in undertaking a comprehensive cost-benefit analysis of competing proposals. Nor is this the end of their disqualifications.

In an intensely political task, judges (with certain limited exceptions) not only will rarely have political experience, but today also seem to have a positive distaste for the practice of politics, except judicial politics. Their typical mode of decision-making, adjudication as between litigating parties, is utterly unsuited to the development of general policies applying across society and based on multifarious non-legal considerations. Their experience in dealing with neatly packaged evidence ill suits them to the task of sifting through the multiplicity of factors and material that typically will inform the making of a major policy decision. They have no experience in designing or even foreseeing the systems necessary to translate a policy decision into reality. All in all, it is scarcely possible to imagine a group of individuals less obviously suited to the formulation of policy than Her Majesty's Judges, with the notable exception of legal academics.

Indeed, I am sometimes amused when supporters of judicial activism querulously ask me who would be better at policy formulation than judges? The obvious answer to this is, an elected Parliament composed of members who at the very least are legitimate, and certainly are both reasonably socially diverse and experienced in the art of government.

Another, more light-hearted but nevertheless valid answer, would be to observe that there are many groups in our community that would have as great a claim to policy-making capacity as the judiciary, at least in terms of the likely quality of their decisions. Thus, for example, the armed forces possess all the virtues commonly claimed for the judiciary in this respect, such as a dispassionate commitment to the state, a disinclination to party politics, and a highly trained and skilled leadership. On the whole, however, I prefer the operations of a parliamentary democracy to either option.

Perhaps the saddest aspect of this whole sad debate over the capacity of judges to make effective legal policy is the genuine hurt evident on the part of many judges when their deficiencies in this direction are the subject of public comment. After all, no-one is denying the intelligence of the judges, which is undoubted. No-one questions their mastery of the law which is, after all, their field of peculiar expertise. No-one disputes their integrity in the discharge of their judicial functions. All that is being maintained is their incapacity in a field entirely outside their experience and expertise. For judges to resent charges of policy ineptitude is a little like a physicist being irked at not being recognised as a concert violinist.

The Dangers of Judicial Activism

The dangers posed by judicial activism fall into two categories. The first concerns dangers posed for society as a whole by the judges engaging in such activity. The second comprises dangers flowing from judicial activism which threaten the position of the judiciary itself.

The fundamental danger of judicial activism from the point of view of society, particularly in the case of constitutional progressivism, is its fundamental inconsistency with democracy. Putting aside the case of common law activism, which already has been acknowledged to fall within a special category, judicial activism in a statutory or a constitutional context quite literally laughs in the face of popular democracy. It posits the existence of an oligarchic group of judicial philosopher-kings, with a greater title to the disposition of fundamental issues concerning the nature of society than the members of that society themselves.

Not only is such a contempt for democracy profoundly disturbing in both theory and practice, but it is immensely damaging for the entire democratic psychology of any state which finds its commitment to popular government qualified in so radical a fashion.

A concomitant difficulty arises out of the value of separation of powers. Some judges are immensely fond of asserting this value whenever some unwary legislature or executive wanders across the path of judicial power, and there is no doubt that certain Australian executives have been less than circumspect in their dealings with the judicial arm. But separation of powers cuts both ways, and in point of constitutional principle, it is equally objectionable for the judiciary to usurp legislative power as it is for the executive to lay siege to the castle of judicial prerogative.

It follows from this that a contempt by the courts for the doctrine of separation of powers can only promote a corresponding contempt in other branches of government, with potentially disastrous consequences. Indeed, there can be little doubt that today's politicians already view with intense cynicism the pleas of an activist High Court which depend for their acceptance upon a genuine commitment to the separation of powers.

A third and often overlooked difficulty is ethical in character. When such courts as the High Court ritually assert the value of the separation of powers, and formally deny any intention of

interpreting the Constitution in a manner inconsistent with the constitutionally expressed desires of the Founders, and yet are perceived by every intelligent observer (whether with approval or disdain) to be doing precisely those things, a great inconsistency is generated at the heart of Australia's constitutional jurisprudence.

It can do nothing but harm for Australia's lawyers, judges and citizens to behold their highest court solemnly presiding over a demonstrable constitutional subterfuge. Thus, it should worry us a great deal more than it actually does that, when we read a judgment of the High Court on a constitutional matter today, we typically do not ask ourselves if the reasoning is convincing -- for this is essentially irrelevant -- but rather whether we agree with the result. It is difficult to expect the law to be within the realm of ethics, when the highest functionaries of the law in the highest reaches of their functions regard intellectual consistency as dispensable.

Finally, judicial activism over most of its range is potentially socially dangerous for precisely the reason that the judges are ill-equipped to discharge any major policy role. Thus, given that judges have no particular aptitude for policy, it is most unlikely that their forays in that direction will meet with general success, on the simple basis that the judges do not possess the resources of experience or practical intellect to regularly produce policy solutions which are adapted to the problems to which they are directed.

Whichever view one takes of decisions like *Mabo* and *Wik*, and there undoubtedly is much moral force embedded within those decisions, they reveal clearly enough the incapacity of the courts to enunciate enduring, comprehensive solutions to complex policy problems.

This is not to belittle the judiciary: the federal Parliament would make an equally bad fist of writing a judgment on the operations of s. 92 of the Constitution. The point remains, however, that the crafting of far-reaching policy options is as little the province of the courts as is the penning of judgments the milieu of the legislature.

The dangers of judicial activism for the judges themselves are equally intense. The first danger is to judicial independence. Judicial independence necessitates the independence of the courts not only from politicians, but from politics itself. Once a court embarks on a routine course of policy formulation, it inevitably becomes part of the political process, and this by definition. It therefore makes no sense to talk of the independence of the judiciary from politicians, if the judiciary has itself chosen to be an integral part of the very political process which defines the very concept of a politician.

Crucial to an understanding of this point, is an appreciation that the public respect which underlies true judicial independence cannot survive the politicisation of the judiciary. That respect is based on a communal perception that judges operate above and beyond the despised field of politics, and genuinely are engaged in the resolution of disputes according to law.

This is why judges traditionally have enjoyed an enormously high respect within the community, while politicians have ranked slightly above tiger snakes. Were the population to come to the view that the highest officers of our judiciary are, at least in a constitutional context, little more than highly specialised political operatives, judicial respect would decline dramatically.

This feeds into the next point. If it becomes generally accepted that judges are no more than social politicians wearing wigs, then the real politicians will feel not the slightest hesitation in treating their new found brethren in precisely the same manner in which they treat any other political opponents. That is to say, the judiciary will be subjected to their full repertoire of political tricks, brutality and cheerful chicanery. This is a process which the judiciary will not survive intact, most obviously because the public respect which traditionally has preserved them from such assaults already will have been substantially eroded.

Just as critically, it must be appreciated that those very judges so confident of their own skills as policy makers, are in reality truly appalling politicians, who confidently can be relied upon to lose any bout with the genuine article. This has been demonstrated in recent years with almost depressing regularity.

Thus, for example, when Deputy Prime Minister Tim Fischer criticised the High Court, the reaction of the Chief Justice, Sir Gerard Brennan, was to write him an eminently leakable letter, and then to be genuinely astounded when that missive rapidly found its way into the waiting arms of the media.

Again, the Victorian Chief Justice has blithely promised to defend judges whenever he feels that criticism is "unfair", seemingly without a realisation that future silence on his part correspondingly will stigmatise any undefended judicial utterance as inappropriate. Finally, the recent comments of Sir Gerard Brennan concerning criticism of the courts, far from moderating those criticisms, predictably were seen as an attempt to stifle debate.

The truth is that if judges are bad policy makers, they are appalling politicians. It presumably is only a fond belief that they will be able to discharge a political role without political accountability that encourages the adventurous among them to pursue their activist fantasy.

Finally, there is the obvious point that if judges are to behave as politicians, then politicians will be appointed as judges. Once the executive is convinced that the occupants of the bench intend to behave as political rather than legal creatures, it is a short step to ensuring that only those persons thoroughly amenable to the programme of the governing party will be appointed to the judiciary. Consequently, the politicisation of the judiciary through judicial activism may be expected to be a self-perpetuating process, which will result in political parties carefully scrutinising future appointments -- particularly to the High Court -- precisely with a view to ensuring that no mere lawyer illicitly finds him or herself upon the Bench. This culminating disaster will set the seal on the loss of independence and prestige inherent in the pursuit of a course of judicial activism.

Conclusion

The inevitable conclusion of this paper is that we must do all in our power to reverse the trend of judicial activism in Australia. While an element of activism may be accepted in the context of the common law, it should there be confined to a slow, cautious progress, mindful of precedent and the limitations of judicial method. In relation to statutory and constitutional interpretation, judicial activism is entirely illicit and must be stigmatised as such.

Unless we fully appreciate the inability of the judges to make the key contribution to complex policy debates, and the truly appalling constitutional consequences that will follow from any attempt on their part to do so, we run the risk of destroying both the independence of our judiciary and the separation of powers. Ironically, we would do so just as the judicial triumphalists are asserting them so self-importantly.

Chapter Ten

The Media and the Constitution

Professor David Flint, AM

As the Chairman has said, I am the new Chairman of an independent statutory authority, the Australian Broadcasting Authority. But that is not how some in the media saw it. They impugned our independence, as in the cartoon you see before you. I assume that it is my hand coming up from below the head of the table. It is both factually and politically correct, for there is no woman member there to represent Ms Kerrie Henderson.

I am unsure who it is who is bursting in demanding, "Who's the Authority here?". He is not Sir Lawrence Steet, the Chairman of Fairfax, for Sir Lawrence is far too elegant and courteous to do that.

Nor is it the President of the Federation of Commercial Television Stations, whose coiffeur is much more generous.

After some reflection, I think I know who it is. It's Mr Stuart Littlemore, QC, the ABC media critic![1]

My subject, *The Media and the Constitution*, raises, I believe, four major issues. I propose therefore to attempt to answer four questions.

First, why is there no express guarantee of the freedom of the press in the Constitution? (I shall use the words "press" and "media" to include both the print and electronic media.)

Second, what protection does the Constitution give to the media?

Third, would the media be better protected with an express constitutional guarantee?

Fourth, do the media deserve their freedom?

1. Why is there no express guarantee of the freedom of the press in the Constitution?

An earlier contributor to this series referred the Society to this definition of the word "Constitution" once enunciated by Viscount Bolingbroke:

> "By Constitution, we mean, whenever we speak with propriety and exactness, that assembly of laws, institutions and customs, derived from certain fixed principles of reason ... that compose the general system according to which the community has agreed to be governed."[2]

Mrs Wade added:

> "The written Constitution is only part of the compact between the government or governments and the people."

In this sense the concept of a "Constitution" transcends and means more than a single document. This concept not only includes the State and federal Constitutions, but it also includes the *Statute of Westminster Adoption Act* 1942 and the *Australia Act* 1986. But of course this is not all. It also includes the conventions which govern the exercise of power.

