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INTRODUCTION

EDDY GISONDA

The Samuel Griffith Society held its thirty-first conference on the weekend of 9 to 11 August 2019, in the city of Melbourne, Victoria.

For the fourth year in a row, it was the best attended conference in the history of the Society, and considerably so.

The conference included papers delivered by an array of speakers not often seen in Australia at the one conference: a former Governor, a Justice of the High Court of Australia, a former Premier, a Justice of the Federal Court of Australia, the nation's pre-eminent historian, a former Justice of a State Supreme Court, a leading constitutional scholar, Solicitors-General, a Senator, a State Parliamentarian, and others.

The Eleventh Sir Harry Gibbs Memorial Oration was delivered by Justice Nettle. Published speeches by his Honour are rare. It was, and is, a marvellous tribute to the Society's inaugural President. The Sir Harry Gibbs Memorial Oration has been transformed into one of Australia's most important lecture series.

The Honourable Alex Chernov, AC, QC is the fourth Governor and fifth Vice-Regal Representative to address the Society. Although the Office is central to our constitutional makeup, there is little modern scholarship on the role of the Governor. His splendid contribution to this volume is learned and sophisticated, and entirely what one would expect from a public servant of such eminence. He also proffers a salient warning to those who would seek to dismantle our current constitutional arrangements. It is essential reading.

Something must be said about the memorable events of Saturday evening, organised as a special tribute to mark the occasion of John and Nancy Stone's ninetieth birthdays. Guests crammed into a normally spacious ballroom, overlooking the bright city lights that speckled the dark skyline of wintery Melbourne. As the rain thundered against the oversized glass-pane windows, and without even a scribbled note at this fingertips, Geoffrey Blainey delivered a masterful after-dinner speech that it is the Society's pleasure to now publish (and see, further, the closing remarks of Ian Callinan, AC, at p. 235).

The Society is of course grateful to each of the other speakers for their contributions to the conference, as well as the chairs of the various sessions over the weekend, including the Honourable Justice Steward and the Honourable Justice Anderson. The Society is further grateful to those who attended the sessions and contributed to lively debate and discussions.

As always, there were many others who contributed to the success of the conference: John Roskam, Kristy Millen, Jeffrey Phillips, SC, Dr Ryan Haddrick, John Pesutto, and Xavier Boffa, among others.

There are now so many young people who attend the conference courtesy of scholarships from generous supporters that it is not possible to list them all. They included Sir Samuel Griffith Scholars, Ian Callinan Scholars, and Mannkal Scholars. Their involvement with the conference contributed to the overwhelming success of the weekend.

Ron Manners again deserves special recognition for his support to the Society and its conferences. So too does the President Ian Callinan AC, the Secretary Stuart Wood, AM, QC, and the other board members as well.

The Sir Samuel Griffith essay competition was won by Catherine Bugler, a law student from Brisbane. The question this year was: 'Which decision of the High Court of Australia in the field of Federalism do you regard as wrongly decided, and why?' As it turned out, more entrants wrote about the *Engineers' Case* than did not, including Ms Bugler. Her essay is published in Appendix 2 to this volume.

This volume concludes (see Appendix 3) with the long overdue publication of Australia Day messages from the Presidents of the Society since 2008. For reference, the messages from 2001 to 2005 are published in Appendix 2 to Volume 17 (2005) and the messages from 2007 and 2008 are published in Appendix 1 to Volume 20 (2008).

The next conference will be held in Sydney.

THE ELEVENTH SIR HARRY GIBBS MEMORIAL ORATION

SIR HARRY GIBBS: A LEGAL CONSERVATIVE

THE HONOURABLE GEOFFREY NETTLE, AC

Next year will mark 50 years since Sir Harry Gibbs was appointed a justice of the High Court of Australia and 39 years since he became its eighth Chief Justice. It has been said that the Court over which he presided bridged the gap between the Barwick Court's conservatism and the Mason Court's progressivism.[1] But the reality is more complex. Certainly, Gibbs steered the High Court away from the Barwick Court's laissez-aller approach to tax avoidance towards a more purposive approach to the construction of revenue legislation. In that sense, it may be said that Gibbs was more 'progressive' than Barwick. But in other respects, particularly States' rights and federalism, Gibbs was more 'conservative' than Barwick. His judgment in the *Payroll Tax Case*[2] being a good example.

Gibbs has been described as a *legal* conservative: by his detractors, as a mark of disdain of what they perceive to have been his lack of jurisprudential innovation,[3] and, by his admirers, in recognition of Gibbs' insistence that 'the law is more important than one's personal preferences and that the hard logic of legal principle should not be overborne by sociological considerations'.[4] The latter view of him is the more accurate. As one of Gibbs' most informed and eloquent admirers observed, Gibbs had in the highest degree two qualities essential to a great judge: 'total commitment to legal principle and a positive inability to compromise once persuaded what the law requires'.[5] But even that description is not entirely accurate nor sufficient to reflect the full extent of Gibbs' contribution.

Gibbs was unquestionably a Queen's man: an influential advocate of what he conceived to be the unparalleled advantages of Australia's constitutional monarchy,[6] and a distinguished member of the Privy Council.[7] He was also a strong adherent to Privy Council precedent and, more generally, a strong proponent of the special worth of English authority. As he observed[8] in an address delivered to the Queensland Bar in 1983, although it had become fashionable at that time 'to comb the law reports of the common law world for authorities' and 'to treat decisions of the English courts as entitled to no greater deference than those of other common law countries', it was to be remembered 'not only that England is the source of our law but also that most of the judges of the English courts have a distinction in the law which was not always uniformly attained on benches elsewhere'.

For a man of Gibbs' generation and experience, it is unsurprising that his intellectual and patriotic sympathies remained to some extent bound to the Privy Council and more generally to England. After all, he was born in 1917, when Australia was still very British, and he served with distinction during World War II.[9] But Gibbs was also a judge like a number of others of his age who appreciated the great importance of Australia's increasingly independent post-war legal identity, and he embraced it. In that respect, he was not unlike his predecessor, Sir Garfield Barwick, albeit that, in other respects, each man was the antithesis of the other.

I THE ABOLITION OF APPEALS TO THE PRIVY COUNCIL

In 1968, the Commonwealth Parliament passed the *Privy Council (Limitation of Appeals) Act 1968* (Cth) which restricted the right of a litigant to seek special leave to appeal from a decision of the High Court to the Privy Council to matters in

which the High Court's decision was given on appeal from a decision of the Supreme Court of a State, otherwise than in the exercise of federal jurisdiction, and which did not involve application or interpretation of the Constitution, a law of the Commonwealth Parliament or an instrument made under a law of the Commonwealth Parliament.

Seven years later, the *Privy Council (Appeals from the High Court) Act 1975* (Cth) extended the restriction to all decisions of the High Court, including its decisions involving only State law. But it was not until the passage of the *Australia Act 1986* (Cth), a decade later, that the right of appeal from a State Supreme Court to the Privy Council was finally abolished.

In 1973, in the midst of the Bjelke-Petersen government's resistance to what it perceived to be the improper encroachment of the Whitlam government's policies on States' rights, the State of Queensland enacted the *Appeals and Special Reference Act 1973* (Qld). By that legislation, Queensland purported to provide that it should be lawful for the Attorney-General of the State of Queensland to apply to the Supreme Court of Queensland for a certificate that any *inter se* question or matter of the kind specified in s 3 of the Act was one which, by reason of its great general or public importance or otherwise, ought to be referred to the Privy Council, whereupon it would be referred to the Privy Council for decision. The Commonwealth challenged the validity of the Act and, in what came to be known as the *Queen of Queensland case*, the High Court held it to be invalid. Gibbs J, with whom Barwick CJ, Stephen and Mason JJ agreed, delivered the leading judgment. Gibbs J concluded that the legislation was invalid because, in face of s 74 of the *Constitution* (which provides for the High Court to grant a certificate to enable an inter se question to be referred to the Privy Council for decision),

the 'legislation would be contrary to the inhibitions which, if not express, are clearly implicit in Ch III of the *Constitution*'.[10]

Significantly, however, his Honour also added that, subject to special considerations, the 'limits of Commonwealth and State powers, having a peculiarly Australian character, and being of fundamental concern to the Australian people, should be decided finally in this Court.'[11]

Arguably, as Michael Kirby has since observed, Gibbs J's judgment in *Queen of Queensland* was not what one might have expected in view of Gibbs' States' rights-based approach to federalism.[12] It was, however, entirely consistent with Gibbs J's later judgment in *Viro v The Queen*[13] that, in view of the *Privy Council (Appeals from the High Court) Act 1975*, the Privy Council was no longer at the apex of a hierarchy of courts of which the High Court was a member; and it was consistent with the fact that, throughout the decade that separated enactment of the *Privy Council (Appeals from the High Court) Act 1975* and the *Australia Act 1986*, Gibbs was publicly, highly critical of the continuing existence of direct rights of appeal from State Supreme Courts to the Privy Council.

For example, in his speech on the State of the Australian Judicature delivered in Hobart at the Australian Legal Convention in 1981, Gibbs CJ forcefully reemphasised concerns earlier expressed by Sir Garfield Barwick in addresses in 1977 and 1979 about the existence of potential for 'conflict' between jurisdictions and the embarrassment and inconvenience likely to result if State courts were faced with conflicting decisions of the High Court and the Judicial Committee. Gibbs CJ branded the right of appeal to the Privy Council as a 'relic of Empire' which was 'now anomalous and anachronistic'[14] and said that:[15] 'Although I would in many ways sincerely regret the breaking of this tie with the nursery of our laws, the present situation can

hardly continue for long.' Gibbs also queried why no practitioners had yet challenged the constitutional validity of the continuing availability of the right of appeal as no longer possessing the necessary connection to State appeals under s 51(xxxviii) of the *Constitution*.[16] In passing, one may wonder what would be said today if the present Chief Justice issued an invitation to the profession to bring on a comparable Constitutional challenge.

To similar effect, in an address entitled 'The State of the Australian Judicature' in 1983, Gibbs spoke disapprovingly of:[17]

> [O]ne case which came before my Court this year, [in which] the Court of Appeal of New South Wales had held that exemplary damages could be awarded to the plaintiff, but had reduced the amount of damages awarded by the trial judge. From this decision, the plaintiff ha[d] appealed to my Court on the ground that the damages awarded are inadequate but the defendant ha[d] sought leave to appeal to the Judicial Committee on the ground that no exemplary damages can as a matter of law be awarded.
>
> In another case, where three actions, involving common questions of law, were heard together in the Supreme Court of Queensland, and where one judgment was given in respect of the three cases, one of the actions ha[d] been brought on appeal to my Court and the others ha[d] been taken on appeal to the Judicial Committee. There is at least one other pending case in which one party is seeking to appeal to the Judicial Committee and the other to the High Court.

Gibbs CJ proclaimed that this 'anomalous position should not be allowed to continue' and that '[i]t is to be hoped that the reports are correct that legislation will soon be introduced as a

result of agreement between the United Kingdom, the Commonwealth and the States to abolish these appeals'.[18]

In a further speech given in 1983, entitled 'The High Court Today', Gibbs criticised the fact that some appeals to the Privy Council could be taken as of right. In his view, a test based on the amount of money at stake was not satisfactory[19] and the 'obvious alternative' was to provide that no appeal should lie except by special leave.[20]

A year later, in an address to the Lord Denning Appreciation Society, Sir Harry again took aim at the continuance of the right of appeal to the Privy Council, which he deprecated as a 'jurisdiction in relation to Australia [that] is difficult to explain to foreigners or to reconcile with our pretensions to independent nationhood',[21] and he once again emphasised the practical difficulties, as well as the legal precedential difficulties, which he said it created:[22]

> It is by no means uncommon now for a litigant dissatisfied with a decision of the Supreme Court to lodge simultaneous applications for leave to appeal to the High Court and to the Privy Council. In one case which came before us, *Caltex Oil (Aust) Pty Ltd v XL Petroleum (N.S.W.) Pty Ltd* (1984) 58 ALJR 38, one of the two parties to a decision of the Supreme Court of New South Wales instituted an appeal to the High Court and the other sought leave to appeal to the Privy Council. The High Court held that the appellant was entitled as of right to appeal to the Privy Council, but that the High Court should nevertheless proceed to hear the appeal brought before it. In the end, the entire proceedings were heard in the High Court. In another case, *Attorney-General v Finch*, a person convicted of murder in the Supreme Court of Queensland had made application to the High Court for special leave

> to appeal which was refused. Some years later he sought to seek leave to appeal to the Privy Council from the decision of the High Court refusing him special leave. The High Court held that it was not competent for him to do so, and restrained him from proceeding with his application: (1984) 58 ALJR 50. Then he sought leave to appeal to the Privy Council directly from the decision of the Supreme Court. The High Court held that the fact that it had already refused him special leave to appeal from that decision did not preclude him from making the application to the Privy Council. He made the application, but it was dismissed on its merits.

The following year, Gibbs CJ remarked, acerbically, as Priestly JA of the Court of Appeal of the Supreme Court of New South Wales had previously observed, 'that New South Wales case law [was as a result] growing relatively more quickly in London than in Canberra'[23] and Gibbs observed, with apparent disdain, that litigants from Western Australia — previously no great clients of the Judicial Committee of the Privy Council — evidently found it cheaper and more desirable to appeal from a single judge direct to London than to the Full Court of the Supreme Court of Western Australia and then to the High Court.[24]

Even in 1985, some three years after the Commonwealth and State governments had reached agreement with the United Kingdom government to remove all rights of appeal to the Privy Council, Sir Harry said[25] in his speech entitled 'The State of the Australian Judicature' that he 'felt it necessary to point to the difficulty and inconvenience of the present situation, because progress in this matter has been so slow that one feels that not all of those concerned understand the urgency of the need to close this chapter in our judicial history.'

II THE INTRODUCTION OF THE REQUIREMENT FOR SPECIAL LEAVE

Many in the legal profession did not share Gibbs' view that it was necessary or desirable to abolish rights of appeal to the Privy Council. To some it also presented as paradoxical that, even as Gibbs was striving for abolition of rights of appeal to the Privy Council, he was pushing hard for the divestiture of large parts of the High Court's original jurisdiction and the introduction of a requirement for special leave to appeal to the High Court. In that respect, however, Gibbs was once again like his predecessor, Barwick, with whom those proposals had originated, although not entirely. Gibbs' view of the matter was more States-oriented than that of his predecessor.

Barwick CJ had first formulated the idea of a special leave requirement in his capacity as Attorney-General in the early 1960s, as part of a plan to establish a Federal Superior Court. After his appointment as Chief Justice in 1964, he published an article in the *Federal Law Review* which explained that:[26]

> [T]he basic objective in proposing a new federal superior court was to free the High Court of Australia, as of this time but particularly for the future, for the discharge of its fundamental duties as interpreter of the *Constitution* and as the national court of appeal untrammelled by some appellate and much original jurisdiction with which it need not be concerned.

Barwick considered that the right of appeal to the High Court should be by leave only[27] in order to ensure that the 'High Court of Australia may move into a new phase of development as the court mainly of ultimate resort in Australia'.[28] Gibbs was of the same view, and, following his appointment as Chief Justice in 1981, campaigned hard in support of it until his objective was

achieved by the passage of the *Judiciary Amendment Act (No 2) 1984* (Cth).

It is, however, a mark of the profession's opposition to the idea that, upon the passing of the amending Act, the editors of the *Australian Law Journal*, after quoting Senator Peter Durack's statements in the Senate that the Act was to implement a very significant change in the future role of the High Court, wrote[29] that:

> It is a moot question indeed whether so radical a modification of the functions of the High Court as an appellate tribunal under s 73 of the *Constitution* was intended by the Founding Fathers of that instrument, or by the Federal Parliament which in 1903 debated the Bill which eventually became the *Judiciary Act 1903* (Cth) ... The citizens of this nation have thus been deprived of a traditional right to appeal to the High Court as of right, regardless of the cogency of the arguments for this measure, and this deprivation has certainly not been received with enthusiasm by the legal profession as a whole in Australia.

Gibbs was unmoved. In his 1984 address to the Lord Denning Appreciation Society, he stated that the High Court, as distinct from the United States Supreme Court, which had to accept the law as laid down by the Supreme Courts in State matters, 'has played a significant part in bringing about a unity not only of the law but of the nation'[30] and that:[31]

> The Court therefore unanimously urged the Attorney-General to amend the law to provide that appeals from the Supreme Courts and from the Federal Court could be brought to the High Court only by special leave. The Law Council of Australia strongly opposed this change, but fortunately the Attorney-General

> supported it, and introduced legislation which was passed by the Parliament earlier this year.

Likewise, in his 1985 'The State of the Australian Judicature' address, Gibbs stated that:[32]

> Turning now to my own Court, a welcome reform was made last year, when finally it was enacted that no appeal could be brought to the High Court except by special leave. When I describe that as a welcome reform, I mean that it was welcomed by the members of my Court, for some sections of the Bar opposed it and perhaps still regret it.
>
> Nevertheless, it was a necessary and logical reform — necessary to prevent the High Court from being overburdened with cases of no real importance, and logical, because in a well ordered judicial system it is enough to allow one appeal as of right, with the safeguard of a further possible appeal by leave in appropriate cases.

Gibbs followed that with a comparison to the workload of the House of Lords, and the Supreme Court of the United States.[33]

As has been observed, however, Gibbs was more States-oriented than Barwick, and so rejected the idea of a Federal Court, as opposed to State courts, exercising federal jurisdiction. Initially, Gibbs' objections appeared modest. On accepting the commission as Chief Justice, he spoke in his acceptance speech of the jurisdictional issues facing the Supreme Court and the Federal Courts:[34]

> It is unfortunate that in some respects the boundary line between the jurisdiction of Federal Courts on the one hand, and State Supreme Courts on the other, remains ill-defined, because no legal proceedings are more futile and unproductive than disputes as to jurisdiction. It may not be too much to hope that it

> will not be beyond the capacity of the Commonwealth and the States, acting in conjunction, with a view to advancing the public interest, rather than in any attempt at self-aggrandisement, eventually to integrate both Federal and State courts into one harmonious system.

