Chapter One

The Racial Discrimination Act 1975

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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.