The Constitution thus described can only be understood in its historical context. Unfortunately, our Constitution is not widely understood. I find myself in full agreement with his Honour Mr Justice Kirby when he laments "the shocking level of ignorance about civics [which] reveals itself in what passes for the constitutional debate' in this country".[3]

The French are celebrated for attempting to codify the broad principles of the law, apart from administrative law. In their latest Constitution, *Constitution du 4 Octobre 1958* --the sixteenth -- it seems that even the French leave certain vital matters vague or unsaid. For example, the concept of the President's *domaine reservé*, particularly in matters of foreign affairs and defence, or the apparently unfettered power of the President to dismiss the Prime Minister.[4]

One line of criticism in the present constitutional debate in Australia is that, if we knew nothing about the country and only read the Constitution, we would completely misunderstand our political system. The government would be run, it would seem, by the Governor-General. For example, he could dissolve the House of Representatives at will, and veto any proposed legislation. He could control the army. But as Justice Gaudron notes, "fundamental constitutional doctrines are not always the subject of exhaustive constitutional provision, either because they are assumed in the Constitution or because what they entail is taken to be so obvious that detailed specification is unnecessary".[5]

Rather than trying to fill the Constitution with the assumptions the founding fathers made, as well as with the obvious, it would be preferable to instruct our citizens, particularly our children and our immigrants, about the history of this nation. This should include a study of the institutions and laws we have imported and adapted. Although it may upset some, unless we know the history of the battle between the Parliament and the Stuart Kings, we will never understand our Constitution -- or indeed, that of the United States.

Our British forebears saw no need to put their basic law into one document. When the United States became independent, they adopted a Constitution under which they retained both the rule of law and the need for checks and balances on power. As we know, they gave constitutional effect to the checks and balances in their political system through a formal separation of powers.

This concept of checks and balances was the great contribution of Anglo-American society -- the rejection of the platonic ideal of the guardians, or the ideal benevolent dictators, a theme which flows through Plato, the French revolution, to the 20th Century totalitarian ideologies. As Lord Acton so succinctly put it, "Power tends to corrupt and absolute power corrupts absolutely".

The American founding fathers distributed state power to the three institutions or branches "to save the people from autocracy".[6] They also adopted a Bill of Rights by way of a series of amendments to the Constitution. In fact, without the Bill of Rights there would have been no federation. This contained those rights the former colonists believed they already enjoyed. They now formally declared them, particularly for the purpose of restraining the new federal institutions from abusing them.

And they decided, in the First Amendment, to give constitutional recognition and protection to a fourth unofficial institution, the press. This was to be a formidable check on the power of the new federal state.

They sought to ensure that the press would be free, at least from prior restraint by the federal authorities. They would have agreed with Carlyle, who later wrote:

> "Burke said, there were three estates in Parliament, but in the reporters' gallery yonder, there sat a fourth estate more important far than they all."

So the First Amendment provides that "Congress shall make no law abridging the freedom of speech, or of the press". Justice Brandeis explained the reasons for the First Amendment in these words:

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties and that in its government the deliberative forces should prevail

> over the arbitrary. They valued liberty both as an end and as a means. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and the spread of political truths; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty and that this should be a fundamental principle of the American government. They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognising the occasional tyranny of governing majorities, they amended the Constitution so that free speech and assembly could be guaranteed."[7]

I have no doubt that had the founding fathers of the Australian Constitution heard these words, written three decades after their work, they would have applauded these sentiments.

And why then did they not incorporate the First Amendment into our own Constitution?

There are a number of reasons. The British had learned from their failure to grant freedom to the Americans, so that Canadians, Australians and New Zealanders did not have to fight for their freedom. (Not that the American colonists lived under the yoke of repression -- they were very much autonomous colonies. Two of the colonies even elected their own Governors!) The Australian Constitution was drafted by Australians and for Australians. I have to point this out for the record. Our Constitution was not a British creation imposed by the Foreign Office, as a former Australian Prime Minister claimed.

And in designing our federal Constitution the founding fathers had few models to choose from. Previous constitutional declarations of human rights were at best of neutral effect, at worst abused by tyrants. For example, article 11 of the *Declaration des droits de l'homme et du citoyen du 26 août 1789* certainly guaranteed freedom of expression. It provided:

> *"La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme: tout citoyen peut donc parler, écrire, imprimer librement, sauf à reprendre de l'abus de cette liberté dans les cas déterminés par la loi."*

These fine sentiments were followed by two centuries of uncertainty and chaos. Neither the terror, the Bonaparte dictatorship, the white terror on the Restoration, the second Bonaparte dictatorship, nor later the Vichy dictatorship, respected this guarantee.

And across the Atlantic there was little in the application of the U.S. Bill of Rights which would have encouraged our founding fathers. The leading cases on human rights which we know so well were decided in the twentieth Century, and most in the last half. Perhaps later events justified this restraint on the part of our founding fathers in not rushing to copy the Americans. As Daniel Lazare observes:

> "Over the *longue durée* of the twentieth Century, moreover, the discrepancy between U.S. and British practice [in the field of human rights] is even more striking. Despite the absence of a Bill of Rights and judicial review, the British somehow found it within themselves not to throw thousands of radicals in jail immediately after World War I; not to make hundreds of thousands of arrests as part of an absurd crusade against alcohol; not to hound thousands of

accused Communists out of jobs and into jail in the forties and fifties; and not to arrest millions more people as part of a neo-prohibitionist war on drugs. The United States did all these things and more, despite being blessed with the most glorious Constitution and Bill of Rights since the dawn of creation. Despite the existence of sizeable black communities in Liverpool and London, the British also found it within themselves not to lynch a dozen or more blacks a year during the 1930s.'[8]

But it was not only that on any reasonable assessment, Bills of Rights had not performed; they had even been used to restrain liberal government measures -- for example, factory regulation. The founding fathers rejected the need for a comprehensive Bill of Rights not only for these reasons, but more importantly, because they had confidence in the efficacy of the Westminster system. In the words of Justice McHugh:

"... they did this because they believed in the efficacy of the two institutions which formed the basis of the constitutions of Great Britain and the Australian colonies -- representative government and responsible government -- and because they believed that the interests of the people of the States would be protected by the Senate as the States' house. The result, as Professor Harrison Moore pointed out in *The Constitution of the Commonwealth*,[9] was that:

Further declarations of individual rights, and the protection of liberty and property against the government, are conspicuously absent from the Constitution; the individual is deemed sufficiently protected by that share in the government which the Constitution ensures him.' "

Justice McHugh concluded:

"The share in the government which the Constitution ensured was the right to determine who should be the representatives of the people in the Houses of Parliament."[10]

But what then can the people do if their representatives abuse their power? The answer is in the power the people enjoy through the ballot box. As the High Court said almost eighty years ago, if ever the elected representatives were to use their powers "to injure the people ... it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper". [11]

Justice Dawson explained the application of this principle in relation to any unacceptable intrusion into freedom of speech and of the media in these terms:

"The right to freedom of speech exists here because there is nothing to prevent its exercise and because governments recognise that if they attempt to limit it, save in accepted areas such as defamation or sedition, they must do so at their peril ... the fact, however, remains that in this country the guarantee of fundamental freedoms does not lie in any constitutional mandate, but in the capacity of a democratic society to preserve for itself its own shared values."[12]

2. What protection does the Constitution give to the media?

Notwithstanding the absence of an express constitutional guarantee of free speech and of the media, the High Court has in recent years found a freedom of political communication in the federal Constitution, a freedom which of course applies to the media.[13]

After finding a freedom of political communication to be implied in the Constitution, the High Court grappled with the application of this law in two actions for defamation in 1994, *Theophanous*[14] and *Stephens.*[15]

In *Theophanous* the Court established a new constitutional defence in action for defamation. They held that there was implied a freedom to publish material:

(a) discussing government and political matters;

(b) of and concerning Members of the Parliament of the Commonwealth of Australia which relates to the performance by such members of their duties as members of the Parliament or parliamentary committees;

(c) in relation to the suitability of persons for office as members of the Parliament."

They then established the new constitutional defence in actions for defamation where such material was published. This was available if the defendant established that:

(a) it was unaware of the falsity of the material published;

(b) it did not publish the material recklessly, that is, not caring whether the material was true or false; and

(c) the publication was reasonable in the circumstances.

Although the Court ruled in favour of the defendant by a majority of 4 to 3, it decided three years later that the two decisions did not contain a binding statement of constitutional principle. Why? Because one of the judges in the majority, Justice Sir William Deane, would have gone further than the other three, Chief Justice Sir Anthony Mason and Justices Toohey and Gaudron. His Honour had been unable to accept the need for a defendant to have to satisfy the court on "matters such as absence of recklessness or reasonableness" -- that is, the second and third aspects of the defence. However, he decided that the appropriate course was to lend his support to the other three (Mason CJ., Toohey and Gaudron JJ.).

In the next few years, it became clear that some of the other Justices wished to have the question reconsidered. That opportunity arose in two cases, *Lange*[16] and *Levy*.[17]

In these cases the Court accepted the argument that the earlier cases, *Theophanous* and *Stephens,* had in fact established no constitutional principle:

"Although Deane J. may have intended his concurrence with the answers in *Theophanous* to extend to the explanation of them in the joint judgment, the absence of an express agreement with the reasons in that judgment raises a question as to the extent to which he concurred with the terms of the answers."[18]

The reasoning which gave rise to the answers in *Theophanous* therefore had the direct support of only three of the seven Justices.

Lange was a unanimous decision. The Court confirmed that the Constitution intended to provide for the institutions of representative and responsible government. This, Their Honours observed, was made clear by both the Convention debates and by the terms of the Constitution itself. Freedom of communication concerning political or government matters between the electors and their representatives, electors and candidates, and between electors themselves, they ruled, is central to the system of government. The Constitution protects freedom of communication which enables the people to exercise a free and informed choice as electors. This cannot, Their Honours held, be confined to the election period, otherwise electors would be deprived of the greater part of the information necessary to make an effective choice at an election. They then held the common law

rules of defamation, and any statutory law on this, must conform to the requirements of the Constitution.

Whether *Lange* gives a better protection to the media than *Theophanous* has been debated, and will be debated elsewhere. I interpret *Lange* as a counsel to lower courts on the interpretation of defences such as that contained in s. 22 of the *Defamation Act* 1976 (NSW), and on qualified privilege at common law.

Lange differed from *Theophanous* in one particular aspect. The Court now said that the Constitution did not confer personal rights. Rather, it acted as a restraint on legislative or executive power. This case may well have signalled the end of the Court's flirtation with the concept of implied rights.

3. Would the media be better protected under an express constitutional guarantee?

Let me raise the question whether some express guarantee should now be inserted into the Constitution. Today most countries do so, even including dictatorships. For some time even the British have enjoyed access to the European Court of Human Rights, under the *European Convention on Human Rights.* This is now to be incorporated into Britain's domestic law. Australia will then be one of the few countries without a comprehensive Bill of Rights, either in our Constitutions or in our laws. I doubt, however, whether this difference from other countries is of much importance in itself.

The Australian people have only once had the opportunity, since federation, of including a guarantee of free speech and of the press in the Constitution. A proposal was made in 1944 to amend the Constitution to prevent any Parliament from making "any law for abridging the freedom of speech or expression".[19] But this was part of a wider proposal to transfer, for five years, certain State powers to Canberra and was rejected.

The principal issue in the current constitutional debate is whether to remove the Crown from the Constitution. This is proposed to be done in such a way that we will not notice. Under the minimalist proposal there will be an election at a joint meeting of the Parliament with only one candidate, nominated by the Prime Minister. In effect, the candidate will be chosen after a deal between the leaders of the political parties. The proposition that without further and substantial amendment this will not significantly change the office of Governor-General or President is hotly challenged by some, and not only constitutional monarchists. They say that under a minimalist change there will be a significant empowerment of the new President.

But if the change to a minimalist republic were to be benign, as the minimalist Republicans argue, a Bill of Rights would presumably have a more tangible effect. It would affect rights and responsibilities. But there would be a long debate as to what rights should be incorporated into the Bill. When the Government proposed three rights for inclusion into the Constitution in 1988, the right to trial by jury, to freedom of religion, and to fair terms for government acquisition of property by the State, the referendum was overwhelmingly rejected.