In later speeches, his observations became more strident. He referred to the establishment of the Federal Court of Australia to exercise federal jurisdiction as unnecessary and described the jurisdictional clashes between the Federal and State courts as 'reminiscent of the Middle Ages'.[35] He commented that '[t]he scope of the accrued jurisdiction (by which, by that stage, the Federal Court had unilaterally, greatly expanded its jurisdiction) ha[d] been said to be a matter of impression and practical judgment — hardly a precise delimitation of jurisdiction'.[36] And he castigated the idea of establishing an integrated Australian Court of Appeal as one that 'baffles the imagination to discover any good reason why the creation of a new court should assist in resolving the jurisdictional conflicts between two other courts'.[37]

III Resolving Clashes Between Concurrent Appeals to the High Court and the Privy Council

Ironically, given the force and nationalistic zeal with which Gibbs opposed the retention of Privy Council appeals, and went about ensuring that the High Court became Australia's ultimate court of appeal, his Honour had the highest regard for Privy Council authority and viewed it as vital that, generally speaking, judges should follow and apply the principles established by courts of the requisite authority. And as Gibbs revealed in his address to the Queensland Bar in 1983,[38] his reasons for that approach were conservative. As he said: 'we cannot all hope to

match the combined wisdom of our predecessors', and 'courts which are too prone to overrule their own decisions are likely to lose public confidence'. In Gibbs' view,[39] adherence to precedent was 'particularly important in the fields of commercial, fiscal and property law ... so that people may arrange their affairs with some degree of confidence'.

That is not to say that Gibbs' version of legal conservatism was inflexible. Plainly, he was mindful of the need to reconcile the requirement of certainty with the attainment of justice in a given case, and, as he said, well aware that unfairness may sometimes result as much from the application of settled principle as from the application of a principle developed for the first time.[40]

Consequently, Gibbs' technique of judicial reasoning was one of conservative incrementalism: a careful case-by-case approach to the development of principle which, as has been said, enabled new aspects of a given legal problem quietly to be accommodated and the unsatisfactory features of a past decision quietly to be modified.

Upon Gibbs' retirement as Chief Justice in 1987, one commentator posited that, if there were 'any discernible weakness in [Gibbs'] formidable judicial armoury, it lay in the field of equity and equitable practice.'[41] Given the command of equitable principle which Gibbs demonstrated, for example, in *Simpson v Forrester*,[42] *Consul Developments Pty Ltd v DPC Estates Pty Ltd*,[43] *Regent v Miller*[44] and *Delehunty Carmody*,[45] that suggestion appears doubtful. Possibly, Gibbs' approach to the notion of a remedial constructive trust in *Muschinski v Dodds*[46] reflected a degree of strict adherence to precedent that a more incisive appreciation of equitable principle would have surpassed. Although English authority at that time was against the notion of a constructive trust based on a common intention

ascribed to the parties by operation of law,[47] as Deane J demonstrated[48] a synthesis of established rules of equity disclosed two general principles of equity: that constructive trusts may be imposed to prevent unconscionable retention of property; and that retention of contributions to a failed joint relationship or endeavour is unconscionable. Hence, as was subsequently accepted by a unanimous High Court in *Baumgartner v Baumgartner*,[49] a remedial constructive trust can give effect to a common intention imputed to the parties by operation of law in such circumstances.

If Gibbs were at all 'weak' in equity, however, he was second to none in the fields of crime and tort, and, ultimately, he brought to the process of statutory interpretation a degree of leadership which still informs the way in which the High Court goes about that task. The strength of Gibbs' adherence to precedent and his predilection for incrementalist development of legal principle were instrumental in his achievements in those respects.

IV CRIME

In crime, Gibbs regarded adherence to precedent as necessary to secure what he described as 'that essential element of certainty which in civil law countries is given by the codes'. His judgment in *Viro v The Queen*,[50] concerning the doctrine of excessive self-defence manslaughter, which entailed the reconciliation of previously expressed divergent views of the Privy Council and the High Court in *R v Howe*[51] and *R v Palmer*,[52] demonstrates the point.

As is now generally accepted,[53] the doctrine was first articulated in Australia in the mid-1950s, in *R v McKay*.[54] McKay had been convicted of murder after firing a shotgun at

an intruder that caused the intruder to die. On appeal against conviction, Lowe J of the Victorian Full Court enunciated[55] six propositions which, he reasoned, were sufficient to test the cogency of the trial judges' directions. The sixth was that:

> If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter - not murder.

McKay's conviction was, however, upheld, and, despite significant public criticism and media commentary regarding the convictions,[56] the High Court refused McKay leave to appeal. But in the following year, in *R v Howe*,[57] the High Court expressly approved[58] Lowe J's sixth proposition and thus the doctrine of excessive self-defence manslaughter was authoritatively established in this country.

Conceivably, it would not thereafter have been questioned had it not been for the Privy Council's subsequent rejection of it, in 1971, in *Palmer v The Queen.*[59] In delivering the judgment of the Privy Council, Lord Morris of Borth-y-Gest held[60] that, contrary to *McKay* and *Howe*, the correct statement of the law was that '[t]he defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected.' As a result, in *Viro* it fell to the High Court to determine whether the Court should follow its previous recognition of the doctrine in *Howe* or follow the Privy Council's subsequent rejection of it in *Palmer*.

That necessitated consideration, first, of whether the doctrine of precedent bound the High Court to follow the Privy Council's later decision in *Palmer*; and, secondly, if the High Court were not so bound, which of the competing positions was the correct.

The High Court were unanimous in holding that the abolition of Privy Council Appeals by the *Privy Council (Appeals from the High Court) Act 1975* (Cth) had secured the High Court's position as the ultimate court of appeal in all cases coming before it and, therefore, that the High Court was *not* bound by the Privy Council's decisions.[61] As Gibbs J explained, that was the result of a simple syllogism: the major premise being the English rule that 'every court is bound to follow any case decided by a court above it in the hierarchy',[62] and the minor premise being that the Privy Council no longer occupied a position above the High Court in the judicial hierarchy. But significantly, Gibbs J also emphasised that the High Court's new function as the ultimate Australian court of appeal both reflected and contributed to an emergent Australian legal identity. As his Honour said:[63]

> Part of the strength of the common law is its capacity to evolve gradually so as to meet the changing needs of society. It is for this Court to assess the needs of Australian society and to expound and develop the law for Australia in the light of that assessment. It would be an impediment to the proper performance of that duty, and inconsistent with the Court's new function, if we were bound to defer, without question, to every judgment of the Privy Council, no matter where the litigation in which that judgment was pronounced had originated, and even if we considered that the decision was inappropriate to Australian conditions or out of harmony with the law as it had been developed, and was being satisfactorily applied, in Australia.

That said, the High Court was divided as to whether to follow *Howe* or *Palmer*. Stephen, Mason and Aickin JJ preferred[64] the High Court's previous decision in *Howe*. Jacobs J expressed[65] what has been described extra-curially as a 'somewhat divergent view', but which was probably 'closer to [...] *Howe* than [...] *Palmer*'.[66]

Murphy J was also conceptually closer to *Howe*[67] but, since his Honour's approach more generally to the law of self-defence was to abandon the objective limb of it in its entirety,[68] it effectively excluded any conception of *excessive* self-defence. Gibbs J took a different view. Despite his Honour's conclusion that the Court was not bound by the Privy Council's decisions, he considered that *Palmer* was correct in principle and so should be preferred.[69] He criticised *Howe* as 'obscure',[70] '[un]sound in legal theory',[71] 'likely to lead a jury to confusion and error',[72] and as likely to 'invite the possibility of a compromise verdict of manslaughter'.[73] Interestingly, Barwick CJ, writing separately, in substance agreed[74] with Gibbs J.

Gibbs' exposition of principle in *Viro* was, with respect, surely correct. But what perhaps most distinguished Gibbs J's judgment from the others was the concern that Gibbs demonstrated for the certainty of precedential effect. Given that there were only three clear adherents to the holding in *Howe*, there might have been a real question as to the status of *Viro* as authority for either position.[75] But in a passage of Gibbs J's judgment which bespeaks recognition of the need to reconcile the requirements of certainty with flexibility in order to attain justice, his Honour concluded:[76]

> [S]ince writing the foregoing I have had an opportunity to read the reasons prepared by the other members of the Court. It is apparent that we hold diversity of opinions. It seems to me that we would

> be failing in our function if we did not make it clear what principle commands the support of the majority of the Court. The task of judges presiding at criminal trials becomes almost impossible if they are left in doubt what this Court has decided on a question of criminal law. In the present case the view which appears to have more support than any other is that we should accept as correct the statement of Dixon CJ in *R v Howe*. Contrary to my personal opinion, but in a desire to achieve a measure of certainty, I am prepared to agree.

Ultimately, Gibbs J's (and Barwick CJ's) preference for *Palmer* was vindicated a decade later, in *Zecevic v DPP*,[77] when a majority of the High Court (including Mason CJ) concluded that the doctrine of excessive self-defence as recognised in *Howe* had created significant difficulties for trial judges and juries, and, on that basis, determined[78] that the law on the topic should conform to *Palmer*.[79]

Viro also entailed a second issue as to whether the trial judge had erred in failing to direct the jury that the accused's intoxication by heroin was irrelevant to the assessment of the accused's capacity to form a murderous intent.[80] Gibbs J held[81] that the judge was in error because the crime with which Viro was charged was a crime that entailed a specific intent and the possibility of intoxication by heroin was thus relevant to the jury's assessment of whether Viro was capable of forming that intent. In reasoning to that conclusion, Gibbs J emphasised[82] the correctness of the Privy Council's decision in *DPP v Majewski*[83] as to the distinction between crimes of basic and specific intent and that, short of intoxication amounting to incapacity, intoxication was not a defence to an offence of basic intent. Strictly speaking, since *Viro* involved a crime of specific intent, it was unnecessary for the High Court to pass upon the

correctness of *Majewski*. But such was the strength of Gibbs J's analysis that the weight of contemporaneous academic commentary regarded it as having validated *Majewski.*[84]

Gibbs J later had the opportunity to conduct a thoroughgoing defence of *Majewski* when the issue of intoxication in crimes of basic intent squarely arose for consideration in *R v O'Connor*.[85] Despite Mason and Wilson JJ agreeing with Gibbs J, however, a majority of the Court concluded that evidence of voluntary intoxication was relevant and admissible irrespective of whether the crime was one of basic or specific intent. But Gibbs J's approach was in a sense one again later vindicated by the subsequent enactment of legislation to give effect to it in most Australian jurisdictions.[86]

V TORT

In the law of torts, Gibbs' conservative, incrementalist approach to authority is perhaps best illustrated by his seminal decisions in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstadt"*[87] and *Shaddock Associates Pty Ltd v Parramatta City Council (No 1)*.[88] Each involved the ancient exclusionary rule, emphatically stated[89] in *Cattle v Stockton Waterworks Co*, that damages are generally not recoverable for economic loss not intended or consequential upon injury to another's person or property. Shortly before *Caltex Oil* was decided, the House of Lords had famously laid down, for the first time, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[90] that a negligent misrepresentation may give rise to an action for damages for financial loss. The issue of principle which thus presented in *Caltex Oil* was whether the exclusionary rule survived *Hedley Byrne* and, if so, whether any exception might apply to negligent acts.

As Gibbs J observed,[91] *Hedley Byrne* could be understood as merely recognising an exception limited to negligent misrepresentations, as distinct from negligent conduct. But as his Honour reasoned,[92] that would be a 'surprising result' given that it is frequently not easy to decide whether a particular act of negligence can properly be described as a negligent misstatement or negligent misconduct. Gibbs J accepted[93] that it was still right to say that, as a general rule, damages were not recoverable for pure economic loss, but he also recognised that there are 'exceptional cases' where a defendant has 'knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of [the defendant's] negligence', and thus that the defendant will owe a duty to take care. Gibbs J added,[94] in emphasis of the incrementalist nature of his conclusion, that it was 'not necessary, and would not be wise, to attempt to formulate a principle that would cover all cases in which such a duty is owed', and that, in the words of Lord Diplock in *Mutual Life & Citizens' Assurance Co Ltd v Evatt*, '[t]hose will fall to be ascertained step by step as the facts of particular cases which come before the courts make it necessary to determine them'.[95]

In *Shaddock,* Gibbs returned to the subject of pure economic loss in the context of negligent misstatement. Extending but qualifying his earlier analysis in *Caltex*, Gibbs acknowledged three 'obvious differences between negligent words and negligent acts', that words cause loss not by themselves, but because others rely upon them; that people speak less carefully in social or informal contexts than in professional or business contexts; and that words may be circulated, raising the spectre of indeterminate liability. His Honour then proceeded to relate those differences to what he described as the 'general principles'

(in contrast to 'hard and fast rules') in *Hedley Byrne* and *Evatt*, according to which liability for negligent misstatement turns on the defendant's knowledge and the objective reasonableness of the plaintiff's reliance.

As Gibbs CJ observed, in *Evatt* a majority of the Privy Council had *further* limited the duty to those who, whether by profession or otherwise, claimed to possess some special skill. In response, Gibbs CJ referred to academic and judicial criticism of that view; observed that the High Court, unlike the Court of Appeal of New South Wales, was by then free to depart from the Privy Council's view; and expressed his own doubts about its correctness. In the result his Honour concluded that:

> In this branch of the law it seems desirable to follow the example already set by the House of Lords and the Judicial Committee, and to avoid attempting to lay down comprehensive rules but rather to proceed cautiously, step by step. It is unnecessary in my opinion to choose between the conflicting views in [*Evatt*] because even if the views of the majority of the Judicial Committee are accepted, it should in my opinion be concluded that the respondent owed a duty of care to the appellants in the present case.

Although *Caltex Oil* was not immediately well received in England,[96] the High Court has persisted with *Caltex Oil* and *Shaddock* reasoning,[97] and that has proved productive of relative certainty. By contrast, the English courts have retained the *Cattle v Stockton Waterworks* exclusionary rule[98] and yet, apparently, also have now moved more generally away from the application of general principles to an approach of attaching greater significance to established categories or distinct and recognisable situations as guides to the existence, scope and omits of the varied duties of care which the law imposes.[99]

One of the more striking features of Gibbs' reasoning in *Caltex* and *Shaddock* is its disclosure of elements of Gibbs' judicial temperament that, at first blush, appear inconsistent with one another: an inclination towards general principles unfettered by illogical distinctions but, at the same time, an unwillingness to venture beyond the particular facts of the case; a strong commitment to Australian legal independence but, at the same time, a pronounced hesitancy about departing from English authority. As Gibbs might have said, however, it is only by a careful case-by-case approach to the development of legal principle that 'new aspects of a given legal problem [may be] quietly ... accommodated and the unsatisfactory features of a past decision quietly ... modified'. Therein lies the answer.

VI STATUTORY INTERPRETATION

Sir Harry Gibbs' contribution to statutory interpretation is arguably the most significant, and yet, perhaps, the most controversial, manifestation of his legal conservatism. To appreciate why that is so, it is necessary to recall a little of the history of the High Court's approach to s 260 of the *Income Tax Assessment Act 1936* (Cth). A couple of decades ago, that was notorious. Now it is largely forgotten.

In effect, it comprised three stages. The first, which ran between 1921 and 1966, resulted in the development of what came to be called the 'predication test'. The second, which began following the appointment of Sir Garfield Barwick as Chief Justice in 1964, led to the repudiation of most of the previous learning on the subject and culminated in an extreme version of what was called the 'choice principle'. The third, which commenced with the appointment of Sir Harry Gibbs as Chief Justice in 1981, led to a re-engagement with previous

learning and Privy Council authority and the adoption of a purposive approach that today substantially still holds sway in the interpretation of revenue statutes.

In 1957, in *Newton's case*,[100] the High Court, by majority (Dixon CJ, McTiernan, Williams, and Fullagar JJ; Taylor J dissenting), upheld the Commissioner's contention that an elaborate tax avoidance scheme entered into to avoid the payment of Div. 7 undistributed profits tax by companies comprising the Lanes Motors and Melford Motors groups, was annihilated by s 260. In the leading judgment, with which Dixon CJ agreed, Fullagar J traced[101] the course of s 260 authority beginning with the High Court's decision in *Purcell's Case*[102] in 1921, through *Jaques' Case*[103] in 1924, *Clarke's Case*[104] in 1932 and then *Bell's Case*[105] in 1953, and concluded[106] that no other inference was open than that 'the very remarkable series of operations' which had been undertaken in Newton had been 'carried out in pursuance of an arrangement, which had for its purpose the avoiding of a liability to income tax imposed by the Act on persons in the position of [each company] and its shareholders.'

In short, if one could predicate from the very form of the transaction that the transaction had been entered into for the purpose of avoiding tax, s 260 would apply. That was the predication test. *Newton* was argued before the Full Court between May and October 1956 and decided in May 1957. After it had been argued but before judgment was delivered, in December 1956 a Full Court comprised of Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ heard argument in an appeal in *W P Keighery Pty Ltd v Federal Commissioner of Taxation*.[107] There, the Commissioner of Taxation had assessed the taxpayer as a 'private company', and therefore as liable to pay undistributed profits tax: in part on the basis that the

company's issue of redeemable preference shares to 20 persons on terms which enabled the two original shareholders to redeem the preference shares before any general meeting could be called, was a transaction entered into for the avoidance of undistributed profits tax, and so void as against the Commissioner under s 260 of the Act. On appeal to the Full Court, the majority held that it was not.

In a joint judgment of Dixon CJ, Kitto and Taylor JJ, published in December 1957, in effect seven months after the publication of the High Court's judgment in *Newton*, their Honours held that Div. 7 presented a taxpayer with a choice — between remaining a private company liable to undistributed profits tax or converting to a public company which was not so liable — and that s 260 did not apply to render ineffectual the taking advantage of a choice for which the Act provided. That was what came to be called the choice principle:

> Whatever difficulties there may be in interpreting s 260, one thing at least is clear: the section intends only to protect the general provisions of the Act from frustration, and not to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them. It is therefore important to consider whether the result of treating the section as applying in a case such as the present would be to render ineffectual an attempt to defeat etc. a liability imposed by the Act or to render ineffectual an attempt to give a company an advantage which the Act intended that it might be given.
>
> It is the outstanding feature of Div. 7 that it makes a company's liability to be assessed for additional tax depend upon the company's possessing certain characteristics on a particular day, the characteristics being such that whether the company possesses them

> on that day is a matter within the antecedent control of shareholders or other persons interested. ... If they so alter the relevant facts that, when the last day of the year of income arrives, the company will not be a 'private company', their action cannot be regarded as tending to defeat a liability imposed by the Act; it is one which the Act contemplates and allows.
>
> Because this is so, an attempt by the commissioner to rely upon s 260 in the present case in order to avoid only the applications for and allotments of the redeemable preference shares would be an attempt to deny to the appellant company the benefit arising from an exercise which was made of a choice offered by the Act itself. The very purpose or policy of Div. 7 is to present the choice to a company between incurring the liability it provides and taking measures to enlarge the number capable of controlling its affairs. To choose the latter course cannot be to defeat evade or avoid a liability imposed on any person by the Act or to prevent the operation of the Act. For that simple reason the attempt must fail, and the commissioner cannot rely upon s 260 in order to treat as void any more extensive set of facts, for an attempt to do so could not stop short of including the incorporation of the appellant company itself.

The taxpayer in Newton appealed from the High Court to the Privy Council and that appeal was heard in May 1958 and decided in July of the same year. As appears from the reports, Sir Garfield Barwick QC, then leader of the New South Wales Bar, represented the taxpayer and argued[108] that s 260 did not apply because, among other things, its effect had been stultified in 1936 by the insertion in it of the words 'as against the Commissioner', or, if that were not right, the section was

confined to arrangements which attempted to displace an already accrued liability to tax.

The Privy Council rejected[109] both of Barwick's arguments. As to the first, Lord Denning, who delivered the advice of the Judicial Committee, observed that it was plain that the only effect of the 1936 addition to s 260 of the words 'as against the Commissioner' was to overcome the decision in *De Romero v Read* that, without those words, the section also had the effect of avoiding a transaction as between the participants.[110] And as to the second argument, his Lordship remarked presciently, that: '[i]f the submission of Sir Garfield Barwick were accepted, it would deprive the words of any effect: for no one can displace a liability to tax which has already accrued due, or in respect of income which has already been derived'. The better view, as the Privy Council held,[111] was that:

> [T]he word "avoid" is used in its ordinary sense — in the sense in which a person is said to avoid something which is about to happen to him. He takes steps to get out of the way of it. It is this meaning of "avoid" which gives the clue to the meaning of "liability imposed". To "avoid a liability imposed" on you means to take steps to get out of the reach of a liability which is about to fall on you.

The Privy Council also rejected Sir Garfield Barwick's protest, that, if that were so, there would be no end to the reach of the provision, in effect waiving it away with the now-famous pronouncement[112] that:

> The answer to the problem seems to their Lordships to lie in the opening words of the section. They show that the section is not concerned with the motives of individuals. It is not concerned with their desire to

> avoid tax, but only with the means which they employ to do it. …
>
> In order to bring the arrangement within the section you must be able to predicate — by looking at the overt acts by which it was implemented — that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section. Thus, no one, by looking at a transfer of shares *cum* dividend, can predicate that the transfer was made to avoid tax. Nor can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid Div. 7 tax, see *W P Keighery Pty Ltd v Commissioner of Taxation*. Nor could anyone, on seeing a declaration of trust made by a father in favour of his wife and daughter, predicate that it was done to avoid tax, see *Deputy Federal Commissioner of Taxation v. Purcell*. But when one looks at the way the transactions were effected in *Jaques v Federal Commissioner of Taxation*, *Clarke v. Federal Commissioner of Taxation* and *Bell v Federal Commissioner of Taxation* — the way cheques were exchanged for like amounts and so forth — there can be no doubt at all that the purpose and effect of that way of doing things was to avoid tax.

As such, the Privy Council's judgment in *Newton* accorded closely to the predication test established by the previous course of High Court authority including the High Court's decision in *Newton*. The problem with it, however, was that it failed to deal sufficiently with the fact that *Keighery* was not decided on the

basis of the predication test but on the basis of the choice principle. Instead of ruling that *Keighery* was wrongly decided — which arguably it was given that there was nothing in the text or context of the Act that suggested that discrimination between companies was intended to provide an incentive for private companies to convert to public companies — or alternatively, holding that *Keighery* was confined to cases where the Act specifically left open to a taxpayer two alternative courses of which one attracted less tax than the other, Lord Denning characterised[113] *Keighery* as an example of an ordinary business or family dealing of which it could not be predicated that it was entered into for the dominant purpose of the avoidance of tax. Consequently, although, for some time after *Newton* was decided, the High Court applied the predication test as it had been approved in *Newton*, notably in *Hancock v Federal Commissioner of Taxation*[114] and in *Peate v Federal Commissioner of Taxation,*[115] it was left to the High Court to decide how *Newton* could be squared with *Keighery*.

The denouement came in 1971 in *Casuarina,*[116] by which time Sir Garfield Barwick had become the Chief Justice and Sir Harry Gibbs had recently been appointed a Justice. In the leading judgment, Walsh J held[117] that what had been said in *Newton* about the predication test in no way weakened what had been said in *Keighery* about the choice principle. Strictly speaking, that was so. But Barwick CJ then added[118] in more general terms that appear to have been the progenitor of the Court's later emasculation of s 260, that there was 'no room for the application of s 260 where [a] taxpayer ha[d] become liable for the amount of tax appropriate under the terms of the *Assessment Act* to the state of affairs obtaining at the date made relevant by that Act for the ascertainment of the taxpayer's

liability', in effect, the very proposition which the Privy Council had rejected in *Newton*.

In contrast to Walsh J and Barwick CJ, it is apparent from Gibbs J's judgment in *Casuarina* that his Honour was troubled by the artificiality of the preference share issue, and why, therefore, it should not be concluded that s 260 applied to it. But evidently, he was also troubled by the Privy Council's mischaracterisation of *Keighery* as an ordinary business or family dealing of which it could *not* be predicated that its purpose was the avoidance of tax. For as Gibbs J observed,[119] it was plain that the preference share issue in *Keighery* was for the avoidance of tax. Ultimately, therefore, Gibbs J essayed[120] to resolve the problem on the basis that:

> [A]lthough one can predicate that the conversion of a private into a public company was done to escape Div. 7 tax, this does not mean that the purpose or effect of the arrangement was to avoid a liability imposed on the company by the Act, since the Act itself imposes the additional tax payable under Div. 7 only on private companies, and contemplates that companies will, and lawfully may, choose to become public companies within the description of s 103A and so escape liability to pay the tax. It seems to me that the authority of *W. P. Keighery Pty Ltd v Federal Commissioner of Taxation* and *Federal Commissioner of Taxation v Sidney Williams (Holdings) Ltd (No 3)* has not been affected by *Newton v Federal Commissioner of Taxation* or by any subsequent decision.

In the result, Barwick CJ and Gibbs J both reached the same conclusion — that s 260 did not apply — but whereas Barwick CJ's approach was in effect to reject *Newton* in favour of what was characterised as the choice principle established by

Keighery, Gibbs J's more principled adherence to precedent treated *Newton* as establishing a generally applicable ordinary business or family dealing test and *Keighery* as an exception to the general rule limited to the conversion of a private company to a public company for the avoidance of Div. 7 tax. With respect, Gibbs J's reasoning was superior. Although criticised at the time,[121] it better accorded to *Newton* while accommodating the exigencies of *Keighery*.

There then followed, however, a quick succession of three further decisions of the High Court — to none of which Gibbs J was party — which radically expanded the scope of choice principle and rendered s 260 essentially devoid of effect.

The first was *Mullens v Federal Commissioner of Taxation*,[122] which involved a bespoke contrived tax avoidance arrangement to generate deductions under s 77A(3) and (4) in the *Income Tax Assessment Act 1936*. It was held[123] by Barwick CJ and Stephen J, McTiernan J dissenting, that s 260 did not apply, because, according to Barwick CJ, *Keighery* and *Casuarina*, taken in conjunction with Lord Tomlin's dictum in *Duke of Westminster's Case*[124] — that one is entitled so to arrange his affairs as to minimise tax — sustained the conclusion that a taxpayer was entitled to cast a transaction into which he proposes to enter in a form which has taxation advantages without attracting the operation of s 260. Notably, Barwick CJ made no mention of *Newton* or the predication test, despite both being implacably opposed to his conclusion.

The second was the now infamous *Slutzkin v Federal Commissioner of Taxation,*[125] which involved a particularly aggressive form of dividend stripping operation that upon further development later led to the bottom of the harbour schemes ultimately countered in subsequent years by the enactment of the *Taxation (Unpaid Company Tax) Assessment*

Act 1982 (Cth).[126] In *Slutzkin*, Barwick CJ, Stephen and Aickin JJ concluded[127] that s 260 did not apply because, according to their Honours, a taxpayer was quite entitled to choose a form of transaction that will not subject him to tax. Barwick CJ made no reference to authority other than the *Duke of Westminster's Case* and *Europa Oil*.[128] Stephen J referred to no authority at all. Aickin J referred to *Newton* but held, delphically, that it did not apply because the subject transaction was one which, according to the terms of the Act, attracted no tax consequences.[129]

The third case was *Cridland v Federal Commissioner of Taxation*,[130] where the High Court took the further step of discarding *Newton* completely. *Cridland* involved a commercially marketed tax-avoidance scheme designed to provide university students with the benefit of primary producer averaging provisions. A Court comprised of Barwick CJ, Stephen, Mason, Jacobs and Aickin JJ held that s 260 did not apply to it. Mason J, who delivered the principal judgment, with which Barwick CJ expressly agreed, reasoned[131] that that result flowed from *Mullens*:

> Although the very restricted operation conceded to s 260 by the course of judicial decision and the generality of the language in which the section is expressed stand in high contrast, the construction of the section is now settled. …
>
> The distinction drawn by Lord Denning in *Newton v Federal Commissioner of Taxation*, between arrangements implemented in a particular way so as to avoid tax and transactions capable of explanation by reference to ordinary business or family dealing has not been regarded as the expression of a universal or exclusive criterion of operation of s 260. Lord Denning's observations were applied neither in the

> *Mullens Case* nor in the subsequent case of *Slutzkin v Federal Commissioner of Taxation*. …
>
> The transactions into which the appellant entered in the present case by acquiring income units in the trust funds in question were not, I should have thought, transactions ordinarily entered into by university students. Nor could they be accounted as ordinary family or business dealings. They were explicable only by reference to a desire to attract the averaging provisions of the statute and the taxation advantage which they conferred. But these considerations cannot, in light of the recent authorities, prevail over the circumstance that the appellant has entered into transactions to which the specific provisions of the Act apply, thereby producing the legal consequences which they express.

A good deal has been written about the approach in *Cridland*.[132] One view of the decision is that it was a forthright summary of the effect of earlier decisions. Another is that it was a remarkable, unwarranted repudiation of previous Privy Council authority regarding s 260. But that was about to change.

In 1981, Barwick CJ retired as Chief Justice and Gibbs CJ was appointed in his place. Then, in 1985, it fell to the High Court, led by Gibbs CJ, to decide *Gulland, Watson and Pincus*.[133] In its facts, *Gulland* was substantially identical to an earlier decision of the High Court in *Peate*. Dr Gulland, who had practised medicine on his own account, transferred his practice into trusts, of which his wife and children were the ultimate beneficiaries, and entered into a contract to serve as employee of the head trustee.[134] Consistently with *Peate*, the Commissioner had assessed Dr Gulland to pay tax on the basis that s 260 applied to annihilate the trust structure as against the

Commissioner. Understandably, the taxpayer contended inter alia that *Cridland* had changed the position.

The question which was thus presented to the High Court in *Gulland* was whether the choice principle could any longer be reconciled with *Newton*. *Mullens*, *Slutzkin* and *Cridland* had foreclosed a synthesis of the kind posited by Gibbs J in *Casuarina* of a limited exception for the conversion of a private company into a public company. But in returning to the problem as Chief Justice in *Gulland*, Sir Harry presented a more principled solution. Crucially, Gibbs CJ justified[135] the *Keighery* choice principle by reference to the maxim *generalia specialibus non derogant*, thus trumping the *a priori* entitlement asserted[136] by Lord Tomlin in *Inland Commissioners v Duke of Westminster* on which Barwick CJ had relied in leading the Court away from *Newton*.[137] On Gibbs CJ's approach, the specific conferral of a choice was a matter to be tested, not assumed. And as Gibbs CJ reasoned,[138] 'it [was] simply not right to say that the Act allows a taxpayer the opportunity' there asserted, namely, 'to have his own income from personal exertion taxed as though it were income derived by a trust and held for the benefit of a number of beneficiaries.' In the result, as Gibbs CJ concluded, 'the general rule enunciated by Lord Denning' in *Newton* could operate generally except where 'displaced' because 'the purpose of the arrangement in question is to make use of a tax advantage for which the Act provides.'[139] What was determinative was that, like the arrangements in *Peate*, the arrangement in *Gulland* bore on its face the stamp of tax avoidance, and so s 260 applied.

Gibbs CJ's judgment in *Gulland* was severely criticised by some commentators as an abrupt change in tack and as inferior to what was said to be the more principled, strict legalism of the Barwick Court's approach to revenue statutes.[140] According to such criticisms, adherence to precedent required the High Court

to continue to apply a strict or literal construction to revenue statutes as exemplified by the judgments of Barton J in *Burt v Commissioner of Taxation (WA)*,[141] Latham CJ in *Anderson v Commissioner of Taxes (Vic)*,[142] and Barwick CJ in *Federal Commissioner of Taxation v Westraders Pty Ltd.*[143] It was contended that there was simply no room for the kind of purposive approach that Gibbs CJ's judgment entailed.

Similar criticisms were also made of the High Court's later decision in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[144] in which the High Court, once again led by Gibbs CJ, but this time including Mason and Stephen JJ, shunned a strictly literal approach to the construction of s 80C(3) of the *Income Tax Assessment Act 1936*, on the basis that it was apparent that a mistake had been made in its drafting. Their decision was characterised by a variety of commentators as, in effect, caving into the pressure of a ground swell of public opinion against tax avoidance,[145] dismantling traditional learning,[146] and, in its place, adopting an unprecedented emphasis on statutory purpose.[147]

If anything, however, *Gulland* and *Cooper Brookes* represented a return to orthodoxy. Traditionally, the principle of strict construction of taxing statutes was not regarded as radically different from ordinary principles of statutory construction. In *Heward v The King*, Barton J observed[148] that 'this rule, while valuable as a caution, cannot be taken as substantially varying the ordinary rules for construing all statutes'. Lord Tomlin's remarks in the *Duke of Westminster's Case* were made 'in the course of rejecting an attempt to treat judicial disapproval of a taxpayer's conduct as a substitute for applying the language of the Act.'[149] And even Barwick CJ's many references to the need for unambiguous clarity are more

naturally understood as stating an ideal for Parliament than a principle of interpretation.

Cooper Brookes reflected long established doctrine that principles regarding 'objects which the legislature is presumed not to intend' were capable of displacement 'by implication' as well as 'in express terms'[150] and that a provision like s 80C(3) of the *Income Tax Assessment Act 1936*, which was 'devised specifically to remedy a particular failing in the law', 'will obviously be construed so as to ensure, so far as possible, that the intended remedial effect succeeds.'[151]

Nor was Gibbs CJ's emphasis on statutory purpose particularly novel. As he noticed, the difficulties of construction presented by s 80C(3) had been recognised by Mason J, Barwick CJ and Gibbs J himself the better part of a decade before in *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation.*[152] And as Gibbs CJ said in *Cooper Brookes*: although, where the meaning of a provision is clear and unambiguous, it ordinarily remains only to give effect to its unqualified words, it had long been established that, where the result of giving words their ordinary effect may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, the canons of construction are not so unrealistic as to prevent a solution in such a case.

Finally, it is notable that among other authorities to which Gibbs CJ referred in support of his purposive approach to statutory the construction was the decision of the House of Lords in *River Wear Commissioners v Adamson.*[153] As Lord Blackburn observed[154] in that case, the purposive construction of '*all* statues' has been the law since at least *Heydon's Case:*[155]

> And after all the Barons openly argued in Court ... it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal

> or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered: —
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo* [for private gain], and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico* [for public good].[156]

VII CONCLUSIONS

What conclusions may be drawn from this history? I contend for four.

First, and fundamentally, although it is apparent that Sir Harry Gibbs had one eye cast back to the Australian common law's English origins, his Honour was firmly seized of the changing order of events and very much focussed on the future. His was a form of legal conservativism that involved an ability to shape the development of legal principle according to changing societal requirements while remaining true to the demands of *stare decisis*.

Secondly, in crime, Gibbs adhered closely to a doctrine of precedent because he considered that it was vital as a protection

against oppression, but, at the same time, as he demonstrated in *Viro*, he was ready to depart from precedent when persuaded that the case required it. His was a conservative, yet pragmatic, perception of the function of precedent and its significance to Australia's evolving legal identity.

Thirdly, in the law of torts, Gibbs was at the forefront in perceiving the dangers of attempting to lay down broad-ranging principles and in recognising the advantages of a conservative, incrementalist process of legal development. That approach continues to serve us well.

Finally, in tax, and more generally in the process of statutory construction, Gibbs' strong adherence to precedent and incrementalism informed his resistance to what he perceived to be the excesses of the Barwickian notion of unqualified strict legalism, and imbued Gibbs' leadership of the Court's re-engagement with the purposive construction of statutes which is sometimes necessary to achieve the results that Parliament intended.

At the time of the enactment of the *Privy Council (Appeals from the High Court) Act*, Edward St John QC wrote[157] that '[f]rom now on [the High Court] must be the great Australian Court, developing Australian law for the Australian people'. As Gibbs CJ himself observed[158] in the speech which he delivered to the Lord Denning Appreciation Society some years later, '[i]n Australia the High Court has played a significant part in bringing about a unity not only of the law but of the nation'. Beyond question, Sir Harry Gibbs, Constitutional monarchist and legal conservative, was a signal contributor to both of those achievements.

Endnotes

1 Anne Twomey, 'Gibbs Court' in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 303.

2 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 417, 424. See also David Jackson and Joan Priest, 'Gibbs, Harry Talbot' in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 302, discussing *The Commonwealth v Tasmania* (1983) 158 CLR 1.

3 The Hon Senator Gareth Evans, quoted in Jack Waterford, 'Gibbs named to succeed Barwick', *Australian Financial Review* (Sydney, 30 January 1981).

4 Peter Connolly, 'Appendix: The Years on the High Court and After' in Joan Priest, *Sir Harry Gibbs: Without Fear or Favour* (1995) 146, 168.