But if a referendum to provide an express constitutional guarantee were approved, much would depend on the form of the guarantee and, above all, its interpretation. Perhaps the widest protection for the press is contained in the First Amendment to the U.S. Constitution as presently interpreted by the Supreme Court. It would be more likely that any guarantee would be along the lines of Article XIX of the *International Covenant on Civil and Political Rights*, which provides:

> "1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) for respect of the rights or reputations of others;

(b) for the protection of national security or of public order (*ordre public*), or of public health or morals."

Whatever the form, Parliament could enact this by statute. This of course could be repealed, expressly or by implication. A federal statute, relying mainly on the external affairs power, could restrain the State Parliaments. If the guarantee were along the lines of Article XIX, it is however doubtful whether the States' powers to legislate would be much more restrained than they already are by the present implied freedom of political communication restated in *Lange*.

So would an express constitutional guarantee give greater protection to the media than now exists? Let us assume for the sake of argument that we did import the American constitutional guarantee. In the final analysis, its meaning would still depend on the High Court.

Justice Potter Stewart has explained the purpose for the American First Amendment as part of a deliberately created internally competitive system.[20] These checks and balances were put there to save the people from autocracy. The purpose of the constitutional guarantee of a free press was similar -- to create a fourth institution outside government. This was to be an additional check on the three official branches.

Potter Stewart further says that the Constitution frees the press to do battle against secrecy and deception in government. As Justice Black observed in the *Pentagon Papers Case*:

> "In the First Amendment the founding fathers gave the press the protection it must have to fulfil its essential role in our democracy. The press was to serve the government, not the governors. The government's power to censor the press was abolished so that the press would remain forever free to censure the government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."[21]

Potter Stewart also warns the press not to expect any help from the Constitution so that it will succeed in its battles with government. Thus the Constitution forbids prior restraints on publication -- except in the rarest of cases. But there is no constitutional right to freedom of information. Nor does the Constitution protect journalists from having to divulge confidential sources except perhaps in limited cases.

While the Constitution therefore frees the press, it does not help it in its battles with the state.

Whether the High Court would interpret a constitutional guarantee any more generously than the present implied protection is not at all clear. Certainly the guarantee would extend to non-political matters. In the United States the doctrine of the "public figure" plaintiff in defamation and privacy cases goes far beyond political figures, which I believe is a weakness. And the U.S. media's protection against defamation actions seems at first glance to be wider than in Australia. Here it is limited to material published in the course of political communication.

But in practice, is the American defence more useful? The freedom is lessened by the propensity of jurors to find in favour of a plaintiff. As a result, the media often appeal on the constitutional aspects of the case.

Now a "public figure" must prove the newspaper acted maliciously. This means the newspaper must have known that the publication was false, or that it was recklessly indifferent as to its truth or

falsity. So the trial typically involves a minute examination of what happened during the news gathering and editorial process. Worse, there is usually a long and highly expensive interlocutory phase. This seems to allow a scattergun approach, indeed a fishing expedition. And the plaintiff's hidden weapon -- or should I say, his attorney's hidden weapon -- centres around the cost rules.

Costs are not awarded against a losing plaintiff. With contingency fees, a plaintiff can litigate without responsibility. Imagine teams of "ambulance chasing" lawyers suggesting to potential clients that they sue for some slight, and being able to offer the plaintiff a complete indemnity from any liability. I can imagine the proposal. "Listen, you stand to gain up to $2,000,000, less of course my percentage. Don't worry, it won't cost you anything. Just sign the contingency fees agreement." So of course the media settles libel cases -- the earlier, the better. The actual burden on the media is heavy.

So in defamation cases at least, I am not confident that the importation of American constitutional law, even with its jurisprudence, would better protect the media -- at least if other aspects of American law and practice came with it.

It could be that in the area of contempt law, and parliamentary privilege, the courts could offer some winding back of the restrictions on the media. Once again, there is no guarantee that this would occur.

A glance at some recent cases where judges have aborted trials because of media reports shows no readiness on the part of at least those judges to allow some relaxation in this area, if such a relaxation were thought desirable.

The one definite advantage of an express guarantee is that it would lock in the protection. The likelihood however of the High Court reversing its unanimous decision in *Lange* is, I suspect, not high -- at least for the foreseeable future.

4. Does the media deserve its freedom?

The Act which established the Authority which I have the honour to chair indicates that the role of the media is to provide entertainment, education and information. To paraphrase the *Letter to the Corinthians*, the greatest of these is to inform. After all, what is the purpose of media freedom if it is not the right of the people to be informed?

Mercifully, we hear no more today of the cultural cringe. But it still lingers, I suspect, in Australians' attitudes to the Australian political system and to our media. The occasional survey of peoples' perceptions of different professions, particularly politicians and journalists, undertaken by *The Bulletin* illustrates this. I shall return to this. In the latest *Silent Majority Report*,[22] six media related issues are identified as among the top 40 problems perceived by Australians. Media issues were never before identified in the 30 years during which the series have appeared.

When I last visited Sir Henry Parkes' office in Macquarie Street, and saw the Old Cabinet Room, I was struck by one thing: that, only a few decades after the founding of the penal colony, our forefathers had established a society which was soon to be in the forefront of the world's advanced democracies.

Almost 170 years ago the sky of Sydney was bright with fireworks and bonfires. Governor Darling had been recalled. The people were not saying a fond farewell. They were saying good riddance.

Governor Darling's attempts to muzzle the Australian press in various ways had proved a failure. His liberal predecessor, Governor Brisbane, and the founding fathers of the free Australian media had triumphed. We should remember them, especially Edward Smith Hall of *The Monitor*, and William Charles Wentworth, who with Robert Wardell together founded *The Australian*.

Not only are we one of the six or seven countries in the world which have enjoyed such a long uninterrupted period of democratic government, we are also one of the few countries which have enjoyed a free media for the greater part of the 19th and so far all of the 20th Centuries.

We are world leaders in political culture and in the media. I read in *The Economist* that the world's media is dominated by the Americans, the British and the Australians! Well, I for one am not ashamed of that. I am proud that Australians are so successful and so innovative. When broadcasting itself was established, we soon moved to a regime where both commercial and independent quality public service broadcasting co-existed. Other countries were to follow us, some of the leading countries of Europe doing this only in the last few years.

And we also lead in self-regulation. I have constantly seen reference to and use of Australian research and experience, including that of the Australian Broadcasting Authority and the Australian Press Council.

We have to accept that the price of a free press is that some of the press will be irresponsible.

Nevertheless, the press, the media has done a great service to this nation. In its best moments it has covered itself in glory -- for example, its work in exposing corruption. Fortunately, corruption is still an aberration here. The media plays an important role in alerting us to this, and of course to any mismanagement in public life.

The only consistent and objective reports on the responsibility of the press and the media generally are in the reports of the Australian Press Council, the Australian Broadcasting Authority and its predecessor.

Those of the Press Council do not indicate a practice of consistent or gross irresponsibility on the part of the press as a whole, or in any section of the press. The Press Council has attempted to verify its own performance, most importantly through an independently managed survey of complainants it undertook in 1996.[23]

This showed that 69 per cent were glad that they had complained to the Press Council. This demonstrates a considerable degree of confidence in the objectivity of the Press Council rulings.

One litmus test of media responsibility is the degree to which it intrudes into personal privacy. Unlike the press of some other comparable countries, the Australian media cannot be said to be an intrusive one. Nor is there a section of the media which practises intrusion to the degree that significant parts of the British and American media do. The recent media intrusion into the personal life of the British Foreign Secretary is inconceivable here. Australian public figures need not lie awake at night wondering whether the media will expose their private lives. (Although the media may well investigate whether they actually paid for their beds from their travel allowances.)

Having praised the Australian media, let me register two reservations.

The first is the phenomenon of the "feeding frenzy" -- which is not only Australian but is a worldwide phenomenon. The second is the need for fairness, especially when the journalist has strong personal views on the matter reported.

The rise of Pauline Hanson is an example of a "feeding frenzy". Now I disagree with the fundamental tenets of Mrs Hanson's policies. For example, I see every advantage from our immigration programme.

But Mrs Hanson is entitled to have a different view. As I have said, the reporting of her rise constitutes, I believe, an example of the phenomenon which Professor Larry J Sabato describes as a feeding frenzy.[24] He defines this as "press coverage attending any political event or circumstances where a critical mass of journalists leap to cover the same embarrassing or scandalous subject and pursue it intensely, often excessively, and sometimes uncontrollably".

L'affaire Hanson was and may still be such a feeding frenzy. A good portion of the reporting exaggerated her message, which was presented in some quarters as if it were the voice of Satan. In fact, her policies are more moderate than those of many right wing parties in Western Europe. Jean

Marie Le Pen, for example, is not only against immigration; he wants immigrants sent back, and their children! Worse, the reporting exaggerated her importance.

Mrs Hanson is, after all, only one independent Member of Parliament. She is in the House of Representatives, where she enjoys no balance of power and where her vote is of no importance. Of our many State and federal politicians she is alone, or almost alone. We shall see how many votes "One Nation" polls in the next elections. I doubt if she will achieve nationally the votes recorded by much more extreme parties in recent elections in Europe. Yet she has been portrayed as if she were an extremely significant politician.

We have had media commentators calling on the Prime Minister to come out hard, to stop her. I asked one how any Prime Minister could have stopped her, what were the few words he should have said. The reply:

> "He should have said on Day One that her views were completely unacceptable in Australian society."

That such a statement would have had any effect in restraining Mrs Hanson from continuing to advance her views is extremely doubtful.

The unfortunate result of this feeding frenzy was that Asian English language newspapers, which serve an élite, finally took notice. How could they not? The frenzy had dominated our media. And the word was passed on. Mrs Hanson was portrayed as a significant and powerful Australian politician, who was enunciating racist views. There was a suggestion that such views were widely held in Australia.

Any damage to Australia was not the result of inaction of the Prime Minister, or indeed of the Leader of the Opposition. It was not even the direct result of Mrs Hanson's words. It was the media indulging in its own fantasies, believing its own stories, which turned Mrs Hanson into a spectre stalking the land.

My second reservation is the need for fairness, especially where journalists and editors feel strongly about the issue. An early example was during the last months of the Whitlam Government. The press was fully entitled to publish the news, which was often unfavourable to the Government, and to take editorial positions. But some went overboard, so determined were they to see the end of that Government. Another was the report that, when the native title legislation passed the Senate, the press gallery stood and applauded. If so, it was both unwise and unprofessional.

As I mentioned, *The Bulletin* regularly publishes surveys of the public's assessment of the integrity and honesty of different professions. Professors, I must say, are ranked quite high, as are judges. But journalists are ranked low, especially print journalists. I think, unfairly so. Yet it cannot be that they intrude excessively into people's privacy -- they have a much better record on this than those of other countries.

Perhaps it is because of the feeding frenzies. But these are not so common. I suspect that it may be a perception of unfairness, perhaps of bias.

There is obviously a fine line between reporting the news and great national debates, and weighting that reporting too heavily on one's own side.

Professor Henningham's survey of journalists suggests a substantial difference of opinion between journalists and members of the public on a wide range of issues.[25] For example:

	Percentage in favour	
	blic	**journalists**
death penalty	60	21
royalty	46	25
strikes	19	45

If there is such a divergence on an issue, then there is a corresponding obligation on the media to present the news on any such issues fairly, and to report both sides of great national debates.

Let me give a current example. We are about to elect our Constitutional Convention. We know that much of the media today supports a change to a republic. There is then an onus on the media to ensure that their reporting of the campaign, and of the issues, is fair. That is, after all, the essence of our national identity, expressed in the *argot* -- "a fair go".

If the story were merely about a factional branch in a political party, we would still expect that it be reported fairly.