5 Ibid 146.

6 Sir Harry Gibbs, 'Re-Writing the Constitution' (1992) 1 *Upholding the Australian Constitution: Proceedings of the Samuel Griffith Society* ix at xii-xiii.

7 See, eg, *Newmont Pty Ltd v Laverton Nickel NL* [1983] 1 NSWLR 131, in which he delivered the advice of the Board (Lord Diplock, Lord Keith of Kinkel, Lord Roskill, Sir John Megaw and Sir Harry Gibbs) affirming a

decision of the Supreme Court of New South Wales (Needham J): [1978] 2 NSWLR 325.

8 Sir Harry Gibbs, 'The Doctrine of Precedent Today', paper delivered at the Bar Practice Centre, 3 November 1983 at 21.

9 *Commonwealth of Australia Gazette*, G140, 19 July 1945 at 1548.

10 *The Commonwealth v Queensland* (1975) 134 CLR 298 at 315.

11 Ibid.

12 See for example the *Payroll Tax Act Case* and in *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227 at 240.

13 (1978) 141 CLR 88.

14 Sir Harry Gibbs, 'The State of the Australian Judicature', speech delivered at the Australian Legal Convention, 10 July 1981 at 9.

15 Ibid 12.

16 Ibid 13.

17 Ibid 15.

18 Ibid 16.

19 Sir Harry Gibbs, 'Comment - The High Court Today' (1983) 10 *Sydney Law Review* 1 at 2.

20 Ibid 3.

21 Sir Harry Gibbs, 'Courts and Tribunals in Australia', speech delivered to the Lord Denning Appreciation Society, Sydney 1984 at 10.

22 Ibid 12.

23 Ibid 12.

24 Ibid 12.

25 Ibid 13.

26 Sir Garfield Barwick, 'The Australian Judicial System: The Proposed New Federal Superior Court' (1964) 1 *Federal Law Review* 1 at 2.

27 Ibid 17.

28 Ibid 21.

29 The Editors of the Australian Law Journal, 'Current Topics - Cessation of appeals as of right to High Court' (1984) 58 *Australian Law Journal* 433 at 433.

30 Gibbs, above n 21, 3.

31 Ibid 4-5.

32 Sir Harry Gibbs, 'The State of the Australian Judicature', speech delivered to the Australian Legal Convention, 5 August 1985 at 5.

[33] Ibid 6.

[34] David Jackson, 'Sir Harry Gibbs', in Michael White and Aladin Rahemtula (Eds), *Queensland Judges on the High Court* (2003) at 49, citing pg 14 of the Transcript of Proceedings, High Court of Australia, 12 February 1981.

[35] Gibbs, above n 21, 15.

[36] Ibid 16.

[37] Ibid 17.

[38] Gibbs, above n 8, 7.

[39] Ibid 6.

[40] Ibid 7.

[41] 'Personalia' (1987) 61 *Australian Law Journal* 102 at 102.

[42] (1973) 132 CLR 499 at 514-517.

[43] (1975) 132 CLR 373 at 393-398.

[44] (1976) 133 CLR 679.

[45] (1986) 161 CLR 464 at 470-473.

[46] (1985) 160 CLR 583 at 595.

47 *Gissing v Gissing* [1971] AC 886 at 898 per Lord Morris of Borth-y-Gest, 900 per Viscount Dilhorne, 904 per Lord Diplock.

48 (1985) 160 CLR 583 at 618-620.

49 (1987) 164 CLR 137 at 146-148 per Mason CJ, Wilson and Deane JJ, 152 per Toohey J, 156 per Gaudron J.

50 (1978) 141 CLR 88.

51 (1958) 100 CLR 448.

52 [1971] AC 814.

53 *R v Howe* (1958) 100 CLR 448 at 492 per Dixon CJ; Mark Weinberg, 'Moral Blameworthiness - The "Objective Test" Dilemma' (2003) 24 *Australian Bar Review* 173 at 191.

54 [1957] VR 560.

55 [1957] VR 560 at 562-563.

56 The public response was quite astonishing: '...the Associated Poultry Farmers of Australia and other representative organisations of the poultry industry were determined, consistent and assiduous in their public protestations that McKay was a victim of the law's failure clearly to define their rights to protect their property against chicken thieves': Norval Morris, 'The Slain Chicken Thief' (1958) *Sydney Law Review* 415 at 432.

57 (1958) 100 CLR 448.

58 (1958) 100 CLR 448 at 462 per Dixon CJ (McTiernan and Fullagar JJ agreeing at 464).

59 [1971] AC 814.

60 [1971] AC 814 at 832.

61 *Viro* (1978) 141 CLR 88 at 93 per Barwick CJ; at 120 per Gibbs J; at 129 per Stephen J; at 135 per Mason J; at 150-151 per Jacobs J; at 163 and 166 per Murphy J; at 172-173 per Aickin J.

62 *Viro* (1978) 141 CLR 88 at 120, citing Rupert Cross, *Precedent in English Law,* 2nd ed, (Clarendon Law Series, 1968) 6.

63 *Viro* (1978) 141 CLR 88 at 128.

64 *Viro* (1978) 141 CLR 88 at 135 per Stephen J; at 138 per Mason J; at 180 per Aickin J.

65 *Viro* (1978) 141 CLR 88 at 155-158.

66 Weinberg, above n 53, 193 (fn 109).

67 Ibid.

68 *Viro* (1978) 141 CLR 88 at 167-171.

69 Ibid 128.

70 Ibid 125.

71 Ibid 127.

72 Ibid 127.

73 Ibid 126.

74 Ibid 93.

75 See and compare *Monis v The Queen* (2013) 249 CLR 92.

76 *Viro* (1978) 141 CLR 88 at 128.

77 (1987) 162 CLR 645.

78 (1987) 182 CLR 645 at 653-654 per Mason CJ; at 661-662 per Wilson, Dawson and Toohey JJ; at 670 per Brennan J; cf at 676 per Deane J and 683 per Gaudron J.

79 The position has since been reversed by Statute: See *Crimes Act 1900* (NSW), s 421; *Criminal Code* (WA), s 248(3).

80 *Viro* (1978) 141 CLR 88 at 109 per Gibbs J.

81 Ibid 113.

82 Ibid 112.

83 [1976] AC 443.

84 Gordon Walker 'Voluntary Intoxication - The Australian Response to *Majewski's* Case' (1979) 3 *Criminal Law Journal* 13 at 18.

85 (1980) 146 CLR 64 at 89-94.

86 *Criminal Code* (Qld), s 28(3); *Criminal Code* (WA), s 28(3); *Criminal Code* (Tas), s 17(1); *Crimes Act* (NSW), s 428C; *Criminal Code* (ACT), s 31(1); *Criminal Code* (NT), s 43AS(1) (in respect of certain offences).

87 (1976) 136 CLR 529.

88 (1981) 150 CLR 225.

89 (1875) LR 10 QB 453.

90 [1964] AC 465.

91 (1976) 136 CLR 529 at 552.

92 Ibid 553.

93 Ibid 555.

94 Ibid.

95 (1970) 122 CLR 628 at 642; [1971] AC 793 at 809.

96 See *Candlewood Corporation v Mitsui OSK Lines Ltd* [1986] AC 1 at 24 per Lord Fraser of Tullybelton for the Board (on appeal from the Supreme Court of New South Wales).

97 See, eg, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481 per Brennan J; *Hill v Van Erp* (1997) 188 CLR 159 at 178 per Dawson J; *Crimmins v Stevedoring*

Industry Finance Committee (1999) 200 CLR 1 at 32 [73], 34 [77] per McHugh J, 97 [272] per Hayne J.

98 *Leigh & Sullivan v Aliakmon Shipping Co* [1986] AC 785 at 809 per Lord Brandon of Oakbrook (Lords Keith of Kinkel, Brightman, Griffiths and Ackner agreeing); *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 618 per Lord Bridge of Harwich (Lords Roskill, Ackner and Oliver of Aylmerton agreeing); *Murphy v Brentwood District Council* [1991] 1 AC 398 at 485 per Lord Oliver of Aylmerton (Lord Ackner agreeing).

99 See, eg, *Caparo* [1990] 2 AC 605 at 618 per Lord Bridge of Harwich (Lords Roskill, Ackner and Oliver of Aylmerton agreeing); *Murphy v Brentwood District Council* [1991] 1 AC 398 at 461 per Lord Keith of Kinkel (Lords Bridge of Harwich, Brandon of Oakbrook, Ackner and Oliver of Aylmerton agreeing); *Michael v Chief Constable of South Wales Police* [2015] AC 1732 at 1762 [106] per Lord Toulson JSC (Lords Neuberger of Abbotsbury PSC, Mance, Reed and Hodge JJSC agreeing); *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736 at 745-746 [24]-[26] per Lord Reed JSC (Baroness Hale of Richmond PSC and Lord Hodge JSC agreeing).

100 *Federal Commissioner of Taxation v Newton* (1957) 96 CLR 577.

101 *Federal Commissioner of Taxation v Newton* (1957) 96 CLR 577 at 647-654.

102 (1921) 29 CLR 464.

103 (1924) 34 CLR 328.

104 (1932) 48 CLR 56.

105 (1953) 87 CLR 548.

106 *Federal Commissioner of Taxation v Newton* (1957) 96 CLR 577 at 654-655.

107 (1957) 100 CLR 66.

108 *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 at 6.

109 Ibid 7.

110 (1932) 48 CLR 649 at 655 per Gavan Duffy CJ and Starke J, 657-658 per Rich J, 660-661 per Dixon J.

111 *Newton* (1958) 98 CLR 1 at 7.

112 Ibid 8.

113 Ibid 9.

114 (1961) 108 CLR 258 at 271-272 per Fullagar J, affirmed at 279 per Dixon CJ (Windeyer J agreeing at 300), 284 per Kitto J, see also at 296-297 per Menzies J.

115 (1964) 111 CLR 443 at 459-461 per Menzies J, affd at 469 per Kitto J (McTiernan and Owen JJ agreeing at 466, 481), 474-475 per Taylor J, 478, 481 per Windeyer J, affd (1966) 116 CLR 38 at 43 per Viscount Dilhorne (for Lord

Morris of Borth-y-Gest, Lord Pearce, Lord Pearson and himself).

116 *Federal Commissioner of Taxation v Casuarina Pty Ltd* (1971) 127 CLR 62.

117 Ibid 101.

118 Ibid 81.

119 Ibid 104.

120 Ibid 105.

121 See, eg, Yuri Grbich, 'Section 260 Re-Examined: Posing Critical Questions about Tax Avoidance' (1976) 1 *UNSW Law Journal* 211, 219.

122 (1976) 135 CLR 290.

123 (1976) 135 CLR 290 at 298 per Barwick CJ, 318-319 per Stephen J.

124 [1936] AC 1.

125 (1977) 140 CLR 314.

126 See generally Patrick McCabe and David Lafranchi, *Report of Inspectors Appointed to Investigate the Particular Affairs of Navillus Pty Ltd and 922 Other Companies* (1982); Arie Freiberg, 'Abuse of the Corporate Form: Reflections from the Bottom of the Harbour' (1987) 10 *UNSW Law Journal* 67.

127 (1977) 140 CLR 314 at 319-321 per Barwick CJ, 322 per Stephen J, 325 per Aickin J.

128 *Inland Revenue Commissioner (NZ) v Europa Oil (NZ) Ltd* [1971] AC 760.

129 *Slutzkin* (1977) 140 CLR 314 at 325.

130 (1977) 140 CLR 330.

131 Ibid 337.

132 See and compare Allan Myers, 'Tax Avoidance and the High Court since Sir Garfield Barwick', paper delivered as the 2005 Annual Tax Lecture at Melbourne Law School, 12 April 2005 at 6-8; Anthony Slater, 'Tax in Australian Society: An 80 Year Perspective' (2007) 81 *Australian Law Journal* 681 at 694.

133 *Federal Commissioner of Taxation v Gulland* (1985) 160 CLR 55.

134 Ibid 64.

135 Ibid 66.

136 [1935] AC 1 at 19.

137 See, eg, *Slutzkin* (1977) 140 CLR 314 at 319.

138 *Gulland* (1985) 160 CLR 55 at 70.

139 Ibid.

[140] See, eg, Robin Speed, 'The High Court and Part IVA' (1986) 15 *Australian Tax Review* 156; Ian Spry, 'The New Approach by the High Court on Section 260' (1986) 15 *Australian Tax Review* 1.

[141] (1912) 15 CLR 469 at 482.

[142] (1937) 57 CLR 233 at 239.

[143] (1980) 144 CLR 55 at 59-60.

[144] (1981) 147 CLR 297.

[145] See Myers, above n 132, 11-12.

[146] See and compare *London Australia Investment Company Ltd v Federal Commissioner of Taxation* (1977) 138 CLR 106 at 116-118 per Gibbs J, extending assessable income.

[147] See, eg, Robert Allerdice, 'The Swinging Pendulum: Judicial Trends in the Interpretation of Revenue Statutes' (1996) 19 *UNSW Law Journal* 162.

[148] (1905) 3 CLR 117 at 127-128. See also Graham Hill, 'A Judicial Perspective on Tax Law Reform' (1998) 72 *Australian Law Journal* 685, 688-689.

[149] Murray Gleeson, 'Justice Hill Memorial Lecture: Statutory Interpretation', paper delivered at the 24th National Convention of the Tax Institute of Australia, 11 March 2009 at 9.

150 *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J.

151 Graham Hill, 'A Judicial Perspective on Tax Law Reform' (1998) 72.

152 (1973) 130 CLR 64 at 85 per Mason J, affd (1975) 132 CLR 535 at 547.

153 (1877) 2 App Cas 743.

154 Ibid 764.

155 (1584) 3 Co Rep 7a [76 ER 637].

156 (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638].

157 Edward St John, 'The High Court and the Privy Council; the New Epoch' (1976) 50 *Australian Law Journal* 389, 398.

158 Gibbs, above n 21, 3.

WANDERING AROUND AUSTRALIA'S DEMOCRATIC HISTORY

GEOFFREY BLAINEY, AC

Mr. Chairman, members, honoured guests. That was the most generous welcome you gave to me. I do appreciate it.

You mentioned the book I have just written, called '*Before I Forget*'. People are becoming very cheeky. A few minutes ago, somebody I do not know came up to me and said: 'you've written it just in time.'

But you are very gracious, Ian Callinan. Thank you for your words.

I am reminded of the day I was in a country town and, with time on my hands, I went into a junk shop; and to my surprise found on the floor a book I had written. I thought it was probably worth ten dollars. When the owner of the shop came to me and enquired, I thought slightly aggressively, whether I had 'found anything amongst that junk?' I did not let on that the author was in her shop. I simply said that I would like to buy the book. She turned over the inside cover and found in her own pencil-writing the sign: $2. She sternly said: 'two dollars for a book by Blainey, you can have it for one.'

I did appreciate the tribute paid to John and Nancy Stone. They have been great servants of your society as well as founding it, or virtually founding it. I know how much Nancy has done. She and John lived in the same Melbourne suburb as we did, and the secretarial and post-office work that Nancy performed for the society was on a huge scale. I remember, one day, Ann my wife saying: 'see if you can pass on a message to Nancy.' She added: 'go up to the post office, she is always

there.' Nancy and John have accomplished so much. Those of you who occasionally consult earlier volumes know how well they are edited and proof-read. That long shelf of volumes is really a tribute to John and Nancy Stone, as well as to numerous conference-speakers.

When I was young, I already had a slight connection with constitutional matters and the High Court. I remember a sad event when I was a little boy in Leongatha. A girl we used to play with, aged about 6, was rather a tomboy and very likeable. She used to play with me and my older brother, and we all got on well. And then one day the news passed through the town that she had been murdered. It was only a small dairying town in South Gippsland, but the city detectives and police soon arrived and there was great questioning. Eventually a man living close to us was arrested on the charge of murder, and he also confessed to other murders that he had committed.

I was in my first year at the Leongatha state school and the children from the school were lined up on the side of the main street for the funeral to pass through on the way to the cemetery. And I was standing there — I suppose not sure why we were waiting — when the hearse came up and the mourning car and the big procession of followers. I looked up and to my surprise there was my dad sitting in the front of the hearse or the mourning coach. Being very young I did not realise that as a Methodist minister one of his duties was to conduct funerals. I waved to him, but he could not wave back.

It was quite a famous legal case. Sodeman, the murderer, was sentenced to death in the days when hanging still took place. There arose a question of whether he was insane, and it led to an important disagreement in the High Court between two of Australia's most famous lawyers — Sir John Latham and

Sir Owen Dixon — both taking different sides on the question of whether he was insane. Eventually he was hanged.

In 1947, in the school vacation, I agreed to drive a powerful tractor for an uncle who was a farm contractor in the potato country and its rich volcanic soil near Colac. I rode my bike down there from Melbourne, which was a very long way in the face of a headwind and arrived long after sunset. I was underage but I could drive in the paddocks and along the side roads without any policeman interfering.

One evening my uncle announced that there was a big political meeting in town, and I went with him in his small truck to join the huge crowd in the Colac hall. Mr. Ben Chifley, as Prime Minister, had announced that he and his Labor Party were going to nationalize the private banks. And here were these hard-working people, nearly all farming very small holdings and wondering what would happen to them if there were only government-owned banks in Australia. What would their creditworthiness be? What if they offended the manager?

The air of tension and indignation in the hall affected me, though I was slightly left-wing. I suddenly realized what it was like to be a small rural producer and to have one's future clouded by political decisions that had taken place quite suddenly without a foretaste of them in the previous federal election. The right to choose one own's bank became one of our nation's greatest constitutional contests, did it not? A long series of legal arguments went all the way to the Privy Council in London. And so I chanced to acquire a keen awareness though not a deep knowledge of a constitutional crisis when I was only 17.

In the following summer I had a great desire to see Sydney, the birthplace of modern Australia, and a very good friend of mine, later a judge, Alan Dixon, came with me. We did not have much sense of geography because we went to the Commonwealth Employment Service in Melbourne and said we would like a well-paid job; and the man at the desk confidently advised us to find our way to Red Cliffs for the grape picking. So, we hitchhiked up to Red Cliffs and earned big money because we worked ten or twelve hours a day on every day except Sunday. And then we set out to hitch-hike to Sydney and back to Melbourne. What a journey that was! There was virtually no traffic on the roads, for the cars were almost banished by petrol rationing, and the long-distance trucks were a rarity, because a crucial section of the *Constitution* was really in abeyance and the railways were allowed to dominate interstate traffic and all but a few of the few long-distance motor lorries were expelled from the Hume Highway. So, from the truck drivers whom we occasionally met, we learned about section 92 of the *Constitution* and the High Court's temporary blindness to the vital role of free trade between the states. So here I am amongst so many lawyers with only a few constitutional trinkets in my pocket.

May I say something about democracy? We are one of the oldest continuous democracies in the modern world. This is an incredible thing to say about a nation that really is so young.

We know that some of the Greek cities before the time of Christ had their relatively short-lived democracies. They were brave and adventurous, but of course they were far different to the modern democracies. You could only take part in the debating, you could only vote, if you lived within travelling distance of the capital city where citizens met in person and listened to the arguments. But it was a brave attempt in a society

which was still slave-owning. Women did not have the vote either. The democracy in ancient Greece was relatively short-lived, but it proved to be a shining example when the modern world invented a more democratic form of democracy in the United States, France, Britain and elsewhere.

Eventually, Victoria and South Australia became leaders in the new emerging brand of democracy. The secret ballot was introduced in Victoria and South Australia in 1856, within a fortnight of each other. When the secret ballot arrived in many parts of Europe and the United States it was called the Victorian or Australian Ballot. It was a sensational step in the growth of democracy.

So many other adventurous steps took place in those early parliaments in what was then called Australasia. While New Zealand was the first country in the world to give votes to women, it did not then grant women the right to sit in Parliament. It was the South Australians who pioneered, in this continent, votes for women. And there it was a campaign led in crucial periods by women: they mostly belonged to the Women's Christian Temperance Union. Nowadays we often look back on temperance and prohibition as a harsh curtailing of civil liberties especially for men, but you can see there was a powerful case for attacking the liquor industry in the 1880s and the 1890s. The typical man was on low wages, and if the man spent even seven percent or ten percent of the weekly wage on alcohol the economic sacrifices that had to be made by the rest of the family were substantial. So in the days before the welfare state, the giving of the vote to women in the hope — often fulfilled — that they would use the vote to cut down the number of hotels and the number of hours they were open, was really one of the great pieces of welfare legislation in Australian history. With the coming of widespread prosperity of course, this reform became

less important. The votes for women, however, was a far-reaching change, and at the federal election in 1903 Australia became the world's first nation where women had both the right to vote and the right to stand for Parliament.

The federation movement itself was in many ways a triumph, and people now award — especially in New South Wales — Sir Henry Parkes the credit, and they hail him as the Father of Federation. I do not see him as the Father of Federation. He really curtailed it in the 1880s, until he had the bright idea of making his famous rallying speech at Tenterfield in northern New South Wales. Federation was far from accomplished when he died in 1896.

I think we do not honour sufficiently Sir John Quick, a native of Cornwall who landed in gold-rush Victoria as a two-year old migrant. His parents were poor and in Bendigo he did humble work in a noisy foundry, a gold-treatment plant and a printery. Belatedly he gained an education and became a leading journalist and lawyer and politician.

It was Sir John Quick who, when the federation movement was almost frozen or dormant in the early 1890s, wisely proposed: 'let's bring in the people'. His idea, originating at a citizens' conference in the small Murray River town of Corowa, was that people in each colony (or state as we now say) , should elect representatives, and the representatives should meet in order to devise the constitution, and the constitution should be taken back to the people for their endorsement. Likewise, the constitution could not be changed unless a similar peoples' referendum took place. Quick is really a distinctive and influential pathfinder in Australian history but not sufficiently honoured.

We have to give praise to those people in the capital cities and in the country towns all around Australia who believed that we should come together politically, and that we should have a federal system rather than a central system. Sometimes the voting in favour of federation was by a very narrow margin. I know that in Queensland, if two train loads of voters had changed their minds, Queensland would not have entered the federation. Sydney, at first, was lukewarm to the idea of a federation, and even in the first referendum held in 1898 that city, as a whole, voted against it. At first Western Australia was wary of joining the proposed federation. And yet finally, on the first day of 1901, the Commonwealth of Australia was formed, after the majority of voters in every colony had decided to belong.

Even one year after Australia became a Commonwealth, some of the leading politicians who had done so much to create it thought, looking back, that its creation was a miracle. They even had the strong impression that if the Australian people, after one year of living under a federation, had been asked whether this change in the political system was worthwhile, they might have voted 'no'. But the Federation persisted and has enjoyed many successes.

We do not realize how fortunate we are to be a democracy. Democracy is not the typical form of government in the world, far from it. The London journal *The Economist* set up a team to work out periodically which nations in the world were democratic. Outlining a short list of criteria defining what is democratic, the team recently decided that there are only 19 fully democratic nations in the world.

In that list of democratic nations, the Scandinavian countries occupied most of the top places and New Zealand and Australia were alongside them, New Zealand ahead of Australia.

Most of the countries were in the northern hemisphere and were people of European stock. The oddity in the list was Mauritius. In this category it is strange to see a country which is not rich.

No Muslim countries have, so far, found a place amongst the real democracies. I think the last time I saw the list of all the nations, the top Muslim country was at number 58 which was Malaysia, and then coming in at about 69 were Indonesia and Tunis. These Muslim countries and many others belonged to the second category, namely democracies displaying serious flaws. Then — headed by Albania at number 77 — stood a third group of countries which mixed democracy and authoritarianism, and then came another long sequence of countries that were simply authoritarian. Standing at the bottom of the list of 167 countries was North Korea.

It seems that one of the hallmarks of a true democracy is that it tends to hold a smallish population and to display social cohesion. Not many nations in *The Economist's* top nineteen democracies hold a very large population. Another hallmark is that a real democracy tends to be prosperous: nearly all the really democratic countries have a high standard of living.

China occupies a fairly humble place on the global ladder of democracy. It used to be argued five or ten years ago that China might soon become more democratic and tolerant, but the present indications are that it will remain an authoritarian system during the lifetime of the present powerful leader. Who can confidently predict, however, what will happen? Given the fact that the United States has often been a kind of global umbrella for democracy in the last three quarters of a century and given the fact that China almost certainly will become as important as the United States militarily, as well as in economic strength, the protective umbrella for the non-democracies in much of Asia

and Africa will often be held by China. That situation will not be so favourable for the world we know.

I think at the moment we are often taking for granted our democracy in Australia. We do an injustice to our political pioneers if we fail to praise them for conducting as early as the 1850s what, by world standards, was a difficult but impressive democratic experiment.

By so many criteria, Australia is a success story; but we allow pessimistic stories to mount the stage and to win wide acceptance. I read the statement made in 2017 by the Aboriginal and Torres Strait Islander groups who assembled at the mighty rock Uluru. It is called 'Uluru Statement from the Heart'. The final paragraph of what is an eloquent statement makes the simple affirmation about the celebrated referendum held in 1967 on the status of Indigenous people: 'In 1967 we were counted for the first time, in 2017 we seek to be heard.' Counted for the first time? It seems to me incomprehensible that such a falsehood or myth could gain such wide currency in our nation.

If I were a young Aboriginal and politically inclined, and I was told that traditionally the sheep were regularly counted in Australia, but the Aboriginals were not, I would feel indignant. But that assertion is far from the truth. The Indigenous people were counted in the census of 1961, some years before the '67 referendum took place. They also were counted in the preceding censuses extending back and back in time. On 30 June 1934 there was even a census in which only the Aborigines were counted. Accordingly, I feel sure in stating that slightly more attempts have been made to count Aborigines than to count mainstream Australians — if that is the right phrase — in the period since 1901. And if we look back before 1901, we discover further attempts to count the Aborigines in the official and regular censuses. But with so many living in remote places, and

with so many living a semi-nomadic existence, it was impossible to count them thoroughly.

We are the targets today of what can almost be called a hoax. Children should not be taught that Aboriginals were not worthy of being counted in a census. They should not be taught that a refusal to count them was the law of the land until the successful nation-wide referendum was conducted under the John Quick formula in 1967. This is not an easy question to discuss because the official definition of an Aboriginal has been changed and, in the last half century, has been revolutionised

Another myth is that Aborigines were universally deprived of the right to vote. This myth was challenged by that excellent historian, the late John Hirst. He pointed out — not many listened to him — that in the second half of the 19th century, in Victoria and South Australia for example, the Aborigines could vote if they wished. I do not suppose many of them voted but in a typical general election in Australia before 1900 neither did most of the white people bother to vote: compulsory voting lay in the future. We forget that all kinds of influential Europeans in Australia were for long denied the vote. For decades women could not vote. Even in the 1920s the Canberra citizens had no vote.

May I offer a thought about international wars? I say this is not in reference to the recent comments about the military might of China by the distinguished young politician Captain Andrew Hastie: he is not only an able historian but also a soldier who served in the war in Afghanistan. Most of my views on war have been held for a long time. It was in 1973 that I wrote the first edition of a well-known book *The Causes of War*.

My view is that a democracy tends to be not quite so alert, not quite so effective, as a dictatorship or a semi-dictatorship on the threshold of a war. Usually, and there are exceptions, a democracy is slower to prepare for war. One of Hitler's profound advantages in the 1930s was that the powerful democracies such as Britain, France and the United States were slow to prepare for the coming war. But once a war is underway, and the democracy manages to survive the first onslaught, it is likely to be more effective than its authoritarian enemy in harnessing ingenuity, resources and patriotism.

Today it is widely said by large groups of Australians, especially in certain intellectual circles and in the ranks of the Green, that Australia should be neutral in the event of war. But we can only be neutral if the potential enemy gives consent. There is no point in a country declaring that it is neutral now, only to observe, a year or two later, the enemy arriving outside its main harbours or sinking its ships on the coastal sea lanes. Some of the smaller European nations in the two world wars resolved to be neutral and paid a high penalty when their neutrality was ignored by a powerful enemy. It is puzzling that there should be, in a well-informed democracy, a popular strand of thinking which says that neutrality is normally a sound option.

We sometimes hear a section of Australians say that since war requires sacrifices from all the people, the people themselves must decide whether to go to war. In theory that is a fine and ultra-democratic idea, but parliament or the people cannot be sensibly asked to make a decision when war seems just about to break out. By then it could be too late. You cannot expect Parliament at that late hour to debate the question: 'will we defend ourselves, will we go to war, or will we not?' Such a debate, so late, is really a half-invitation to be invaded or a concession that the nation is ill-prepared.

I suspect that a democracy tends, with plenty of exceptions, to be more interested in internal affairs than in external affairs. Defence issues are not usually a priority. Traditionally we relied on a powerful ally, hoping that would mainly solve our defence problems. It has not always solved them. Sometimes we read our history strangely. Australia late in 1941 was in extreme danger; France had fallen, the Soviet Union was invaded by Germany, the vital Suez Canal might be captured by German and Italian forces, and Japan was about to attack a cluster of nations and European colonies in Southeast Asia. Britain was our ally, a great ally for a very long period, but Britain was now almost overwhelmed by the sheer variety of warfronts on which it was fighting on sea and land and air. We could no longer depend on Britain and yet the naval base in Singapore — the outer defence line for Australia — relied heavily on last minute naval and air reinforcements arriving from Britain. And in the ensuing crisis most of the promised reinforcements failed to arrive.

On 27 January 1941, John Curtin as Prime Minister published an appeal in the Melbourne *Herald*, the biggest-circulation afternoon paper in the nation, calling on the United States — not yet formally our ally — for urgent military aid. 'Australia looks to America, free of any pangs as to our traditional links or kinship with the United Kingdom.' The news was cabled to the United States and also Britain, where it was seen by some critics as mealy-mouthed or tactless. In many quarters in Australia, however, the appeal was hailed as statesman-like and eventually viewed as one of the turning points in our role in Pacific War. We forget that it was the United States that really made the decision, and naturally made it in order primarily to serve its own strategic interests rather than Australia's.

At that time, the United States was fully absorbed in defending the Philippines from a Japanese invasion, and its forces seemed almost certain to be defeated there. Japan, remarkably, having won control of the air, was now capturing the land. A convoy carrying aircraft and other war equipment was on its way from the west coast of the United States to Manila, and now it had little hope of arriving safely. The swift decision was made in Washington for the convoy to change course and steer for Australia. It reached Brisbane, to the great gratitude of the Australians who heard the news, just before Christmas 1941. In fact, the convoy quietly arrived before Mr. Curtin publicly made his newspaper appeal for military help. The persistence of this myth — that Australia had taken the initiative in this crucial moment in our history — seems a reflection of a certain over-confidence in the way we view our defence dilemmas, past and maybe present.

I think one problem of a democracy such as Australia is that it must have an ally, but it cannot depend completely on the ally. The ally has its own security interests; sometimes it must put its own interests first. That was one lesson taught by the dramatic military events of 1941–42. I remain a democrat but am concerned that we are inclined as a democratic nation not to debate important defence issues with the urgency that we would debate other issues such as superannuation and taxation and so forth.

In the last three or so years, there has been concern in most sections of the public that democracy in Australia is failing. I accept that there is a case for this point of view, though not a convincing case. The main statistical argument used by those who are disillusioned with democracy is that in the last dozen years there have been seven prime ministers. But this is not such an unusual or unique period. In the first decade of the

Commonwealth, from 1901 to 1910, the average term of office of the prime minister was even shorter. Our era is not unique in our political history. Interestingly, the frequent changes of government come after a period of remarkable stability. Between the ascent of Mr. Hawke in 1983 and the defeat of Mr. Howard in 2007 — a period of 24 years — we were led by only three prime ministers; and that was one of the most stable periods of government in our history.

In our federal history there have been many political crises. They include the First World War when the planned conscription of young Australians for service overseas was the burning topic. It divided the Labor movement, and, in many ways, it divided Australia. Another political crisis was the Great Depression of the early 1930s when the Labor Party under James Scullin could not govern effectively because it was far outnumbered in the Senate. I think that Labor had seven senators and the opposition had 29. That was one of the results of the unusual electoral system operating in the early Senate. Likewise, the infant Reserve Bank, the Commonwealth Bank, was not very sympathetic to the policies of the ruling Labor government. Likewise, the state governments were more powerful in the economy than they are today. New South Wales, under Mr. J T Lang was fiercely radical. Therefore, this was a crisis for democracy in Australia.

That crisis was followed by the WA secession movement, a kind of national foretaste of Brexit. I call it 'Wexit'. In the West Australian state elections in 1933 the voters in 44 of the 50 Lower House seats voted to secede. Several of the numerous West Australians present here tonight can tell you that the only electorates in the lower house that voted not to secede were in Kalgoorlie and other goldfields. The arrival of federal ministers as peacemakers after that momentous decision to secede — just

imagine the three wise men coming from the eastern states — only increased the indignation. If Western Australia had actually seceded, we can feel pretty sure that, soon after Japan's devastating attacks on south east Asia in the summer of 1941-42, and especially after the bombing of Darwin and Broome, the premier in Perth would have eagerly petitioned to rejoin the Commonwealth of Australia.

Meanwhile an acute deadlock gripped the Federal Parliament in mid-1941, while the nation was in some peril. Two Victorian independents held the balance of power. They crossed the floor of the house to give firm support to Labor, and so the crisis was resolved without an election, exactly two months before the Japanese attacked Pearl Harbor. Incidentally, the three national leaders central to this crisis were Robert Menzies, Arthur Fadden and John Curtin, and they retained relatively harmonious personal relations for the remainder of the war: a political harmony not so visible in Canberra in recent memory.

Most of us remember the constitutional crisis in 1975 when Gough Whitlam was set aside by the Governor-General and then by the Australian electorate. All serious crises, they were resolved. Though igniting bitterness, they were solved peacefully and democratically. That is a tribute to a vigorous democracy; we should be proud of it.

There are predictions that the amending of the *Constitution* in favour of Aborigines could become thorny. Even the ABC's gardening writer, on television yesterday, turned aside from his garden to say that Uluru will be a key topic of our time. Then he went back to the nasturtiums.

Next year is the 250th anniversary of Captain Cook's remarkable voyage along the east coast of Australia. It is a voyage worth celebrating. Aborigines say quite rightly that their

ancestors really discovered Australia. I think it would be sensible if the federal government erected, not on behalf of Aborigines but on behalf of all Australians, a simple monument which honours that first discovery which happened some 60 thousand years ago. We do not know whether that ancient event took place on the present Australian territory or the present Papua New Guinea territory: at the time those two territories were united by land. The probabilities are that the first coming ashore took place in what is now PNG territory but that does not matter. A significant discovery in world history, it occurred when the sea levels were much lower, and south east Asia was not so far away. The place of discovery is now under the sea, but it should be honoured.

I hold the belief that most Aboriginals and Torres Strait Islanders are far better off today than if they were living in 1788. I hold that belief, contrary to some of the tenets of the Uluru Statement, but will abandon that belief if sufficient evidence is forthcoming. On the other hand it is vital, in hand with Aboriginal leaders, to face the unique difficulties of that minority of Aboriginal people who live mainly in remote places and still straddle and struggle with two different values and ways of life.

It is also sensible to be reminded that the world as a whole has gained greatly from all those millions of migrants — and their descendants — who have increasingly inhabited this country since 1788. They have made this land infinitely more productive and fruitful than it could ever have been in Aboriginal history. In some years Australia produces enough food to sustain probably a hundred million people in the world and the minerals with which to build ships, aircraft, railways, bridges, pipelines and city apartments for even more. Likewise, here in this continent flourishes a democratic society which, for

all its imperfections, offers freedom in a world where freedom is scarce for most of its inhabitants.

The very idea that Australia should never have been taken over by outsiders who in the long term were capable of making the land more productive and life-giving, and the very idea that Aboriginal people should have remained The First Nation and the only nation in this huge expanse of land, seems absurd and fanciful.

Long live Australia!

FIXING FEDERALISM: A FEDERATION FIT FOR PURPOSE IN A CHANGING AND CHALLENGING WORLD

THE HONOURABLE JOHN BRUMBY, AO

Any responsible business or NGO will regularly examine its structures and processes — from policies and procedures on the ground to board arrangements at the top — to make sure they are right to meet the challenges and opportunities of the times. A nation should be no different.

Today I want to claim that our federal model is the right model for a period in which major global trends and forces are reaching into every nook and cranny of our economy, our society and our daily lives. But it is also time to look at the way that federal model is operating, and how it might be improved.