But this is about a fundamental aspect of our Constitution, about the removal of one of the pillars of the "indissoluble federal Commonwealth under the Crown" which our forefathers established. A change of such importance needs not only to be carefully considered. It also needs to be reported fairly. The public is entitled to be informed, particularly on that part of the debate which relates to the checks and balances in the Constitution. (I must admit a personal interest in this -- I am a candidate in the election.)

But I return to my original assessment. That is that, while not perfect, the Australian media has acquitted itself well.

Let me conclude with one point that I made frequently as Chairman of the Press Council. Whatever the faults of the media in departing from the highest ethical standards, they cannot be cured by state regulation, which in any event would run the risk of breaching the Constitution.

As that great liberator, himself a journalist and a lawyer, Mahatma Ghandi wrote:

> "The sole aim of journalism should be service. The press is a great power, but, just as an unchained torrent submerges the whole countryside and devastates crops, even so an uncontrolled pen serves but to destroy. If the control is from without, it proves more poisonous than want of control. It can be profitable only when exercised from within."

Endnotes:

1. It is, in fact, Mr Kerry Packer, although Professor Flint was far too courteous to say so. (Editor).

2. Hon. Jan Wade, MLA, *The Future of the Federation*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 6 (1995), ix at xxiii.

3. Hon. Justice Michael Kirby, speech at Queensland University of Technology, 16 August, 1997.

4. Pierre-Henri Chalvidan, *Droit Constitutionel*, Nathan Université, Paris (1996), p. 223.

5. *Australian Capital Television Pty Ltd v. Commonwealth of Australia* (1992) 177 CLR 106, 209.

6. *Myers v. United States* (1926) 227 US 52, 243 per Brandeis J..

7. *Whitney v. California*, 274 US 357 at 375, Brandeis J. concurring.

8. Daniel Lazare, *The Frozen Republic*, Harcourt Brace, Orlando, Florida (1996), pp. 216-217.

9. Harrison Moore, *The Constitution of the Commonwealth* (2nd edition, 1910), p. 78.

10. *Australian Capital Television Pty Ltd v. Commonwealth of Australia* (1992) 177 CLR 229 per McHugh J..

11. *Amalgamated Society of Engineers v. Adelaide Steamships Co. Ltd (*The *Engineers' Case)* 1920-28 CLR 129 at 151-152.

12. *Australian Capital Television Pty Ltd v. Commonwealth of Australia, loc. cit.* at 182-183.

13. *Ibid*.

14. *Theophanous v. Herald and Weekly Times Ltd* (1994) 182 CLR 104.

15. *Stephens v. West Australian Newspapers Ltd* (1994) 182 CLR 211.

16. *Lange v. ABC* (1997) 145 ALR 96.

17. *Levy v. Victoria* (1997) 145 ALR 248.

18. *Lange v. ABC, loc. cit.*.

19. *Constitutional Alteration (Postwar Reconstruction and Democratic Rights) Bill* 1944.

20. *Or of the Press*, 26 *Hastings Law Journal* (1975), pp. 631-634.

21. *New York Times v. U.S.* (1971) 403 US 713 at 826.

22. Report No. 111, Roy Morgan Research (1997).

23. Australian Press Council, *Survey of Complainants* (1996).

24. Larry J. Sabato, *Feeding Frenzy*, New York (1991).

25. *Independent Monthly*, February, 1996.

Chapter Eleven

Native Title: A Path to Sovereignty

Dr Stephen Davis

Following the *Wik* decision, 78 per cent[2] of the Australian continent is potentially subject to native title claim, if it can be safely assumed that freehold title is not subject to claim or that native title cannot co-exist with freehold. The latter presumption is not beyond doubt.

One consequence of the federal Government's proposed *Native Title Act* amendment (10 Point Plan) will be an expected reduction in the claimable area by between five and eight per cent. The federal Minister for Aboriginal Affairs is reported as saying that 70 per cent or more of Australia will still be available for claim under the amended *Native Title Act*.[3] This, of course, comes somewhat as a shock to most Australians, who assumed that the *Native Title Amendment Bill* was designed to recognise the intent of the *Mabo* (No.2) decision and restore the level of potentially claimable land to the pre-*Wik* level of approximately 38 per cent.

Native title rights have not been defined. Nor will they be defined by the proposed amendments to the *Native Title Act*. It will be left to courts to define the incidents of native title on a case by case basis. It is unclear whether those incidents will include rights to sub-surface water or mineral resources, although the proposed amendments seek to preclude both possibilities. NSW relies on the Royal prerogative to underpin its ownership of the Royal Minerals (gold and silver).

A case is likely to be constructed by Aboriginal people, on the basis of sovereignty, to test the Crown ownership of minerals. If a case for sovereignty is successful, then there may be latitude for a claim for compensation in respect of at least the royal minerals, or a royalty payable to indigenous groups for royal minerals extracted, both past and future. If Crown ownership of minerals is affirmed in the amendments then there may well be a case for compensation mounted by indigenous groups.

The States are wary of this possibility and have subsequently encouraged the federal Government to avoid any affirmation of Crown ownership.

Overseas, such as in some areas of Canada, minerals rights are vested in indigenous people. There may be a strong push for such precedent to be extended to Australia, particularly if coupled with the sovereignty argument. The granting of mineral rights as a native title right may well be a position the federal Government is willing to concede should it find itself in a difficult negotiating position with indigenous groups. This would be a simple method of the government displacing the burden of compensation to those who wish to acquire the mineral rights ... a simple case of user pays.

In Western Australia specifically, the *Land Act* provides exclusive rights of pasturage for the term of the pastoral lease. It does not give the pastoral lease holder general rights to soil or timber. There is some question as to whether these rights may therefore be available for claim through native title. If not, they may well accrue through the application of one or more international instruments.

Native Title and International Instruments

Recognition of native title can be traced back to early human rights instruments passed by the United Nations, the Organisation of American States and the Council of Europe in the period 1948 to 1970 (Appendix 1). By guaranteeing specific human rights of the individual, these

conventions laid the basis of an argument for the recognition of indigenous rights as a collective. Indigenous people argue that their enjoyment of the basic human rights guaranteed by these early instruments is dependent on the recognition of their collective rights. They cannot have one without the other, they contend.

The most prominent of the early human rights conventions is the United Nations' *International Bill of Human Rights* which is made up of three instruments, the *Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966).

The *Universal Declaration of Human Rights* focuses principally on human rights, and in that respect is associated with the rights of the individual. In contrast, the latter two Covenants widen the scope of human rights to include economic and social rights and with reference to minority, community and group rights. The group and collective rights are seen as being associated rights to peace, environmental conservation and humanitarian assistance, and therein extend beyond the rights of any individual. The move to an expression of rights on behalf of a collective or group is a major step towards the recognition of a body corporate with an identifiable political, economic and social continuity.

The myriad of indigenous related studies, declarations and instruments produced under the auspices of the United Nations, Organisation of American States and European Parliament, since the early 1980s, is indicative of a recent shift from preoccupation with human rights issues, as such, to concern with the rights of indigenous people as a "special" group (Appendix 2). These activities represent a broader movement towards the establishment of minimum standards for the recognition of indigenous rights. Their link to early human rights instruments ensures that few countries will escape their influence. The human rights obligations of member countries are being slowly expanded to include the recognition of the "special" rights of indigenous people.

The *Native Title Act* 1993 provides a good example of how international conventions feed through to native title issues in Australia. In the preamble, there is specific reference made to Australia's ratification of the *International Bill of Human Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination.* Similarly, the "right to negotiate" and "good faith consultation" clauses in the *Native Title Act* are replicas of provisions in the International Labour Organisation's (ILO) *Convention 169* (*ILO 169*). Clearly, the Keating Government intended the Act to be seen as building on the international standards set by the United Nations.

ILO 169

ILO 169, also known as the *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, was essentially the first international instrument to establish indigenous land rights. The instrument, adopted in 1989, necessarily superseded the *Indigenous and Tribal Populations Convention No. 107* (1957), which was based on a philosophy of assimilation and therefore found to be unpalatable. *ILO 169* introduces the right to self-determination, the right to consultation for participation, the right of indigenous and tribal people to decide their own priorities, and the provisions on contracts and cooperation across borders. It deepens the concept of land and territory, introduces new provisions on the rights of indigenous and tribal people to natural resources and the return of the ancestral lands they have lost.

Going further, *ILO 169* establishes the right of indigenous and tribal people to determine their own priorities for their development and to exercise control over any development that may occur on their ancestral lands. They are to be consulted in good faith on appropriate procedures

and representative institutions in respect not only of administrative and legislative measures but also development plans.

In addition, *ILO 169* ensures that governments will conduct studies in cooperation with indigenous and tribal people to assess the social, spiritual, cultural and environmental impact, on the people, of planned development activities. It requires governments to recognise the "special" relationship of indigenous and tribal people with their lands, and protects the indigenous and tribal people's ownership and possessory rights to the lands. It safeguards their rights to natural resources within their ancestral lands and territories, their right to participate in the use, management and conservation of those resources, and ensures that they will be consulted prior to exploration or exploitation activities of mineral or sub-surface resources or other resources pertaining to indigenous and tribal people's lands but whose ownership is retained by the state.

ILO 169 also ensures that indigenous and tribal people will be consulted wherever a change in their capacity to own the lands is being considered. In the case of people who have been displaced from their ancestral lands, indigenous and tribal people, under *ILO 169,* have the right to be relocated only with their free and informed consent or, following appropriate procedures including public hearings, to be provided with lands of quality and legal status at least equal to the lands previously occupied, and to be fully and adequately compensated when relocated.

Each country that ratifies *ILO 169* is bound to send evidence of implementation of the instrument's provisions to the ILO. The International Labour Office has set up a procedure which will, from time to time, examine the application of conventions and recommendations by ratifying countries. The International Labour Office may seek further information on compliance by requests to the national government in respect of the implementation of *ILO 169.* The observations by an independent committee on implementation are published by the ILO. To date, only 10 countries (8 Latin American, 2 Nordic) have ratified *ILO 169,* although the number is reportedly growing.

UN *Draft Declaration on the Rights of Indigenous Peoples*

The provisions of the UN *Draft Declaration on the Rights of Indigenous Peoples* bear considerable similarity to many of the articles of *ILO 169.* In the *Draft Declaration,* the rights of indigenous people are being expanded such that they are on the edge of being recognised beyond individual rights at a more inclusive level. Rather than being seen as group or minority rights, there is a distinct move to see them as a separate category which is not encompassed within the original *Universal Declaration of Human Rights.* In that respect, indigenous people are lobbying to have a further instrument drafted to recognise their particular rights over and above those declared in the *Universal Declaration*.

Indigenous groups claim that their unique rights deserve particular recognition and must be distinguished from the rights of minorities and from the rights of communities. They contend that these rights should not be confused with the personal rights conferred on all people under the *International Covenant on Civil and Political Rights.* Rather, they see the adoption of the *Optional Protocol,* and its provision for the determination of complaints against State Parties, as confirming their separate and unique status. The *Optional Protocol to the International Covenant on Civil and Political Rights* empowers the Human Rights Committee, established under part IV of the *Covenant,* to receive and determine complaints from individuals who claim to be victims of a violation of any of the rights contained in the *Covenant* (Article 1).

The indigenous groups contend that the *Universal Declaration* provides them with the right to freely participate in the cultural life of their community (Article 27), the right to take part in the government of their country (Article 21), and stresses their duties to the community in which the

free and full development of their personality is possible (Article 29). Whilst these rights appear to be available to all persons under the *Universal Declaration*, indigenous people assert that their situation is so unique that a separate instrument is necessary for the recognition of the particular situation of indigenous people.

The *Draft Declaration*, it is contended by indigenous groups, gives particular emphasis to the rights of communities and community structures, and in that respect transcends the human rights of the individual and the rights of minority groups. The grant of rights to a collective also satisfies and subsumes the issues of concern for the rights of individuals and therein it would be more appropriate, they contend, to recognise and grant the rights of indigenous people as a collective.

There has been considerable criticism of the proposal for community rights on the basis of group identity or membership. Such rights are criticised as being in conflict with what is seen as universal human rights of the individual. The basis of group or community rights is seen as the foundation for the development of an independent state system at international law and has become increasingly inclusive to the detriment of the definition of individual rights.

Self-determination

One of the most contentious issues about the *Draft Declaration* is the concept of self-determination (Article 3), the meaning of which has been left ambiguous. Partly for this reason, the declaration has received a lukewarm response from countries such as Australia, the US, New Zealand and Canada. The unqualified right to self-determination is seen as too open to different interpretations and possibly implying a right to secession.

The Aboriginal and Torres Strait Islander Commission (ATSIC) believes that "the term self-determination' should not be qualified so as to remove any possible right to secession". Self-determination is also a right which finds expression in Article 1 of *ILO 169* (1989) and Article 2 of the *Declaration of the International Human Rights Conference of Vienna* (1993). ATSIC is firm in its view that unqualified reference to self-determination should remain in the *Draft Declaration* and that Aboriginal communities in Australia should have the right to exercise self-determination according to their own circumstances.

ATSIC interprets the *Draft Declaration on the Rights of Indigenous Peoples* as providing that, among other things:

- Indigenous people have the right to participate in decisions that affect them, and therein they may choose their own representatives and use their own decision-making processes (Article 19) [with no limit on the number of representatives per group or the number of groups in any negotiation];
- Indigenous people have the right to participate in law and policy making that may affect them, and governments must therein obtain the consent of indigenous people before adopting such laws and policies (Article 20);
- Indigenous people have the right to determine priorities and strategies for their own development, and therein they should determine health, housing, economic and social programs and attend to delivery of the programs through their own organisations (Article 23) [the basis of local government acknowledged by developers through regional agreements];
- Indigenous people have the "right to maintain and strengthen their distinctive spiritual" relationship with the land and waters (Article 25) [*ILO 169* specifically recognises the ability to elaborate traditions as was evident in the Coronation Hill and Hindmarsh Island cases];

- Indigenous people have the right to own and control the use of the land, waters and other resources (Article 26);
- Governments must obtain the consent of indigenous people before giving approval to activities affecting the land and resources, particularly the development of mineral, water and other resources (Article 30);
- As a form of self-determination, indigenous people have the right to self-government in relation to their own affairs. These include culture, religion, education, media, health, housing, employment, social security, economic activities, land and resources management, environment and entry by non-members (Article 31);
- Indigenous people have the right to determine who are their own citizens (Article 32);
- Governments shall respect previous agreements entered into with indigenous people. Disputes shall be resolved by international bodies (Article 36);
- The United Nations and other international organisations shall provide financial and other assistance in order to give effect to the rights recognised in this Declaration (Article 40).

This interpretation of ATSIC's statement alone suggests that signing the *Draft Declaration*, as it currently stands, would be an act destructive of Australian sovereignty.

Possible Outcomes of Native Title in Australia

Appendices 3 and 4 illustrate the intricate relationship between native title in Australia and international instruments and events. The Australian government's policies on indigenous people appear to be influenced by Canadian policy, which has gone much further in recognising indigenous rights, and United Nations activities, which reflect opinion on the rights of indigenous people (Appendix 3). Canadian legal events also set precedents for Australian courts (Appendix 4). Specifically, the *Mabo* and *Wik* decisions have mirrored Canada's *Sioui* and *Delgamuuku* decisions, with a time lag of approximately two years between the two countries. This relationship serves as a useful predictor of the possible cumulative outcomes of native title in Australia.

Co-existence on Fee Simple

It is generally accepted that in Australia, a grant of fee simple (i.e., freehold, which entails a perpetual right of exclusive possession) would extinguish native title regardless of the grantee's actual occupation and use of the land. In the *Wik* decisions, this was clearly stated by Toohey, J. who said "... it has been generally accepted that a grant of an estate in fee simple extinguishes native title rights since this is the largest estate known to the common law".[4] Similarly, Kirby, J. said "such [co-existence of native title and pastoral rights] would not be the case where an estate or interest in fee simple had been granted by the Crown".[5] In Canada, however, "even a fee simple interest is not necessarily inconsistent with indigenous rights".[6]

In the case of *R v. Sioui*,[7] Larner J. did not find any inconsistency between the Crown's use of the land and the Hurons' exercise of their rites and customs.[8]

In *R v. Badger*,[9] Cory J. found that "Treaty No.8 Indians" would continue to have the right to hunt throughout the territory they surrendered in the treaty, except on land that was "taken up" for "mining, lumbering or other purposes".[10] The test for the continuance of the "right of access" under the treaty was not the title conferred but the actual use to which the land was put. Therefore, Cory J. concluded that "where lands are privately owned, it must be determined on a case-by-case basis ... If the lands are occupied, that is, put to visible use which is incompatible with hunting, Indians will not have a right of access".[11]

In *Badger*,[12] the treaty right to hunt continued on land granted in fee simple to private landowners and was exercisable to the degree of inconsistency with the actual or visible use

made of the land by the private landowner. However, if the actual or visible use of the land ceased, then Cory J.'s judgment may have left the door open for the hunting rights to be revived. Although buildings may have been constructed on the land, the continued occupation and use of such structures would seem necessary to sustain the inconsistency with Indian hunting rights. What actually constitutes "occupation" of the land was a matter "to be explored on a case-by-case basis".[13] The matter was one of suspension rather than extinguishment of rights.

The similarity of the *Badger* and *Wik* decisions is shown in Toohey J.'s judgment, where he states that the question of inconsistency between native title rights and pastoral rights must be determined on a case-by-case basis. If the two sets of rights can co-exist, then native title is preserved, but where inconsistency is deemed to exist, the rights of the pastoral lessee prevail.[14]

The co-existence of aboriginal rights with Crown rights which was addressed in *Badger*, was earlier considered also in *Delgamuuku.*[15] Macfarlane JA., in co-authoring the main majority judgment in *Delgamuuku,* stated that even where the Crown may create an interest in land which was inconsistent with aboriginal rights, "if the consequence is only impairment of the exercise of the right it may follow that extinguishment ought not to be implied ... Two or more interests in land less than fee simple can co-exist. A right of way for powerlines may be reconciled with an aboriginal right to hunt over the same land".[16]

Macfarlane JA.'s test for continuance of aboriginal rights was more the actual or visible use of the land as compared to the legal inconsistency that may derive from the grant of title. "A fee simple grant does not necessarily exclude aboriginal use".[17]

Given the strong relationship that appears to exist between Canadian and Australian legal events and the fact that Canadian legal decisions appear to set precedents for Australian decisions, it is likely that co-existence of native title and fee simple will soon be tested in Australian courts, with similar results to Canada's.

Chief Justice Brennan stated in his *Wik* judgment:

> "If it were right to regard Crown leaseholds not as estates held of the Crown but merely as a bundle of statutory rights conferred on the lessee, it would be equally correct to treat a grant in fee simple' not as a grant of a freehold estate of the Crown but merely as a larger bundle of statutory rights. If the grant of a pastoral lease conferred merely a bundle of statutory rights exercisable by the lessee over land subject to native title in which the Crown (on the hypothesis advanced) had only the radical title, the rights of the lessee would be *jura in re aliena*: rights in another's property. And if leases were of that character, an estate in fee simple would be no different."

Chief Justice Brennan's view was in the minority and received little attention at the time of the *Wik* decision. Although it was received by many as a counter argument to the coexistence of native title with fee simple, it potentially provides some grounds for an argument in support of co-existence.

Increase in claimable Land

The recommendation of Justice Woodward for a *Land Rights Act* in the Northern Territory produced a rather different result than intended. Justice Woodward intended that between eight and twelve per cent of the Northern Territory land mass would become Aboriginal land through the *Aboriginal Land Rights (Northern Territory) Act* 1976. Currently, 42 per cent of the Northern Territory land mass has become Aboriginal land through the process, with a large number of claims totalling a further eleven per cent in progress or awaiting hearing.

Former Prime Minister Keating, in his preamble to the *Native Title Act* 1993, made it clear that pastoral leases would not become subject to native title claim. Only 38 per cent of Australia was

anticipated to be subject to claim. Clearly the *Wik* decision has shown that pastoral leases in Queensland can be subject to native title claim. That decision has raised the amount of land possibly subject to native title claim to 78 per cent.[18] In response, the current federal Coalition Government has moved to amend the *Native Title Act* 1993 to reduce the claimable land to 70 per cent, still exceeding the original intention by more than 30 per cent!

The basis of land claims under the *Aboriginal Land Rights (Northern Territory) Act* 1976 was presumed to be one of patri-lineage claimed by a local descent group. The basis of the claims has widened from those early criteria. Groups no longer have to be local in terms of their residence, and there is no bar to area of location of residence. Further, many cases have been recognised which could not demonstrate actual blood descent from forebears in the area.

Some examples of such claims, as cited by Maurice J. (Aboriginal Land Commissioner) in his report on the Lake Amadeus Land Claim, are listed below:[19]

i) Parents travelling through the vicinity of the claim area (para. 210);

ii) Grandparents travelling through the vicinity of the claim area (para. 210);

iii) Claimant travelling through the vicinity of the claim area (para. 210);

iv) History of employment on the claim area, leading to a knowledge of country (para. 210);

v) Affiliation through spouse (para. 210); and

vi) Skin group membership, which requires knowledge of stories associated with the claim area, even if such stories may have been acquired unscrupulously (paras. 248-249).

The breadth of application of the legislation has increased as the basis of the legislation is tested in the courts. Consequently, there have been many wide-ranging and unintended consequences, flowing from not only the *Aboriginal Land Rights (Northern Territory) Act* 1976 but also the current *Native Title Act* 1993.

Domestic Dependent Sovereignty

The human rights of the individual being extended to the social, economical and political rights held by the collective or the group lays the foundation for Aboriginal sovereignty. To grant regional administrative powers to representative Aboriginal bodies provides the basis on which to recognise domestic sovereignty (Appendix 4).

That domestic sovereignty is dependent upon funding from the federal Government, and therefore is a domestic dependent sovereignty which provides what appears to be an intermediary tier of government to local regions. However, the *Draft Declaration* and other associated international instruments would permit regional administrative recognition to be promoted to a sovereign state basis, whereby the federal Government would deal with Aboriginal groups in Australia on a sovereign state to sovereign state basis. This is precisely the basis of the relationship between the governments of North America and the First Nation groups. The Canadian Government has clearly stated that it deals with the First Nation groups in Canada on a sovereign to sovereign basis. The step to domestic dependent sovereignty is a small and simple one thereafter. The consequences are profound.

Sovereignty is obviously something that some Aboriginal groups are considering. In July, 1997, at the United Nations Working Group on Indigenous Populations in Geneva, a peak Aboriginal group in Australia advocated the negotiation of a settlement between the Australian Government

and the Aboriginal people from Australia by way of treaty. It advocated five principles as follows:

- "the right to decide whether we want to be part of the nation called Australia;
- the right, so long as our status remains as that of a Dependent People within the Australian community, to fully participate in every level of society through positive and special measures;
- the right to negotiate an Interim Charter by which a timetable for regaining control over ourselves and our territory is progressively achieved;
- the right to the return in ownership of sufficient territories (including land and sea) to satisfy our needs as a People; and
- the right to negotiate arrangements by which the territorial integrity of Aboriginal lands and Australian territory is to be mutually respected."