Today I want to point to some of the trends I think will most shape Australia's future; I want to identify some problems with the way our federation is currently working and suggest some ways forward; and I want to examine the currently live question of Indigenous recognition in the Constitution.

I GLOBAL TRENDS

Let me begin with the global context. To my mind, there are five major trends that will affect every individual, every family, every community, and Australia as a whole.

They are the return of Asia, the movement of peoples, the shifting disease burden, the advance of technology and the changing climate.

For reasons I will explain, I think that each of these trends, which are global in both their causes and their effects, are best addressed in Australia through a cooperative federal framework. Let me briefly describe them one by one.

A *Return of Asia*

At the centre of the return of the Asian region to a position of global predominance is the growth of China.

The Chinese economy is now, in purchasing power parity terms, bigger than the US. But per capita, the US is ahead by a factor of about six. If you think, as I do, that the Chinese Government will not be content to leave their citizens six times poorer than those of the US, then you know they will aggressively pursue growth for many years to come. We sometimes hear talk of a 'slowdown' in China. But that is a slowdown to around 6.5 per cent per annum off a $14 trillion base. As Reserve Bank Governor Philip Lowe recently pointed out, when China's per capita GDP hits around 50 per cent of the US, its economy will be twice as large.

Whether you welcome the rise of China or fear it, the one thing you cannot do is ignore it.

B *Movement of Peoples*

Linked to the return of Asia is the movement of peoples. There are more than 60 million refugees in the world today. Large-scale migration and its backlash have arguably led to Brexit in the UK, populism in Europe and Donald Trump in the US.

But it is not just refugees. International tourism is also increasing rapidly. In 2010, the UN World Tourism Organisation predicted that there would be 1.4 billion annual

international tourists by next year. Instead, it happened last year. This was an increase of 6 per cent on the year before — at a time when the global economy grew by just 3.7 per cent. And the major driver of that growth is Asia, particularly China.

C *Shifting Disease Burden*

Another global trend is the shifting disease burden. For several hundred years, as societies got wealthier they also got healthier — investments in public health and hygiene led to a massive reduction in the spread of communicable disease.

Today, increasing wealth and the associated lifestyle changes mean a massive rise in non-communicable diseases such as heart disease, cancer, obesity and diabetes. The World Health Organisation says: 'These are among the most democratic of all diseases, affecting populations at every income level in every country, but the poor suffer the most.'

In Australia, almost 6 per cent of our population now has diabetes — over 1.2 million people. Apart from the massive human cost in terms of health complications and premature death, this is contributing to an unsustainable rise in the financial cost of health to state budgets. On current trends, health will completely swamp the budgets of some of the smaller states within a few short years.

D *Technological Change*

The fourth global trend is the dramatic increase in the rate of technological change. Information Technology is now more pervasive, more interconnected, and more intelligent than many of us have yet come to grips with. More than 20 billion devices are currently connected to the internet — and therefore potentially to each other — and this number is expected to grow exponentially in the years to come. New currencies in the form of encrypted codes store value in exactly the same way as the money in our wallets — but without government or central bank oversight. Artificial Intelligence already operates in realms of discovery beyond the capability of the human brain. The confluence of 5G, the Cloud and Artificial Intelligence present enormous challenges for governments to make sure technology works well for all of us.

E *Climate Change*

And finally, while in Australia some people still argue about the science of climate change, the economics tells a very different story. The Governor of the Bank of England, Mark Carney, recently said that any company that ignored the crisis of climate change would 'go bankrupt without question', and that 'the most important thing now is to move capital from where it is today to where it needs to be tomorrow'. The International Energy Agency predicts that in the next five years, renewables will account for 40 per cent of global energy consumption growth. By 2023, renewables will account for one third of electricity generation.

II GLOBALISATION AND FEDERALISM

As the effects of these five inter-related global trends are felt in Australian communities, it has never been more important for governments to respond to local concerns in all their uniqueness and particularity. We are seeing, if you like, the revenge of the local in the rise of so-called 'populism', which is driven by the frustration of people on the ground who feel distant from the 'elites' in control. Even if populists such as Donald Trump are offering the wrong answers, this does not mean the questions themselves are illegitimate.

If you were designing a system with all this in mind, you would want a strong, coordinating national government, as well as flexible, innovative, and responsive state governments — and you would want the principle of subsidiarity built in.

In other words, you would want the kind of system our founding fathers designed and embodied in the Australian Constitution.

In fact, in their 2007 study prepared for the Council for the Australian Federation, Anne Twomey and Glenn Withers said:

> Federalism is regarded as one of the best governmental systems for dealing with the twin pressures produced by globalisation — the upward pressure to deal with some matters at the supra-national level and the downwards pressure to bring government closer to the people.

III SUCCESSFUL REFORMS UNDER THE FEDERAL MODEL

How do we know that a system designed at the tail end of the nineteenth century can handle the reforms made necessary by the pressures of globalisation? Because we have seen it before.

The Hawke-Keating economic reforms of the 1980s and 1990s happened because they had to — the world was telling us that we needed to change. The old closed-in model of high tariff walls, currency controls, protected banks and industries — in fact, the very economic model many of the founding fathers thought would serve us very well indeed — was breaking down under the pressure of global forces and an interconnected global economy.

Hawke and Keating changed all that — and they did it without constitutional change and with the cooperation, in many cases, of the states and territories.

There are many other examples of successful reforms under the federal model in Australia.

Some of these were led by the Commonwealth. I am thinking, for example, of Prime Minister John Howard's changes to gun laws in 1996. Watching the news in the past week you cannot help but be reminded of the difficulty some other nations — principally the US — have in regulating private gun ownership. John Howard got the job done here in Australia, and with the close cooperation of many of the states: Australia's National Firearms Agreement was achieved through the mechanism of the Australasian Police Ministers Council.

Another example of Commonwealth leadership is the National Competition Policy that passed through COAG in the last year of the Keating Government. In the early nineties, Prime Minister Keating recognised that the Australian economy was being held back by artificial advantages given to government-owned businesses and public sector monopolies. Many of these were owned by the states. And a lot of burdensome regulation was on state books, not federal. The answer was a National Competition Policy. The reforms were agreed, not imposed,

between the state and federal governments. The states were given freedom and flexibility to determine exactly how they would achieve the reforms. An independent body — the National Competition Council — was established to monitor implementation of the reforms.

Most importantly, the benefits of reform were shared. If you grow the economy, the federal government will benefit disproportionately because they collect the company and income tax. The National Competition Policy acknowledged that and compensated for it via National Competition Reward Payments to the states. And it worked. The Productivity Commission has argued that the National Competition Policy played a big role in our quarter century of unbroken economic growth.

One of the strengths of the federal model is that any member of the federation can take the lead on an issue. If it works, well and good. Others may follow. If it fails, the damage is limited. In recent years, some of the most profound reforms — particularly social reforms — have come from the states. My government in Victoria led the way in providing a free Parliamentary debate and vote on the issue of abortion law reform. Many other jurisdictions have followed our lead, and New South Wales looks set to do the same. More recently, Victoria has again led the way with a free Parliamentary debate and vote on Voluntary Assisted Dying legislation. It seems to me highly likely that other jurisdictions will go the same way.

When you think about all these state-led social reforms, and add to that the Commonwealth reforms to the *Marriage Act* that took place at the end of 2017, a definite trend emerges: in the last decade or so, Australian parliaments have been extending choice and rights to Australians — and they have been doing it through genuine parliamentary processes involving real debate on the floor and free votes. When we decriminalised abortion,

for example, we had MPs with a wide range of opinions on both sides, and some even spoke of changing their minds as a result of the debate.

Even those who do not like the particular policy results I have mentioned should appreciate the value of parliaments across the federation working the way they are supposed to. In my view, this momentum will continue, and we will see it applied more widely; including on questions of Indigenous rights and recognition. I will come back to that issue in a moment, but before doing so I want to briefly mention three other things we can do to strengthen our federal model.

IV Future Reforms

First, if our successful system of co-operative Federalism is to continue, we need to address the continuing fiscal imbalance between the Commonwealth and the States. I have pointed out in many places — going back to my Hamer Oration in 2014 — that this question is inextricably linked to the question of tax reform and that by far the best way to address this imbalance is to increase the GST, compensate lower-income Australians through the tax and benefits system, and distribute the proceeds fairly between the Commonwealth and the States. The reality is that with a growing and ageing population, the pressures on the States and Commonwealth for increased spending on health and aged care are inescapable.

Second, we need to make COAG work better. When COAG works well it can be a great facilitator of change and reform — a great asset to the Federation. But when it does not meet or it works badly, it is a deadweight that drags everyone down. As I have pointed out in a number of places, COAG needs reform to remain fit for purpose. It should have an independent secretariat,

regular meetings, and an agreed forward agenda of major strategic issues to discuss.

I remember, as Chair of the COAG Reform Council, addressing COAG in 2014 on these very issues, and saying to them that I would recommend putting energy policy on the agenda for the March 2015 meeting, because energy policy in Australia was a shambles, and it needed a cooperative COAG effort to get it right. But history shows that it has taken the better part of four years to get on top of what everybody could see was an emerging train wreck.

Third, we need a new COAG Reform Council. The decision by the Abbott Government to abolish the Reform Council in 2014 was a retrograde and backwards step. The COAG Reform Council existed to independently measure and report on the progress of the COAG Reform Agenda — an ambitious and worthwhile set of goals agreed to by every government in Australia to improve social and economic participation, reform regulation, increase competition, improve health systems and tackle Indigenous disadvantage. We need a similar set of objectives today to lift productivity and the performance of our nation. But whatever is agreed, it will require an independent body to monitor and report on results. What gets measured, matters.

V VOICE, TREATY, TRUTH

Finally, let me briefly address the big constitutional question of the day, and that is Indigenous recognition. Aboriginal people have made clear what they hope for, and it is summed up in the theme of this year's NAIDOC Week: Voice, Treaty, Truth.

The Uluru Statement from the Heart is short and direct: it calls for 'the establishment of a First Nations Voice enshrined in

the Constitution.' We, in this room, rightly celebrate the achievement of federation in 1901, but we should also acknowledge that there was a voice missing from the process. It does not detract from the achievement of the founders to point out their blind spots. Australia is not the only nation to carry the wounds of a founding injustice. But great nations have the capacity to address them.

First Australians Minister Ken Wyatt is right to say that when it comes to the question of treaties: 'it's important that state and territory jurisdictions take the lead. When you consider the Constitution, they are better placed to undertake that work.'

Victoria's treaty process is well advanced. There is a Victorian Treaty Advancement Commissioner in place (Jill Gallagher) and a First People's Assembly is about to be elected by Indigenous Victorians. Commissioner Gallagher says she is hopeful a treaty will be negotiated in this term of the Victorian Parliament. Queensland, the Northern Territory and Western Australia have all made moves towards treaty-like arrangements.

But if reconciliation is to truly heal the nation, we will need a national approach, and a national acknowledgment of the truth of our past. This is consistent with the views expressed recently by two former Chief Justices of the High Court — Murray Gleeson and Robert French — who in separate speeches have both publicly endorsed the proposal for Constitutional recognition of Aboriginal and Torres Strait Islander peoples. As The Conversation noted in an article of 1 August: 'The intervention of two esteemed and vastly experienced judges in a controversial and complex debate is significant and provides an important signal of hope in finding a way towards political agreement on the issues.'

VI Conclusion

We are extremely fortunate in Australia to have been gifted a model of governance that is, as Twomey and Withers said, 'regarded as one of the best governmental systems for dealing with the twin pressures produced by globalisation.' It has served us through successive waves of reform, and has the capacity to accommodate the changes that are needed in an emerging world order defined by the return of Asia, the movement of peoples, a shifting disease burden, the advance of technology and a changing climate.

If we can better align the roles and responsibilities of the Commonwealth and States, reduce the fiscal imbalance, elevate the status of COAG and maintain our faith in cooperative federalism, we will have a federation fit for purpose in a changing and challenging world.

And we can further do justice to our people and our Constitution, I believe, by recognising our Indigenous peoples in it.

THE STRANGE (CONTINUING) STORY OF COMMONWEALTH AUTHORITY TO SPEND

CHERYL SAUNDERS, AO

This paper deals with the source of authority for the Commonwealth's power to spend and, by extension, to contract. It involves Alfred Deakin, at least peripherally, and to that extent complements Professor Judith Brett's paper. The issues that it raises are familiar in other countries as well. But as they have developed here, the story has taken some distinctively Australian twists, and is still playing out.

Australia became a federation as a way of uniting six colonies in a 'nation for a continent and a continent for a nation', as the catch-cry went. From that perspective, Australia was an (almost) classic 'coming together' federation. Union has long since been achieved, however. The contemporary challenge is to realise the potential of federalism for Australian democracy across an area that is geographically vast, with diverse needs and attitudes, in a political culture that is not well-attuned to consultation, negotiation and power-sharing.

The federalism provisions of the *Constitution* are modelled closely on those of the United States, in key respects. In fact, however, Australia was, and is, quite different to the United States in many ways that affected the fit of the US model. One of these was the dependence of the Australian colonies, about to become States, on customs and excise as sources of revenue. The emphasis that the framers of the *Constitution* placed on internal free trade meant that duties of customs and also, or so they thought, duties of excise, needed to be exclusive Commonwealth powers. How to deal with the impact of that

change on the budgets of the States occupied more time of the framers of the *Constitution* than any other issue.

Despite their labours, in the end, with hindsight, the result was unsatisfactory; made even worse by some last minute changes at a Premiers' Conference in 1899. Transitional provisions for revenue redistribution managed the problem for the first 10 years (secs 87, 89, 93). After that, the only continuing guarantee was a requirement in section 94 for the Commonwealth to redistribute to the States, monthly, its 'surplus' revenue; a requirement that was quickly circumvented by accounting practice.[1] Thereafter, the only basis for revenue redistribution was the power for the Commonwealth to make grants to the States under section 96; a section added to the draft in last-minute negotiations, which apparently was intended to be transitional, but which in practice now is permanent. This is the context in which Alfred Deakin famously remarked, in an anonymous letter to the *Morning Post* in 1902, that federation left the States 'legally free, but financially bound to the chariot wheels of the central Government'.[2]

The use of this familiar quote almost always assumes Deakin's prescience. Indeed, the letter as a whole seems to speak accurately to current conditions, if read through a contemporary lens. But Deakin could not possibly have foreseen the manner in which this imbalance between legal power and financial muscle would play out in Australia, and with what practical consequences.

For a period, in fact, after the Financial Agreement of 1927, the States were independent of the Commonwealth for general revenue redistribution. But that balance changed dramatically after World War Two, initially through the uniform income tax scheme and gradually through the expanded judicial understanding of duties of excise. These two developments left

the main sources of revenue in the hands of the Commonwealth, de facto or de jure. The bases for general revenue redistribution, including inter-state equalisation, have been an ongoing problem ever since.

The effect of the fiscal imbalance on Australian federation is a well-known story that I do not pursue here. Rather, my purpose is to draw attention to one other consequence of the imbalance: the encouragement that it offered the Commonwealth to rely on its considerable revenues to expand its authority into areas of State responsibility.

One obvious vehicle for the purpose is the Commonwealth's power under section 96 to grant financial assistance to the States on such terms and conditions as the Commonwealth Parliament thinks fit. Increasingly, however, the Commonwealth has by-passed the States, relying on direct spending in areas where its legislative powers are, at best, doubtful.

Typically, such programs rely solely on executive action, apart from a (usually very) general appropriation by the Parliament. Sometimes they are, effectively grants, accompanied by (often detailed) executive guidelines; sometimes the vehicle for expenditure is contract. This has become an attractive model, for successive Commonwealth governments of both political persuasions. Apart from the advantages of avoiding federal limitations on legislative power, it also avoids both Houses of the Commonwealth Parliament and presents a more than usually difficult target for judicial review.

Initially the practice was much less prevalent than it is now. Whenever the issue arose, however, in any significant context, there was uncertainty about the source of authority for it.

Comparisons occasionally were drawn with Canada and the United States, as the two most obviously comparable federations, in both of which a federal spending power was implied. But in both those federations, the power was implied to empower the central level of government to make grants to the provinces or states, in the absence of an equivalent to Australia's section 96. From that point of view, the inclusion in the *Constitution* of an express power to spend through the States operated against an implied power to spend in ways that could not be supported by legislation.

For a while, nevertheless, it was assumed that Commonwealth spending depended on the meaning of sections in the *Constitution* requiring parliamentary appropriation 'for the purposes of the Commonwealth'. There was disagreement over whether these purposes could be determined by the Parliament of the day or were circumscribed by constitutional limits. This debate intersected with academic writing encouraging the view that for the purposes of contract and spending the executive branch of government was the equivalent of an ordinary person. On this view, because contract and spending were consensual, they should not be subject to constitutional, including federal, constraints.

The source and scope of Commonwealth power to spend were challenged during the heady days of the Whitlam federal government: a government with an ambitious social agenda across areas of both Commonwealth and State authority, but a poor relationship with many of the States. One initiative was the Australian Assistance Plan: a plan to provide funds to 'Regional Councils for Social Development' across the country.

The validity of the plan was challenged by Victoria in 1975.[3] The *AAP Case* was one of those rare High Court of Australia decisions in which the plaintiff lost but made

advances in the doctrinal war. The Court divided equally (3-3) on the merits. The seventh judge, Sir Ninian Stephen, holding the ring, held that the plaintiff State lacked standing. This was a conclusion with which the others disagreed, but it nevertheless prevented Sir Ninian from reaching the merits.

On close reading of the reasons of the various judges, nevertheless, the doctrinal ground was shifting. The clearest indication of the change lay in the reasons of Mason J, which subsequently became the most influential. Appropriation was a process internal to the Commonwealth level of government; necessary, but not a source of a power to spend. The source of authority to spend and to contract was the executive power in section 61 of the *Constitution*. The executive power was limited; not only, obviously, by considerations of separation of power but also by the federal character of the *Constitution*, including the legislative division of powers. Even allowing for some flexibility in the 'federal' scope of the executive power, through the addition of a 'nationhood' component, the AAP scheme was beyond the pale.