The possible outcomes as seen by indigenous groups in Australia are:

i) A separate geographically defined sovereign state governed by indigenous people. Such a state would most probably be the Northern Territory or the arid desert region of Central Australia. However, such a separate state is unlikely to satisfy the needs of most Aboriginal groups, so those who would benefit would be those who have a traditional interest in such area. The bulk of the Australian Aboriginal population on the eastern seaboard would be excluded.

ii) A second possible outcome would be regional agreements recognising and giving official exclusive status to representative bodies (through the *Native Title Act).* These bodies would become the conduit through which the Federal Government would provide funds for the delivery of services to communities, therein eventually becoming a replacement tier of the existing government, i.e., a local or regional government authority.

Domestic sovereignty would have important implications for Australia's economy and international standing as a sovereign nation. In Canada, domestic sovereignty has had some unintended outcomes, and in trying to reverse these, the Government is intending to spend hundreds of millions of dollars to buy back concessions already granted to Aboriginal groups. Settlement of some current claims may require billions of dollars, which in turn would threaten the country's AAA credit rating.

Conclusion

In summary, land rights, native title and their link to international instruments inevitably have a compounding effect on Australia, the extent of which is largely unknown but potentially profound and beyond the Australian Government's control.

Native title issues in Australia are inextricably intertwined with international events and instruments. We can observe a pattern of activity by UN bodies and other international organisations such as OECD, in conjunction with what are called "non-government organisations", such as Greenpeace, World Wildlife Fund and the Sierra Club, to undermine the present political structure of the world, and replace it with one more to their liking.

Today, the world comprises a collection of nation states who interact with each other as legal entities, and who are legally sovereign within their respective jurisdictions. We can readily observe an ongoing process in which the sovereignty of the nation states is diminished and political power is transferred from those states to what is agreeably described as the "international community". The *Draft Declaration on the Rights of Indigenous People* and *ILO 169* are important examples of this process.

Whilst Australia is unlikely to ratify *ILO 169,* and it is contended that the *Draft Declaration* is not a Convention and therefore will not be legally binding on signatories, the instruments still represent major milestones in the global conceptualisation of indigenous rights. As such they will have a compounding effect on native title in Australia. Already, Chief Justice John Doyle in South Australia has cited the *Draft Declaration* as a standard setting instrument.

The recent Mitchell Decision[20] of the Canadian Federal Court has recognised the international nature of Aboriginal rights and ensured that Aboriginal customary rights will be preserved across international borders. Aboriginal rights are clearly being distinguished and recognised as distinct from Aboriginal title. The distinction warrants ongoing attention.

The issue of domestic sovereignty is set to dominate future international discussions of indigenous rights, and decisions made by the United Nations, together with precedents in other countries, could potentially change the map of this country. Land rights and native title in Australia are examples of a very dynamic debate which is open-ended, and which can be simply linked to international conventions and trends to develop a credible basis for a range of outcomes with far reaching and irreversible consequences.

Australians tend to take their sovereignty for granted. That sovereignty is now being contested. We must become more aware of the issues, the players and be prepared to defend our sovereignty if we are to maintain it.

Endnotes:

1. The author wishes to acknowledge the significant contribution made by Sani Lupahla in the research redrafting that she has conducted for this paper.

2. *Herald Sun*, 29 September, 1997: *Land rights and wrongs*.

3. *The West Australian*, 11 September, 1997: *Herron storm at meeting*.

4. Cited in *The Wik Peoples and Others v. The State of Queensland and Others,* Australian Indigenous Law Reporter, Vol. 2, Issue 1, 1997, p.38.

5. *Ibid,* p.41.

6. Kent McNeil, Indigenous Law Bulletin, Vol.4, Issue 5, August-September, 1997: *Co-existence of indigenous and non-indigenous land rights: Australia and Canada compared in light of the Wik decision,* pp. 4-9.

7. (1990) CNLR 127 (SCC).

8. *Ibid,* pp. 157-158.

9. (1996) 2CNLR 77 (SCC).

10. *Ibid,* p. 95.

11. *Ibid,* p. 102.

12. *Loc. cit.*.

13. *Ibid,* pp. 96-97.

14. Australian Indigenous Law Reporter, *loc. cit.,* p. 39.

15. (1993) 104 CLR (4th) 470.

16. *Ibid,* p. 525.

17. *Ibid,* p. 531.

18. *Herald Sun*, 29 September, 1997: *Land rights and wrongs*.

19. Maurice, J. (1988), *Lake Amadeus Land Claim,* Australian Government Publishing Service, Canberra.

20. *Mohawk Council of Akwesasne v. Canada (Minister of National Revenue - MHR*), [197] F.C.J. No. 882 (QL).

Appendix 1
Human Rights Milestones: United Nations
Government United Nations NGOs
1950: Council of Europe. European Convention for the Protection of Human Rights & Fundamental Freedoms adopted.
1969: OAS
American Convention on Human Rights adopted.
1959: OAS. Inter American Commission on Human Rights established.
1966: International Covenant on
Civil & Political Rights adopted
Self Determination (Art 1.1).
1966: International Convention on Economic, Social & Cultural Rights adopted
Self Determination (Art 1.1).
1948: Universal Declaration of Human Rights adopted.
1963: United Nations Declaration on the Elimination of All Forms of Racial Discrimination.
1948: Organisation of American States (OAS)
American Declaration of the Rights & Duties of Man adopted.
1968: Proclamation of Teheran reviewing progress in human rights issues & reaffirming previous Instruments.
1961: Council of Europe.
European Social Charter
Guarantees economic, social & cultural Rights.
1978: OAS Inter-American Court of Human Rights in force.
1969: International Convention on the Elimination of All Forms of Racial Discrimination in force.
1981: Organisation of African Unity
African Charter on Human & People's Rights adopted.
1995: OAS. Inter-American Declaration on the Rights of Indigenous People approved.
1996: OAS-UN. Cooperation Agreement signed between the OAS and UN.
1994: Sub-Commission on Prevention of Discrimination & the Environment.
Draft Declaration of Principles on Human Rights & the Environment.
1995: UN. Agreement on the Identity and Rights of Indigenous People.
1996: UN-OAS. Cooperation Agreement.
1994: Sierra Club Sponsors meeting to draft declaration on Human Rights and the Environment.

Appendix 2

Indigenous Milestones: United Nations

1957: ILO 107

1971: Economic and Social Council authorises UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to conduct a review of the "Problem of Discrimination against Indigenous Populations".

1982: UN Working Group on Indigenous Populations set up as a result of Cobo reports. Studies by WGIP include treaties between indigenous people and states, intellectual property.

1988: WGIP produce first complete draft of the Declaration on the Rights of Indigenous People.

1989: ILO 169 (Convention on Indigenous and Tribal Peoples) - Establishes customary international law and treaty obligations.

1991: ILO 169 comes into force - ratified by Norway and Mexico.

1989: European Parliament "Position of the World's Indians".

1991: The World Bank Operational Directive 4.20.

1972: Inter-American Commission on Human Rights.

1977: International Non-Government Organisation Conference on Discrimination Against Indigenous Populations in the Americas.

1981-83: Cobo reports issued on the "Problem of Discrimination against Indigenous Populations". [Major catalyst.]

Government United Nations NGOs

1994: Summit of the Americas recognises the Decade of World's Indigenous People.

1992: Rio Earth Summit (United Nations Conference on Environmental Development) adopt Agenda 21 including a position on indigenous peoples' rights.

1992: Conference on Security and Cooperation in Europe.

"The Challeng of Change."

1992: Ibero-American Heads of State. Indigenous Peoples Fund.

1993: The Vienna Declaration and Program of Action adopted by the United Nations Conference on Human Rights.

1993: International Year of Indigenous People.

1993: Decade of World's Indigenous People.

1993: Proposal for permanent Forum for Indigenous People.

1994: Sub-Commission on the Prevention of Discrimination and Protection of Minorities adopt the WGIP Draft Declaration and submit it to the UN Commission on Human Rights. [Canada takes a leading role from 1982 to 1994.]

1994: Program of Action adopted by United Nations Conference on Population and Development.

1994: European Parliament Resolution on Self-determination for Indigenous People.

1995: Inter-American Commission on Human Rights approve draft of Inter-American Declaration on the Rights of Indigenous People.

1994: Inaugural International Day of the World's Indigenous Peoples. 09 August.

1993: WGIP produce the final revision of the draft Declaration on R.I.P.

Appendix 3
Indigenous Milestones: United Nations
Policy Policy Event Policy
Canada Australia UN USA
Integration
1953
Integration
1964
Working Group on Indigenous Populations
1982
Self Determination
Draft Declaration on Rights of Indigenous Peoples
Commissioned
1985
Self Management
1972
Self Determination
"Treaty Proposal"
1988
Negotiation
1973
Constitutional Recognition
1982
s.35 Self Government
Comprehensive Land Claims
Settlement
EcSoC Review of Discrimination Against Indigenous People.
1971
Integration
ILO 107
1957
Cobo Reports Discrimination Against Indigenous People
1981-83
Integration
1969
First Draft of Declaration on Rights of Indigenous People
1988
ILO 169
1989
i) Customary international law
ii) Collective Rights
iii) Self Determination
ILO 169 comes into force
1991
Key Provisions:
Right to negotiate;

Good faith consultations.
Vienna Declaration
1993
Self Determination Art. 2.
Sub-Commission on Prevention
of Discrimination & Protection
of Minorities
Current Studies
Protection of Heritage
of Indigenous People
1996
Land Rights of
Indigenous People
1996
Treaties & Agreements Between States & Indigenous Populations
1996
Title Affirmation
1993
Native Title Act

Appendix 4
Administrative
Effect
Claimable
Land
Basis of
Recognition
Self
Determination
Draft Declaration
1985
(Art.. 3)
Draft Declaration
1985
(Art.. 3)
ILO 169
(Art. 1)
1989
Vienna Declaration
(Art. 2)
1993
Land Agreements
Vacant Crown Land
Traditional continuous residential attachment
European Parliament Resolution on Self Determination for indigenous people.
1994
Multiple Local Agreements
Contemporary
residential attachment
Domestic Dependent
Sovereignty
Occupied
Freehold
(fee simple)
Contemporary
non-resident
self-identification
Multiple Group Regional Agreements
Regional
Self-Government
Unoccupied Freehold
(fee simple)
Multiple Regional Agreements
Pastoral Leases
Contemporary
non-residential

attachment
AUSTRALIA
Indigenous
Politics
Canada
Legal Event
Canada
Legal Event
Australia
Domestic
Dependent
Sovereignty
Constitution Act
1982
Self-Government
1982
Bicentennial Treaty
Proposal
1988
Native Title Act
1993
Delgamuuku.
Co-existence
test: visible use 1993
Sovereignty
1994
R v. Badger.
Co-existence on private land
Suspension 1996
Wik
1996
Mabo 2
1992
R v. Sioui.
Co-exist VCR
1990
R v. Sparrow.
Crown's Fiduciary Duty
1990
N.T.A.
(Amended)
1998
Self-Determination
CANADA

Concluding Remarks

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

I hope you will agree that at this conference we have again heard papers which make a valuable contribution to the discussion of some of the most significant issues of the day. I shall not attempt to refer to the papers individually since I could not do justice to the authors in the time available to me.

I may, however, presume to make a few comments on two of the questions discussed. Australia has gone astray in dealing with its Aboriginal population.

We have to recognise that there is a great gulf of comprehension between the majority of the population, on the one hand, and the tribal Aboriginals, comparatively few as they are, on the other hand. However, the gulf seems to be equally deep between the tribal Aboriginals and those people, part Aboriginal but of mixed blood, who have in truth lost their Aboriginal culture, although they claim to be Aboriginal.

The claim of the latter group to what are misleadingly described as land rights, and the recognition of that claim by the courts, has led to problems which the courts themselves have failed to recognise. The Parliament compounded those problems.

Surely it was a mistake to extend the provisions of the *Native Title Act* 1993 to an undefined and disparate class which includes persons who have no cultural affinity with the tribal Aboriginals, and no direct relationship with the land claimed; and equally erroneous to give a right to negotiate -- that is, a right to demand ransom -- to persons without requiring them to produce even a scintilla of evidence of their entitlements to the land rights which they claim.

It is by no means unjust to try to correct these errors, but not easy to do so. Part of the difficulty of resolving these problems is caused by the operation of the *Racial Discrimination Act* 1975 in conjunction with the constitutional right to receive just terms if property is compulsorily acquired; and the difficulty will be increased if the race power is held to mean that the only laws that the Parliament can make under that power are laws which benefit a particular race. International instruments, and the actions of organs of the United Nations, create additional difficulties, and threaten the very sovereignty of Australia.

The *Native Title Act* operates unjustly, and as a detriment to economic development within Australia, but whether it can and will be satisfactorily amended is a matter of conjecture.

Although I do not intend to refer to the details of the discussions at this conference, I would make an exception in favour of one contributor, who spoke from the floor, and whose remarks would otherwise go unrecorded. He is the holder of a leasehold property which is subject to seven different claims to native title. He has raised the argument, which seems convincing, that if compensation is to be paid to Aboriginals the burden should not be borne alone by the holders of pastoral leaseholds, but by the whole community, since the dispossession of Aboriginal lands resulted from the taking of freeholds as well as leasehold land.

The further matter that I would mention is the dysfunction of the federal system, caused by the fact that the tax base of the States has been unduly narrowed and that the Commonwealth collects an unduly large proportion of the taxation revenues. It is notable that the Premier of Western Australia, the Hon. Richard Court, in his address to us, dealt with both these questions and the problems created by *Mabo;* and notable also that both Mr Court and the Hon. Peter Walsh, although from different sides of politics, recognise the need to give the States the power and the responsibility to raise the revenues that they are required to expend. It must be clear to

everyone, except the politicians and bureaucrats in Canberra, that the situation demands a remedy.

I could not usefully add any comment on the interesting addresses we have heard from Mr McGuinness, Professor Craven and Professor Flint, which are fresh in our minds.

I thank all those who have contributed the papers which we have heard with such benefit and enjoyment, and would also thank all those -- including particularly our man in Perth, Mr Bevan Lawrence -- who have done so much to make this conference a success. I thank you all for your attendance.

Appendix I

Address Launching Volume 8 of

Upholding the Australian Constitution

Trevor Sykes

In this distinguished audience, I have absolutely no doubt that I am the person present who is least conversant with the Australian Constitution.

So the fact that I am standing up here today launching the eighth volume of The Samuel Griffith Society's Proceedings, *Upholding the Constitution* is proof -- if any more were needed --that total ignorance of the subject never stopped a journalist from commenting on anything.

One of the few beliefs I retain from an early grounding in Christianity is that anything made by man is less than perfect, so I have no doubt the Australian Constitution can be improved, but from my rough working knowledge of the subject, I believe our Founding Fathers did a fairly good job in framing the document.

In the corporate world they have a saying: "If it aint broke, don't fix it."

That is roughly my opinion of the Australian Constitution, and I was greatly reinforced on reading past addresses to this Society to see that Sir Paul Hasluck shared that attitude, although he phrased it much more elegantly.

I do not see how anyone can be expected to vote for or against a republic until we know just what sort of Constitution would come with it. However, far too many of the republicans take the attitude that we should turn into a republic immediately and fix the Constitution as an afterthought. Nobody in Australia would buy a used car on that premise, so I don't see why we should buy a republic on it. Especially when you consider who would be selling it to us.

The Samuel Griffith Society has done a praiseworthy job in airing the relevant issues. Certainly this volume greatly improved my knowledge of them.

Even more, the Society should be applauded for keeping alive the freedom of speech and debate in Australia. In my small way, in 43 years in journalism, I have been a seeker after truth. Before writing anything I try to assemble as many facts as I can, apply logic to them and try to reach the most probable conclusion.

Unfortunately, too much political debate in Australia today is commanded by people who have already reached their conclusion and want to bar any examination of facts which might threaten it. All too frequently debate is stifled by abuse. It is almost impossible to start a debate, for example, on what the appropriate levels of immigration should be, or how to make the *Native Title Act* workable, without some clown (or all too often some vested interest) branding the exercise as racist.

It is therefore refreshing to read this volume of essays, in which John Stone does not even take the boundaries of the Australian Capital Territory as being sacrosanct.

On the Constitution, Sir Harry Gibbs gives a truly learned dissertation on the constitutional issues that would need to be tackled before Australia could convert to a republic.

Two other papers I found particularly illuminating were those of Sir David Smith, on the powers of the Governor-General, and Professor Craven on the High Court's role.

But the essay that struck the strongest chord was John Forbes' on amending the *Native Title Act*. As other authors also referred to the *Native Title Act*, and I know a little about the subject, I thought it appropriate to make a few remarks on that vexed subject today.

Going back to the *Mabo* judgments, it is useful to start any discussion by looking at a map and seeing where the Murray Islands are, that were the subject of the *Mabo* claim. They are closer to Papua-New Guinea than to Australia, and many Australians would doubtless be surprised to know that our territory extends that far into the Gulf of Papua.

The Melanesians who lived there unquestionably had a working system of native title. They were a settled community, they had gardens which were cultivated from year to year, they handed down properties from generation to generation, they had recognised boundaries marked by trees and rocks between their properties. They had land which was owned not by the community but by individuals and groups. If any native title claim within the Commonwealth of Australia deserved to succeed, it was that of the Murray Islanders (or Meriams, the chief island in the group being Mer).

The fact is that legally their claim did not deserve to succeed. Mr Justice Dawson's judgment sets out the precedents quite clearly. If the rest of the High Court had taken the same black letter approach, the *Mabo* claim would have been rejected -- doubtless with extreme sympathy -- and the federal Government would have been urged to draft legislation which would give the Murray Islanders native title.

As we all know, that is not what happened. The other Justices of the High Court tacitly acknowledged that the law was as Dawson had said, because they invented new law to achieve the result they wanted.

Mr Justice Brennan's majority judgment acknowledged that precedent was formidably against the Court's creation of native title, but said the law "could be modified to bring it into conformity with contemporary notions of justice and human rights". Brennan also said the law had to be changed to meet "the expectations of the international community".

Now your average simpleton reading the Constitution could have been pardoned for thinking that if anyone has the job of bringing the law into conformity with contemporary notions and meeting the expectations of the international community, it is the 200 politicians we elect to federal Parliament. The simpleton could be further pardoned for wondering: "If that is not their job, why are the politicians there?"

This is not to deny the High Court some law-making function.

As John Forbes says:

> "Ever since *Mabo* was criticised 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 is a matter of degree."

When the High Court effectively creates a new form of land title in Australia, and in the process throws doubt over all the property titles that have been granted in the nation since white settlement, the degree of law-making becomes very high.

Heaven knows, our federal politicians are not perfect when it comes to making laws. But the judges who comprise the High Court have now comprehensively proved they're not, either. In the words of Greg Craven:

> "...why should we believe that relatively elderly and cloistered male barristers, sequestered all their lives from making any policy decision larger than that concerned with 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?"

The proposition can be taken a little further. If the High Court judges are going to take it upon themselves to create new laws, then it is fair to expect that they should introduce laws which are comprehensible and workable. To date the Court has done neither.

Going back to *Mabo*, if the Court feels a special form of property title should be created to benefit a particular race of people in Australia, it would have been helpful if the Court had defined who that race were.

The Court did not bother with this sort of detail, but as Colin Howard points out, the *Native Title Act* later defined Aborigines as "peoples of the Aboriginal race of Australia", which doesn't take us very far.

Faced with a similar situation in Alaska in the 1980s, the US defined an Atabascan Indian as anyone of 25 per cent or more native blood. So Alaska, whose handling of native title would have been a model for our Northern Territory, is pretty clear as to who is identified as an Indian and who is not. The description of native Alaskans has, I believe, since been changed from Atabascan to some other term, but the 25 per cent principle remains.

Nor has the Court defined, in any satisfactory manner, what tests are necessary to establish native title, nor what native title actually is in practice. If the Murray Islanders' standards of property title had been those that were set, then it is doubtful whether any mainland Aboriginal group could have passed the test.

And without harping too much on this aspect, we are discussing different races here. The Melanesians are a different people from the Australian Aborigines, and ensured their separate identity by putting the "TSI" (Torres Strait Islanders) into ATSIC at its formation.

Nor do we yet have any workable definition of what native title is. If native title were the right to hunt game across a property and conduct traditional ceremonies every full moon or whatever, then very few mining companies would have trouble with it, although pastoralists might.

And there still remain the formidable problems, as John Forbes has also pointed out, of how access to the land is to be policed, and the fiduciary duties of native title brokers.

It was obvious that the application of native title was going to cause substantial problems to our pastoral and mining industries -- the backbone of our export trade. Brennan's *Mabo* judgment dismissed this problem in just one throwaway line. I will quote it:

> "Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates or of freehold or of leases *but* (my emphasis) not necessarily by the grant of lesser interests (e. g., authorities to prospect for minerals)."

That was it. No elaboration. Australia's two greatest export industries have been trying ever since to fill in the gaps.

The *Mabo* judgment left such a mess that it was imperative we should have a *Native Title Act*, so we got one. Given that we were trying to settle a two hundred year old problem which went to the core of race relations in Australia, it would have been nice if the legislation had been the intellectual product of our best statesmen, Aboriginals, anthropologists and lawyers.

Instead we got a political compromise cobbled together in the backrooms of Canberra, where no fewer than three groups of professed Aboriginal representatives were arguing with each other. The main motivation of our (then) Prime Minister was not to reconcile the tribes of Australia (he

couldn't even reconcile the three teams of spokesmen), but to build a monument for himself in the Year of the Indigenous People. As the year was fast running out, it was speed rather than justice or statesmanship that prevailed, and the *Native Title Act* was rammed through a tired Senate on Christmas Eve. Against some stiff opposition, it remains the worst Act I have ever read in terms of plain workability.

The one certainty that the Act was supposed to achieve was the extinguishment of native title on pastoral leases, and it didn't even do that.

That particular point was referred back to the High Court, who came down with five *Wik* judgments. The key one, written by Mr Justice Toohey, said that the grant of pastoral leases did not necessarily extinguish native title. Where there was an inconsistency between the rights and interests of native title holders and those of the lessee, the lessee's rights must prevail.

Ah! But how do we know whether native title has been extinguished? What are the tests? Toohey says:

> "Whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established."

This really is not being very useful. Having invented an entirely new form of property title in Australia, the Court keeps resiling from any definition of what it is.

Taken to its logical extreme, the proposition is that every property title in Australia must remain in limbo while we wait for the High Court to hand down its Delphic decisions at the rate of one property every three years.

To me, the most disturbing thoughts in this volume were those of Roger Sandall on the Ditch between tribalism and civilisation. (As a footnote I must add that I think Karl Popper is a philosopher whose time has come, and I have been particularly persuaded of this by some of the writings of George Soros on the Open Society, but I'll spare members my thoughts on that today.)