Judicial challenges to government spending are unusual. Recipients have standing but are unlikely to object. The standing of third parties may be uncertain, as the *AAP Case* made clear. There was no early judicial follow-up to the decision in the *AAP Case*, to clarify its meaning. In these circumstances, the odd outcome led to divergent understandings across Australia. I can attest that students at Melbourne Law School were taught for the next 30 years that the Commonwealth power to spend was limited. In Commonwealth circles, however, the case seems to have been understood as something of a green light, requiring less attention to be paid to constitutional constraints.

And so matters stood until the end of the first decade of the 21st century when another three spending cases came before the High Court. The first was a fallout of the global financial crisis in a decision called *Pape*, which I will not canvass here except to note that it helped to lay the foundations for the others.[4] Both the remaining two cases dealt with a challenge to the School Chaplains' program. This program funded chaplains in schools across Australia, through contractual arrangements with participating schools. Some States had similar programs. The Commonwealth program was entirely dependent on executive action. It operated pursuant to executive guidelines, which were detailed and frequently changed. The program was challenged by Mr Williams, a parent of children at one of the schools. His standing was accepted by the Court or, at least, assumed.

In the first *Williams* case a majority of the High Court held that the contracts were invalid because they were not supported by the Commonwealth's executive power.[5] In other words, the High Court by this time had adopted the view of Mason J in the *AAP Case* that the source of the Commonwealth power to spend is the executive power of the Commonwealth. The school chaplains program was invalid because it needed the support of legislation. The flaw in the scheme, therefore, was linked to considerations of separation of powers. The analogy between the executive government and 'ordinary' people was repudiated. It was not necessary for the court in the first *Williams* case to consider the obvious potential for other flaws, derived from federalism, which might also have affected the validity of the scheme.

It was evident from this decision that there is no general, inherent, Commonwealth executive power to contract and spend. Some contracts can be made without supporting legislation. The scope of these is unclear, but they are likely to

include contracts made in the ordinary course of administration, and so attributable to section 64 of the *Constitution*. While the reasoning of the Justices varied, all drew on the structure of the *Constitution*, which included federalism and parliamentary democracy, in construing the meaning of the Commonwealth's executive power. The dependence of the reasoning of the court on the context of the *Constitution* makes it hard to predict with certainty whether State executive power is similarly limited (although my best guess is that it will prove to be).

As the hearing in the first *Williams* case progressed and the possibility of an adverse decision appeared to increase, the Commonwealth took steps to ascertain how many other spending programs might be at risk. The final tally was around 400, which may or may not have been complete. In the immediate aftermath of the decision in *Williams,* legislation hastily passed through Parliament provided a statutory basis for all existing programs in an unusual manner that gave them the status of delegated legislative instruments. The legislation also allowed for future spending programs to be put in place through delegated legislation. Political rhetoric at the time claimed that this was a temporary, stop-gap measure. In effect, however, it is still in place.[6]

The School Chaplains scheme, now with a form of delegated legislative underpinning, was challenged again by the indefatigable Mr Williams in the case of *Williams No. 2*.[7] And once again, the challenge succeeded. The Court stuck to its guns in relation to the scope of inherent executive power. But the real issue now was not separation of powers but the validity of the supporting legislation. The regulation that underpinned the School Chaplains program was oddly drafted and its purport not entirely clear. But at least it provided the Court with a text, which could be measured against the yardsticks that the

constitutional heads of legislative power provide. The Court found the regulation wanting, in the sense that it was not supported by any head of legislative power. Both benefits to students and the trading corporations power were rejected as possibilities. The case illustrates well how an understanding of the executive power that requires legislation for contracts of this kind serves to reinforce the federalism limits in the *Constitution*, as well as enhancing accountability to the Parliament. Direct action having failed, the decisions in these cases forced the Commonwealth back to section 96, requiring negotiation with the States, if it wanted to continue with the program.

I welcomed the *Williams* decisions (and I was not alone), as strengthening federalism and democracy, whether considered as values in their own right or as a compound conception of federal democracy. In a sense the decisions are timeless. But they are particularly important at this time. Current practice in the delivery of public policy relies extensively on public contracts for a range of purposes with contemporary and intergenerational significance: the performance of public services; very large-scale infrastructure and other projects; the sale of public assets. Australia is by no means the only country following these trends or grappling with the consequential issues. It is, however, grappling with them in the distinctive context of Australian constitutional federal democracy, fuelled by the fiscal imbalance. Elsewhere, there is burgeoning debate about suitable institutional mechanisms for public spending and public contracts that serve the public interest without undermining the fabric of the constitutional system. The *Williams* decisions provide the opportunity to have that debate here too.

So far, the opportunity has not been taken, although I do not despair. It must surely happen in due course, if only for reasons of budgetary prudence. Current Commonwealth spending practices raise obvious problems from the standpoint of fiscal management. No opportunity for prioritization. No attempt to fit isolated incidents of Commonwealth largesse with existing, developed State programs.

Meanwhile, however, the story continues. Regulations to underpin executive spending continue to be made. It is impossible to tell whether they are made for all new programs that the outcomes in *Williams* place at risk. The relevant Senate Standing Committee has insisted that the explanatory memorandum that accompanies new 'spending' regulations identify the head of power that supports each of them. The typical response, my cursory research suggests, is the 'nationhood' power; almost certainly a slender reed, if and when another of these programs reaches a court.

In the absence of a challenge, political practice is hard to shift. Those alive to these issues watched aghast during the last Commonwealth election campaign as candidates from both sides of politics promised goodies from football fields to car parks that are almost certainly beyond Commonwealth power, unless achieved through grants to the States. The sports grants affair raised the problem to a new level, with spending promises that were not only unsupported and unsupportable by legislation but were actually contrary to an existing Act.

To return to the connection with which I began. Alfred Deakin anticipated Commonwealth financial hegemony. He could not have foreseen these developments, however. They have implications for the effectiveness and integrity of government at the Commonwealth level. I like to think he would be concerned as well.

Endnotes

1 *New South Wales v Commonwealth (Surplus Revenue case)* (1908) 7 CLR 179

2 Alfred Deakin, *Federated Australia* (1968).

3 *Victoria v Commonwealth (AAP case)* (1975) 134 CLR 338.

4 *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

5 *Williams v Commonwealth* (2012) 248 CLR 156.

6 See now the *Financial Framework (Supplementary Powers) Act* 1997 (Cth), s 32B.

7 *Williams v Commonwealth (No 2)* (2014) 253 CLR 416.

SPENCE *v* QUEENSLAND: CALIBRATING AUSTRALIAN FEDERALISM FOR A SECOND CENTURY

PETER DUNNING, QC

I am delighted to have been asked to speak today about the recent decision of *Spence v Queensland*.[1] It was my privilege to run this case for the State of Queensland whilst I was its Solicitor-General earlier in the year. I should mention, however, that some weeks ago, Professor Nick Aroney observed of my performance in *Spence* that he did not realise you could lose so many points and still win the case.

I will confess that I thought of renaming this speech '*Heartland*',[2] because that word has attracted such significant attention since the delivery of the decision in the case. Yet I have stayed with the current topic, because there is an anterior point that I consider needs to be made.

What I hope to demonstrate is that the reasoning of the majority in *Spence* (being the joint judgment of Kiefel CJ, Bell, Gageler and Keane JJ) should be seen as an orthodox outcome, and should not be viewed as surprising, as some people have suggested, nor a return to some pre-*Engineers* heresy, another epithet I have heard offered by some in the constitutional law establishment.

There are three essential matters that I wish to develop. First, that the test of characterisation of the majority, and the minority (being each of Nettle, Gordon and Edelman JJ who wrote separately in dissent), in *Spence* did not substantially differ. What differed was the conclusion when the ultimate test

was applied, and relatedly, how the answer to that ultimate enquiry might be arrived at.

Second, the place of purpose in applying that test, and ultimately the hint of a proportionality analysis as an interesting feature to watch for the future.

Third, the result should not be seen as startling. To the extent it is startling, it is due to a somewhat dogmatic perception of what *Engineers*[3] stood for, what Windeyer J had meant in *the Payroll Tax Case*,[4] and how Windeyer J's reasoning had been restated in *the Work Choices Case*.[5] In fact, I would go as far as to suggest that triumvirate has joined, among others, Magna Carta, as authorities so more often cited than read that they develop a common perception of what they stand for that drifts from what they actually held.

I BACKGROUND

In May 2018, Queensland passed laws prohibiting property developers from making political donations to political parties which promote candidates in Queensland (and local government) elections. The laws commenced in October 2018.

The Queensland laws were challenged by Mr Spence, then the President of the Liberal National Party, in the original jurisdiction of the High Court. One main basis of challenge was that the law infringed the implied freedom of political communication. That aspect of the challenge always faced the significant hurdle that the High Court had upheld the New South Wales ban on property developer political donations in *McCloy v New South Wales*[6] and it was ultimately unsuccessful.

There was another significant basis of the challenge. It arose this way: almost invariably, Queensland political parties are also federal political parties — that is, they also promote candidates

in federal elections. The donations that a party receives may therefore be used for campaigning in either kind of election — or, perhaps, on some other purpose such as administrative costs. The Queensland ban, however, applies to all donations received by a political party which promotes candidates in Queensland elections, irrespective of whether the donation is intended by the donor, or by the party, for use in State or federal elections.

This aspect of the Queensland laws gave rise to additional challenges to validity, which were that the laws: (a) intruded into an area of exclusive Commonwealth legislative power about federal elections; (b) infringed an implied immunity protecting the Commonwealth from the operation of State legislation; and (c) were indirectly inconsistent with the regime for the regulation and disclosure of donations under the *Commonwealth Electoral Act 1918* (Cth).

The Commonwealth intervened in support of the plaintiff. Its main argument was that, to the extent the Queensland laws prohibited the making and receipt of donations which were earmarked for use in federal elections, or which were available for use in federal elections, the Queensland laws were invalid for intruding into an area exclusively reserved to the Commonwealth.

However, the Commonwealth obviously foresaw that their exclusive power argument was not bullet-proof because, in December last year, the Commonwealth Parliament amended the *Commonwealth Electoral Act* to insert s 302CA. It was clearly designed to override the Queensland laws. It purported to permit property developers to make donations to political parties if the donations are required to be, or *may* be, used for federal electoral purposes, despite any State or Territory law. The immunity was then removed if the donation is used for State electoral purposes.

Queensland conceded that if s 302CA was valid, there was an inconsistency between s 302CA and the State's prohibited donor provisions. However, Queensland challenged the validity of s 302CA on the following grounds: (a) s 302CA is not a law with respect to federal elections and hence lacks a sufficient connection with any head of Commonwealth legislative power; and (b) the operation of s 302CA offends the principle derived from *University of Wollongong v Metwally*[7] and s 302CA breaches the *Melbourne Corporation v Commonwealth*[8] doctrine.

As Gageler J remarked at one of the directions hearings, the case 'bristled' with constitutional questions. Those questions were all, essentially, about the nature of the Australian federation.

II THE CHARACTERISATION TEST

Ultimately, the test of characterisation adopted by the majority and the minority were as explained in the following aspects of their respective reasons.

The test of characterisation applied by the majority in their judgment can be found in the following passage:[9]

> The principles governing characterisation of a Commonwealth law in order to determine whether the law is within the scope of a legislative power conferred by s 51 of the Constitution have become "well settled" since *the Engineers' Case* and have even been described as "established, if not trite, constitutional law" … The character of the law must "be determined by reference to the rights, powers, liabilities, duties and privileges which it creates". The constitutional description of the subject matter of the power must "be construed with all the generality which the words used admit". The law will then

> answer the description of a law "with respect to" that subject matter if the legal or practical operation of the law is not "so insubstantial, tenuous or distant" that the law ought not be regarded as enacted with respect to that subject matter. There is no need for the law to be shown to be connected with the subject matter of the power to the exclusion of some other subject matter that is outside Commonwealth legislative power, and "if a sufficient connection ... does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice".

The majority then explained that the sufficiency of the connection of a Commonwealth law with the subject matter of a conferral of legislative power can turn on questions of degree, and that the more the legal operation of the law is removed from the subject matter of the power, the more questions of degree will become important.[10]

Turning to the characterisation of s 302CA, the majority then said:[11]

> The contrast between the slightness of the impact of s 302CA on the subject matter of the federal electoral process and its much greater impact on matters outside that subject matter points strongly to a purpose that cannot be said to be incidental to that subject matter. Indeed, it is difficult not to draw from the operation of s 302CA the inference that its purpose is to ensure that, save for donations earmarked for use in State, Territory or local government election campaigns, political entities may receive donations to fund any activities from any donors who would otherwise be prohibited by State or Territory electoral laws from making those donations. Ensuring the availability to political

> entities of funding for participation in federal elections appears to be at most an adventitious consequence of this purpose.

The majority then concluded that having regard both to the tenuous connection between s 302CA of the *Commonwealth Electoral Act* and the federal electoral process and to the section's purpose to confer an immunity from State laws in respect of subject matters outside the subject matter of Commonwealth legislative power, s 302CA could not be supported as a law incidental to federal electoral processes to the extent that it authorised the giving, receipt and retention of a gift that might never be used for any federal electoral purpose. As a consequence, the section was to that extent beyond the scope of the power conferred by s 51(xxxvi) of the Constitution.[12]

In relation to the minority, for the purposes of this argument, I will adopt the reasoning of Nettle J as representative of the position of the minority, as follows:[13]

> Arguably, a Commonwealth law which did no more than purport to exclude the application of State law to gifts that might be used for Commonwealth electoral purposes would be beyond Commonwealth legislative power. On one view of the matter, the link between the subject matter of Commonwealth elections and a mere possibility of a gift being used for Commonwealth electoral purposes, standing alone, would be too tenuous to conclude that the law was one with respect to Commonwealth elections. As was accepted by the Solicitor-General of the Commonwealth, the situation would be in some respects analogous to the examples of Commonwealth prohibitions adumbrated by Dixon CJ in the *Second Uniform Tax Case* in support of his Honour's conclusion that a Commonwealth law

> which purported to prohibit a taxpayer paying State taxation before paying Commonwealth taxation went beyond any true conception of what was incidental to the Commonwealth's power to make laws with respect to taxation. But there are dangers in analogies, and as Dixon CJ expressly cautioned in the *Second Uniform Tax Case*: "[W]hen you are considering what is incidental to a power not only must you take into account the nature and subject of the power but you must pay regard to the context in which you find the power." …
>
> As it appears to me, the answer to that question is that because that possibility is inherent in every donation made on terms that permit but do not require the donation to be used for Commonwealth electoral purposes, Pt XX is a law with respect to both Commonwealth purposes and purposes not within Commonwealth legislative power. But as has long been established, if a law enacted by the Commonwealth Parliament can fairly be described as a law with respect to a grant of Commonwealth legislative power as well as a law with respect to matters left to the States, that will suffice to support its validity as a law of the Commonwealth.
>
> In *Actors and Announcers Equity Association v Fontana Films Pty Ltd* Stephen J concluded that the question of whether a "mixed" law may fairly be described as one with respect to a head of power will depend upon the "significance" of the remaining elements.

It may be seen that the majority lay the basis to answer the question of a sufficient connection in the negative, as follows:[14]

> Where difficulty lies is with the breadth of the operation of s 302CA(1) insofar as it extends to protect from the operation of a State electoral law the giving, receipt and retention of a gift in circumstances where, to adopt the description used in argument by the Solicitor-General for Tasmania, the "gift (or part of it) may (or may not) be used for Commonwealth electoral expenditure" and where, at the time it is given and received, use of the gift to create or communicate matter for a purpose of influencing voting at a federal election is nothing more than a bare possibility. Consideration of whether s 302CA, to that extent of its operation, is within the scope of the power conferred by s 51(xxxvi) of the *Constitution* requires closer attention.

If Nettle J had characterised the legislation in that way, his Honour would have come to a like conclusion as to the result, applying the test of characterisation that his Honour had adopted as set out above.

Thus, it may be seen that the difference between the majority and the minority was not as to the ultimate test to be applied, but how their Honours characterised the legislation in question in the answer to that ultimate enquiry.

III THE PLACE OF PURPOSE IN APPLYING THE MAJORITY TEST OF CHARACTERISATION

It is in this regard that distinction, perhaps contra-distinction, as to approach might readily be discerned between the majority and the minority.

The approach of the majority in turning to purpose for answering that enquiry may be seen as follows:[15]

> Determining whether a law is incidental to the subject matter of a power can be assisted by examining how the purpose of the law – what the law can be seen to be designed to achieve in fact – might relate the operation of the law to the subject matter of the power. In *the Bank Nationalisation Case*, Dixon J went so far as to say that "in all cases where it is sought to connect with a legislative power a measure which lies at the circumference of the subject or can at best be only incidental to it, the end or purpose of the provision, if discernable, will give the key". …
>
> Applying that manner of characterisation, a law the purpose or object of which is protection of something that is encompassed within the subject matter of a conferral of legislative power may yet not be a law with respect to that subject matter because the law is insufficiently adapted to achieve that purpose, having regard to the breadth and intensity of the impact of the law on other matters. Professors Zines and Stellios have commented in this respect that "the slightness of the impact on the federal subject" will often be "shown most clearly by contrasting it with a much greater effect on matters outside the subject of power".
>
> Thus, it was said in *Davis v The Commonwealth* of the protection against commercial exploitation attempted to be afforded by s 22 of the *Australian Bicentennial Authority Act 1980* (Cth) to words associated with the national program of celebrations and activities to commemorate the bicentenary of European settlement in Australia that "[a]lthough the statutory regime may be related to a constitutionally

legitimate end, the provisions in question reach too far" in that their "extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power". Much the same was said in *Nationwide News Pty Ltd v Wills* of the protection attempted to be afforded by s 299 of the *Industrial Relations Act 1988* (Cth) against even fair and reasonable criticism of a member of the Australian Industrial Relations Commission. While use of the concept of proportionality in this context has been criticised, the point presently to be made is that consideration of the purposes which the law is or is not appropriate and adapted to achieve may illuminate the required connection to the relevant head of power. …

In *Gazzo v Comptroller of Stamps (Vict)* Gibbs CJ referred to the *Second Uniform Tax Case* as amongst a number of decisions which showed "that a provision cannot be said to be incidental to the subject matter of a power simply because in a general way it facilitates the execution of the power" and "that in considering whether a law is incidental to the subject matter of a Commonwealth power it is not always irrelevant that the effect of the law is to invade State power". Although the correctness of the decision in *Gazzo* has been questioned, there is no reason to doubt the veracity of those observations. …

If s 302CA of the *Commonwealth Electoral Act* is to be found to have a sufficient connection with the subject matter of the power, that connection could only be found by relating the operation of the section to the purpose of the section. Exploring that possibility makes it necessary to turn to the identification of the section's purpose.