Returning to the Ditch between tribalism and civilisation, it has been a policy followed by all complexions of Australian governments over the past two decades that Aboriginals should be re-united with their land. Native title could be regarded as merely the latest manifestation of this philosophy.

We now have a debate raging about native title, generating more heat than light. As Aboriginal land policies have now been pursued for more than 20 years, perhaps it is time we looked at what is actually happening.

I believe we can afford to be brave where Aboriginal policy is concerned, because I do not believe any policy mix could deliver a worse result than we have at present. We have raised the hopes of Aboriginals without delivering much effective benefit to the great bulk of them. Several are frustrated and embittered. Their representatives are becoming strident and encouraging increasing militancy. Billions of dollars have been spent on welfare and advancement programs over the past decade, but any television crew who wants to find a group of Aboriginals living in abject poverty can do so with very little trouble.

On the other side, many rural whites are embittered by what they see as bias in favour of Aboriginals. The policies have resulted in divisiveness and hostility on both sides without markedly improving the lot of Aboriginals.

The chattering classes of Paddington and Carlton may well have expunged their own middle-class guilt by giving a form of land title to Aboriginals. But what happens next? The chattering classes probably imagine that the Aboriginals return to their native land and spend their time

communing with their dreamtime spirits, or carving boomerangs for tourists or acting as tour guides.

In a few cases, this is so. But for the great majority of Aboriginals who adhere to "their" land, they are simply living in rural squalor. By the standards of the rest of Australia, their health is poor, their education is poor, their truancy rates are high and their unemployment rates are high. Of those that are employed, many are on the lowest wages in Australia and are employed merely in looking after the basic needs of their own community. Few have what the rest of Australia would regard as career jobs.

I would defer to Graeme Campbell as a far greater expert than I on this subject, but in my opinion the Aboriginals who live in groups of around a couple of hundred each in communities scattered throughout the remote areas of Australia are not catching up to the rest of Australia, they are falling behind. For them the Ditch is widening. The cost of servicing them is enormous already, and in the absence of any change in the present system, that cost is likely to grow as their numbers increase.

In an era when technology is advancing apace, and when it is more vital than ever for Australians to be better educated and at the cutting edge of global changes, a group of Australians are being left behind and for them the Ditch is widening. Sure, you can give them the Internet, but it's not much use to a kid who's functionally illiterate.

It's only my opinion, but I believe it is high time we questioned the economic *and* social utility of settling small groups of Aboriginals in scattered remote areas. They are costly to maintain, but I for one would be prepared to bear the expense if there were some sign that Aboriginals were benefiting by becoming more self-reliant and economically independent.

I'm a friend of John Moriarty -- probably the most successful Aboriginal businessman in modern Australia. He comes from Borroloola. All year he works at his design business, which used to be based in Adelaide but has recently moved to Sydney. Four times a year he has to attend ceremonies in Borroloola, so he loads his wife and children into the four-wheel drive and off he goes. He stays in touch with all the members of his tribe, his children are fully aware of their culture, ancestry and people. Then he comes back to Sydney and designs fabrics or goes overseas to Tokyo or Paris to sell them.

Maybe that gives us a clue as to where the future should be.

The concept of native title having been established, it cannot be taken away. But should that -- and other land grants to Aboriginals -- always lead to the establishment of mendicant communities? If the land and the culture is valuable, could it not be maintained by small groups of elders or custodians, and the rest of the people be encouraged to take their part in mainstream Australia?

That took me a long way from upholding the Constitution, I'm afraid, but I commend the Society for maintaining intellectual rigour in Australian debate, and I commend (and launch) the book as highly desirable reading.

Appendix II

Contributors

1. Addresses

Pastor Paul ALBRECHT, AM was educated at Emmanuel College, Adelaide and Emmanuel Seminary, Adelaide. He was ordained in the Lutheran Church in 1956 and took up appointment in the Finke River Mission in Central Australia in 1957, becoming Field Superintendent of the Mission (1963-83). During this time he was awarded a Churchill Fellowship (1969-70), which he spent at the Tata Institute of Social Science, Bombay. Since 1983 he has devoted his time to literacy and translation work (being fluent in the Western Arrarnta Aboriginal language) and the training of Aborigines for the Ministry. His translation of the New Testament, and extensive selections from the Old Testament, were published by the Bible Society in 1997.

The Hon. Richard COURT, MLA was educated at Hale School, Perth and the University of Western Australia. After graduation (B.Comm) he spent a year in the USA as a management trainee with the Ford Motor Co. in 1969; was the proprietor of two small businesses in Perth from 1970 through 1982; and then became, in 1982, the Liberal Party Member for Nedlands in the W.A. Legislative Assembly. He held a number of shadow portfolios in Opposition (Small Business; Resources Development; Mines, Fuel and Energy; the North West and the Goldfields) during the period 1986-93, and was Deputy Leader of the Liberal Party during 1987-90. In 1992 he became Leader of the Opposition, and following the State election of February, 1993 he became Premier (and Treasurer) of Western Australia, being re-elected in December, 1996.

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 *Succession: The Ultimate States' Right* (1986) and *Australian Federation: Towards the Second Century* (ed.) (1991).

Dr Stephen DAVIS was educated at Parramatta High School and the University of Melbourne (MA, 1985; PhD, 1990). During 1981-92 he worked as a consultant investigating and documenting Aboriginal sites and land and sea tenures. Since 1992 he has been Group Geographer for WMC, with oversight of all indigenous related matters throughout the Corporation's global operations. He is the author of numerous articles in Australian and international journals, as well as six books, and the published map of *Australia's Extant and Imputed Aboriginal Boundaries.*

Professor David FLINT, AM was educated at Sydney Boys High School, at the Universities of Sydney (LLB, 1961; LLM, 1975) and London (B.Sc.Econ, 1978), and at L'Université de Droit, de l'Économie et des Sciences Sociale, Paris (DSU, 1979). After admission as a Solicitor of the NSW Supreme Court in 1962, he practised as a solicitor (1962-72) before moving into University teaching, holding several academic posts before becoming Professor of Law at Sydney University of Technology in 1989. In 1987 he became Chairman of the Australian Press Council, and in 1992 Chairman of the Executive Council of the World Association of Press

Councils. Since October, 1997 he has been Chairman of the new Australian Broadcasting Authority. He is the author of numerous publications and in 1991 was honoured as World Outstanding Legal Scholar by the World Jurists Association. In 1995 he was made a Member of the Order of Australia.

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.

The Rt Hon Sir Harry GIBBS, GCMG, AC, KBE was educated at Ipswich Grammar School and Emmanuel College at the University of Queensland (BA Hons, 1937; LLB, 1939; LLM, 1946) and was admitted to the Queensland Bar in 1939. After serving in the A.M.F. (1939-42) and A.I.F. (1942-45), he became a Queen's Counsel in 1957, and was appointed, successively, a Judge of the Queensland Supreme Court (1962-67), a Judge of the Federal Court of Bankruptcy (1967-70), a Justice of the High Court of Australia (1970-81) and Chief Justice of the High Court (1981-87). Since 1987 he has been Chairman of the Review into Commonwealth Criminal Law and, since 1990, Chairman of the Australian Tax Research Foundation. In 1992 he became the founding President of The Samuel Griffith Society.

The late Professor Austin GOUGH was educated at Xavier College, Melbourne and, after a period editing the *Coonamble Times* and *Walgett Spectator* (1946-52) and as a Commonwealth public servant (1953-60), completed degrees at the Universities of Melbourne (BA Hons, 1960) and Oxford (D.Phil., 1965). After teaching at the University of Warwick (1965-67) and as Reader in History at Monash University (1967-70), he was for 21 years Professor of History (and then Emeritus Professor) at the University of Adelaide (1970-91). He was the author of two books on 19th Century European history and, since 1991, of numerous newspaper and other articles. After having just finished writing the paper which appears in this volume, he died on 28 September, 1997.

Professor Bhajan GREWAL was educated at Raikot High School in the Punjab, India and at the Panjab University, Chandigarh (MA, 1964) and the Punjabi University, Patiala (Ph.D., 1972). After lecturing in Economics at the latter university he was appointed in 1973 to a post in the Centre for Research on Federal Financial Relations at the Australian National University, Canberra. During 1975-83 he lectured in Economics at the James Cook University, North Queensland before joining the Victorian Department of Management and Budget (1983-90) and serving (1990-93) as Director, Revenue and Grants Policy in the Victorian Treasury. Since early 1993 he has held a Chair as Deputy Director of the Centre for Strategic Economic Studies at the Victorian University of Technology. He is the author of six books and many articles on topics in fiscal federalism, taxation and public infrastructure.

S. E. K. Hulme, AM, QC, was educated at Wesley College, Melbourne and at the University of Melbourne (LLB, 1951) and Magdalen College, Oxford (BCL, 1955). He was Rhodes Scholar for Victoria in 1952 and the Eldon Scholar, Oxford in 1955. He was admitted to the Victorian bar in 1953 and at Gray's Inn, London in 1957. Since 1957 he has practised as a barrister-at-law, becoming Queen's Counsel in 1968. He has published in various legal journals, and is a Director of several public companies.

Padraic Pearse McGUINNESS was educated at St. Ignatius College, Riverview and Sydney Boys High School, and at Sydney University (B.Ec.Hons, 1960) and the London School of Economics (M.Sc.Econ, 1967). During 1963-71 he lived in London and Paris, working variously as chief economist for the Moscow Narodny Bank in London, economic consultant to the OECD in Paris, and lecturer in economics at the City University, London. Since returning to Australia his career has been chiefly in journalism, including as economics editor (1974-80), as editor and editor-in-chief (1980-85), and as European editor (1985-87) of *The Australian Financial Review*; as a daily columnist for *The Australian* (1989-94); and since August, 1994 as a public policy columnist for *The Sydney Morning Herald* and (until recently) *The Age*. During 1973-74 he served as senior economic adviser to the then Minister for Social Security, the Hon. Bill Hayden. During 1992-94 he was a member of the Board of the Constitutional Centenary Foundation.

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*.

Trevor SYKES was educated at Adelaide Technical High School. Since joining *The Adelaide Advertiser* as a cadet in 1952 he worked, successively, on *The Sydney Morning Herald* (1959-62 and 1964-65), for Reuters, London (1962-64), the *Sun News-Pictorial*, Melbourne (1965-71), *The Australian Financial Review* (1971-77) and *The Bulletin* (1977-84), becoming editor of the latter in 1980. During 1985-91 he was the executive editor, then editor-in-chief of *Australian Business* before becoming (1991-95) contributing editor of *Australian Business Monthly* and *The Bulletin*. He is the author of six books, including *The Bold Riders* (1994), and has written the "Pierpont" column for many years -- first in *The Australian Financial Review*, later in *The Bulletin* and *Australian Business* and, since 1995, again in *The Australian Financial Review*. He is the winner of a number of national awards for financial journalism.

The Hon. Peter WALSH, AO was educated at Doodlakine School, W.A. and subsequently, while working on the family wheat and sheep farm there, as an external student in Economics at the University of W.A., but did not complete his degree. After seeking election as the Labor candidate for Moore in the 1969 and 1972 federal elections, he was elected as a Senator for W.A. in May, 1974. Between 1977 and 1983 he served as shadow Minister for Primary Industry, for Finance, and for Resources and Energy before becoming, in 1983, Minister for Resources and Energy (1983-84) in the Hawke Government. In 1984 he was appointed Minister for Finance, resigning from that post after the 1990 federal election, and from the Senate in 1993. His memoirs, *Confessions of a Failed Finance Minister*, were published in 1995, and these days he contributes a weekly column to *The Australian Financial Review*.