However, the kicker, so to speak, is to be found in the following passages of the majority: [16]

> The ultimate purpose of the section can on that basis be generalised as being to protect a source of funds which might, but need not, be deployed by a political entity in a federal electoral process. The Solicitor-General of the Commonwealth expressed that ultimate purpose even more generally as being "to protect the federal electoral process by ensuring that participants in that process are not starved of funds that are able to be used for the dominant purpose of influencing the way electors vote in the federal elections".
>
> The difficulty with accepting the purpose so postulated by the Commonwealth lies in the disconformity between that purpose and the breadth of the operation of s 302CA, to which attention has been drawn. The section confers immunity from the application of State and Territory electoral laws that would otherwise limit the availability of funds to political entities to pursue a range of activities having no connection with federal elections. *They include activities the regulation of which is within the heartland of State legislative power*. (emphasis added)

I note my friend the Solicitor-General for New South Wales, Mr Sexton SC, in the audience, and whilst I know he is not given to difficulty sleeping, it would be fair to say that if you were a State or Territory Solicitor-General or Crown Solicitor, and experiencing difficulty in finding inner peace at night to go to sleep, keeping this passage about "heartland" by your bedside table would offer a sure and certain comfort.

In fact, in my opinion, these matters might fairly be observed in relation to how the majority employed purpose in their reasoning.

First, purpose can, not must, assist in characterising the relevant connection to Commonwealth power.

Second, whether a law is sufficiently adapted to achieve its purpose may also bear upon this enquiry.

Third, consequently, there is the real prospect that notions proportionality testing, as are now employed by some judges in the implied freedoms sphere,[17] will be employed in this characterisation exercise.

Fourth, as the majority have employed the criterion of sufficient adaptation in their reasoning, it would seem to be no higher than a tool of analysis[18] for arriving at that characterisation conclusion.

IV A STARTLING RESULT?

The result in *Spence* should not be seen as a startling one. To explain why this is so involves, in my view, some analysis of the reasoning of the plurality in the *Work Choices Case*.

In particular, the majority of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ reasoned as follows:[19]

> Underlying all these arguments there was a theme, much discussed in the authorities on the corporations power, that there is a need to confine its operation because of its potential effect upon the (concurrent) legislative authority of the States. The Constitution distinguishes in s 107 and s 109 between legislative powers exclusively vested in the Parliament of the Commonwealth and inconsistency between federal and State laws made in exercise of concurrent powers.

> Section 107 does not vest exclusive powers in the State legislatures.

The majority next quoted the following passage from Windeyer J's judgment in the *Payroll Tax Case*:[20]

> The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed; and that of the States has waned. In law that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in fact by financial dominance. That the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur. This was greatly aided after the decision in the *Engineers' Case*, which diverted the flow of constitutional law into new channels.

The majority then said as follows:[21]

> These were the observations of a distinguished legal historian. References to the "federal balance" carry a misleading implication of static equilibrium, an equilibrium that is disturbed by changes in constitutional doctrine such as occurred in the *Engineers' Case*, and changes in circumstances as a result of the First World War. The error in implications of that kind has long been recognised. So much is evident from Alfred Deakin's Second Reading Speech on the Judiciary Bill in 1902 and his comparison between the difficulty of amending the Constitution by referendum, and this Court's differing but continuing role in determining the meaning and operation of the *Constitution*.

There has, in my opinion, been a tendency to read only one side of Justice Windeyer's passage in the *Payroll Tax Case* as cited in the *Work Choices Case*. However, as may be demonstrated, that is not in fact what the plurality did in *Work Choices*. In particular, Windeyer J in the *Payroll Tax Case* spoke to the circumstances to the end of 1960s and his Honour's passage, so often referred to, needs to be understood in that context.

Windeyer J did not suggest that there would for all time be a trajectory of the diminution of State legislative power in favour of Commonwealth power, such that inexorably the States would be rendered some legislative rump. Rather, his Honour recorded what had happened in the period of 1901-70. What his Honour had made clear and, what had been adopted by the plurality in the *Work Choices Case,* was that there should be no assumed constitutional balance or an assumed equilibrium between the Commonwealth and the States; implicit in this is that there should be no assumption of ever more enfeebled State legislative

power. Rather, the *Constitution* provided the means to regulate and determine such matters in the context in which they presented themselves over time.

So much is, respectfully, plainly correct when considering the operation the *Constitution* as a document for the ages, entrenching the federal government and the States and Territories as constituent institutions of the Commonwealth of Australia, and regulating their interactions both to resolve conflicts between them, yet preserve their perpetual operation.

None of this is, or need be, any collateral attack on the legal supremacy, in areas of concurrent power, provided by s 109, or of the reasoning in *Engineers*. Less still is it some back-door attempt to breathe life into the surely dead reserve powers doctrine. Rather it comes to the question of resolving a conflict between Commonwealth and State legislative power from a position of neutrality, consonant with the text and structure of the *Constitution*, applying orthodox canons of characterisation, and shorn of pre-conceptions that the Commonwealth must prevail, lest there be a return to some form of reserve powers doctrine.

In that regard the majority's reasoning in the *Work Choices Case* is apposite:[22]

> As Windeyer J rightly pointed out in the *Payroll Tax Case*, the *Engineers' Case* is not to be seen "as the correction of antecedent errors or as the uprooting of heresy". There is no doubt that, as he continued, "[t]o return today to the discarded theories would indeed be an error and the adoption of a heresy". But the *Engineers' Case* was both a consequence of developments outside the law courts (not least a sense of national identity emerging during and after the First World War) and a cause of future developments.

> As Windeyer J went on to say: "That is not surprising for the Constitution is not an ordinary statute: it is a fundamental law. In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries: or that they may do so."

Respectfully, those who are so startled fail to appreciate the rigor and astuteness of our common law tradition and method to ensure fidelity not only to the text of the *Constitution*, and what it does and does not confer on the Commonwealth, but also its structure.

By the time of the *Payroll Tax Case*, the first 70 years of federation had been punctuated by two of the most dramatic world wars that the world had ever seen. These events were inevitably going to expand Commonwealth power.

Moreover, the fact that the Commonwealth commenced in 1901 with, obviously, no pre-existing functions or powers, explains why during the first century of federation it was to be expected that the Commonwealth would commence and continue to fill out its function and legislative remit in accordance with the *Constitution*.

However, the fact of that significant reduction in State power at the expense of the increase in Commonwealth power over that period through to 1970 did not warrant the conclusion that there would be an ever-continuing diminution of State power in favour of the Commonwealth. Rather, both the act of the Commonwealth filling out its function and legislative remit, and changing context and imperatives, gainsays such a proposition.

Indeed, the *Work Choices Case* made that sufficiently clear as follows:[23]

> What was discarded in the *Engineers' Case* was an approach to constitutional construction that started in a view of the place to be accorded to the States formed independently of the text of the *Constitution*. The *Engineers' Case* did not establish that no implications are to be drawn from the *Constitution*. So much is evident from *Melbourne Corporation* and from the *Boilermakers' Case*. Nor did the *Engineers' Case* establish that no regard may be had to the general nature and structure of the constitutional framework which the Constitution erects. As was held in *Melbourne Corporation*: "The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities." And because the entities, whose continued existence is predicated by the Constitution, are polities, they are to continue as separate bodies politic each having legislative, executive and judicial functions. But this last observation does not identify the content of any of those functions. It does not say what those legislative functions are to be.

At federation what was created was not only the Commonwealth government but the former colonies became constituent permanent parts of the Australian constitutional infrastructure. True it is that certain powers they previously exercised as colonies were now to be exercised by the Commonwealth, and there was scope for that to expand over time, but their continued existence was a significant and permanent feature of federation.

It ought not to have been that surprising that there would come a point where a significant extent of the Commonwealth's legislative power under the *Constitution* had been filled out and that it would not continue to erode the position of the State as materially as it had previously.

Indeed, it is as well to look to minority statements in judgments as often illuminating, by way of contrast sometimes, of what can be found in the majority. In that regard the concluding remarks of Justice Callinan in dissent in the *Work Choices Case* are apposite, where his Honour, quoting Justice Windeyer in another case, said: 'The question whether an enactment truly answers to the description of a law with respect to a given subject matter must be decided as it arises in any particular case in reference to the facts of that case.'[24]

V CONCLUSION

Ultimately, in my view, the decision in *Spence* did not produce some marked shift in judicial attitude to federal state relations. The *Work Choices Case* tells us to eschew any preconceptions of a particular federal-state balance. Rather, one goes to the text and structure of the *Constitution* for its proper construction according to orthodox canons of construction and that will give an answer in an individual case as it did in *Spence*.

That said, whereas the first century of our federation was marked by an apparent ever-decreasing area of state power and increasing area of Commonwealth power, the reductions in state power and the accretion of commonwealth power might not nearly be as marked in the second century, and more nuanced and nicer questions will arise for consideration in relation to the preserving of states as polities created by the *Constitution*.

Endnotes

[1] *Spence v Queensland* (2019) 367 ALR 587.

[2] Ibid [80].

[3] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[4] *Victoria v Commonwealth* (1971) 122 CLR 353, [395]-[396].

[5] *New South Wales v Commonwealth* (2006) 229 CLR 1.

[6] *McCloy v New South Wales* (2015) 257 CLR 178.

[7] *University of Wollongong v Metwally* (1984) 158 CLR 447.

[8] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

[9] *Spence v Queensland* (2019) 367 ALR 587, [57].

[10] Ibid [59].

[11] Ibid [81].

[12] Ibid [83].

[13] Ibid [138], [143]-[144].

[14] Ibid [56].

15 Ibid [60], [62]-[63], [69], [76].

16 Ibid [79]-[80].

17 See, e.g., *McCloy v NSW* (2015) 257 CLR 178.

18 See *Brown v Tasmania* (2017) 261 CLR 328, [158]-[159] per Gageler J, [473] per Gordon J, see also [125] per Kiefel CJ, Bell and Keane JJ.

19 *New South Wales v Commonwealth* (2006) 229 CLR 1, [54].

20 *Victoria v The Commonwealth* (1971) 122 CLR 353, 395-396

21 *New South Wales v Commonwealth* (2006) 229 CLR 1, [54].

22 Ibid [193]

23 Ibid [194]

24 Ibid [912].

THE EROSION OF THE ECONOMIC BENEFITS OF FEDERALISM

JUDITH SLOAN

I have been asked today to talk about the erosion of the economic benefits of federalism. I had to do some homework, to tell you the truth. And I concluded, after doing my homework, that — certainly at the academic level — the study of the federation is a dying field amongst economists. I spoke to my dear friend Jonathan Pincus this week and asked him whether he agreed with that proposition and he said that was right.

There was a halcyon time when economists were very interested in the federation and how it interacted with government spending and taxation and federal financial relations in general. The key economists in Australia interested in this area included Geoff Brennan, Jonathan Pincus, Glenn Withers, Brian Dollary, Cliff Walsh and Brian Galligan. But there is not much interest from younger academics today.

When thinking about why economists are interested in federalism, one of the absolute key issues is subsidiarity. It is a simple idea really: we want governments to be performing their task as close as possible to the locus of their activity, be it citizens or businesses. We want these things to be performed at the lowest possible level. The debate in this country has become extraordinarily confused and you hear all the time people saying: '*We need a national approach on homelessness, we need a national approach on pill testing, we need a national approach on lock-out laws*.' No, we do not. In fact, we do not need a national approach on a lot of things.

A national approach robs the nation of the potential benefits of competitive federalism. One state can experiment with a particular policy approach, or indeed do nothing, that also is an experiment, and see what happens, providing a yardstick for competition which is available to the other states. The Productivity Commission's Blue Book compares the performance of the states in providing government services, which essentially forms the basis for some very useful material when thinking about competitive federalism.

Subsidiarity is an absolute key idea based on the idea that sub-national governments have a much better idea of citizens and businesses in their jurisdiction. It is also about accountability, with much less blame shifting and buck passing. An important aspect to the system, however, is that there is free and unfettered movement of people within the country, with the potential for mobility of citizens therefore acting as a constraining force. For example, in the early 1990s in Victoria, things were getting sufficiently bad at that point, and there was scope for citizens to flee the jurisdiction. Of course, Victoria had an election and Jeff Kennett was elected.

When thinking about the economic issues of the federation, it really would be quite helpful if we had a better definition of the roles and responsibilities of the different levels of government. It was probably clearer in the past: the states had sole responsibility for school education, for example, and for hospitals, and so on. However, defining the roles and responsibilities of the different levels of government has now become a very blurry field. When Tony Abbott was the Prime Minister, he made the very useful suggestion that the Commonwealth Government should not be involved in urban transport; it being an area without any real interjurisdictional spill-overs. Interestingly, he was howled down at that point.

And now, of course, the Commonwealth is deeply involved in urban transport.

We also need to reform the specific purpose payments. These are a controlling mechanism whereby the Commonwealth provides grants to the States on tied terms, which has now become out of hand. I will return to this shortly.

And, of course, we have the complication of horizontal fiscal equalization. I have been in the news a lot over the past several years particularly with Western Australia doing so badly out of the allocation determined by the Commonwealth Grants Commission. This is an important economic issue, especially because of the lack of incentives for states to do sensible things. For example, in the case of royalties, they are distributed away to states that do not do anything.

Because this is a dying field, there is little recent evidence on the economic benefits of federalism. However, at a broad level, there are some international papers which demonstrate that federated states perform better economically than unitary states. Further, Anne Twomey and Glen Withers did a very interesting paper back in the mid-2000s, where they showed that the federal structure was adding about $4,500 to per-capita income. And then they estimated that we could get an additional $4,000 if we were to move to a better structure of federation. It was quite a compelling piece of work. But the big business community that operates over jurisdictional borders is not a big fan of federation. So the Business Council of Australia commissioned Access Economics to come up with what looked like, for them, compelling reasons to sort out the federation, suggesting that the cost of federation was about nine billion dollars because of overlaps and confused roles and responsibilities.

The 2000s was a bad time for federation in Australia in the sense that we had the *Work Choices Case* and the *Pape Case*, which confirmed the ability of the Commonwealth to override the states on various matters. (And I do not know whether anyone is talking about the *School Chaplains Case*, but it looks to me like the Commonwealth is violating that precedent all the time, but no one's bothering to challenge the Commonwealth because it is handing out money directly to local governments, and even handing out money directly to members of parliament to then allocate to their friends for community projects!)

For a time there in the 2000s, it looked a little favourable because when Kevin Rudd became Prime Minister (and my guess is that it was Ken Henry), he recommended that they call a quick COAG meeting in December 2007 and at that time there was a real push to try to sort out roles and responsibilities and the specific purpose payments. It fell apart, but it was quite an interesting development. Then we had Prime Minister Tony Abbott, who had really been a very devoted centralist. He had said early in the 2000s that he thought the federation was "*feral*" and when he was the Minister for Health he thought it might be a good idea if the Commonwealth took over all health responsibilities from the states and territories, which was actually quite a lunatic idea that even the Commonwealth bureaucrats did not like. The Commonwealth did run one hospital down in Burnie incredibly badly for quite a long time and has now, at great expense, handed it back to the Tasmanian government.

When Rudd came to power there were 70 ongoing specific purpose payments and 30 one-off payments. They moved to six national agreements, which was a positive development, but it was incredibly short-lived. They panicked during the Global Financial Crisis and they wanted to tell the states what to be

doing. By 2010, we had 51 national partnership agreements and 230 implementation plans. The mind boggles when you think about it. Can you imagine the number of meetings? Can you imagine the number of reports? Can you imagine the number of words? Can you imagine the number of public servants that were involved in that activity? And then, by 2016, when the Abbott reforms had been killed off by Malcolm Turnbull after the green paper, we had seven national agreements, 30 national partnership and 50 project agreements. And the more general point is that the tied grant represents around 45% of all state grants, bearing in mind that GST grants are not tied grants, and there were only about 20% of such grants in the 1950s and 1960s. So, it really is a picture of encroaching and inefficient Commonwealth controlled spending. There is a really high degree of process and measurement and outcomes that are required in these specific purpose payments: in other words, the compliance costs are extremely high.

Turning then to the issue of vertical fiscal imbalance. The Commonwealth is absolutely dominant in terms of raising revenue. The Commonwealth raises 82% of total tax revenue, the states and territories raise about 15% and local government the remaining 3%. And it really does contrast quite markedly with Canada, where the provinces are very active in raising their own revenue, and the central government there raises only 45%. The sub-national governments of Germany, the United States and Switzerland also raise very high proportions of revenue. Thus, Australia has a very high degree of vertical fiscal imbalance. The only one that seems to be higher is Austria.

It also is quite true, and it partly arises because of the horizontal fiscal equalization issue, that this degree of vertical fiscal imbalance also varies across the states. Victoria, New South Wales and Western Australia raise a higher proportion of

their own revenue, than, for example the Northern Territory, which raises pretty much nothing. Jonathan Pincus was telling me that he had done a 'back of the envelope' calculation about the rate of growth of taxes that the states and territories would have to impose to get Australia into a level of vertical fiscal imbalance at around 20% like it is in Canada: and the answer was 90%. In other words, the states and territories would have to increase taxes and other charges by 90% in order to remedy the vertical fiscal imbalance. I guess you can conclude that that is not going to happen, which means we are going to continue to live with a very high degree of vertical fiscal imbalance and its consequences.

How do I see the future? The mess will continue, and the confusion will continue, and the Commonwealth will continue to dominate. All the levels of government are to blame and I think the blame shifting and the buck passing suits everyone up to a point; it certainly suits some of the states — in Queensland and Western Australia, particularly, they press the Canberra button and they might get some more votes. And I am not sure the states and the territories are particularly keen to raise their own revenue.

I think it was extremely badly handled but Prime Minister Malcolm Turnbull raised the issue of the states imposing an income tax surcharge. The sprint out the door was particularly unedifying. None of them were interested in that at all and you just have to come to the conclusion that, in a sense, they might complain but they are unlikely to do anything about the current system. I think the sad thing is that we will continue to exact a high economic price for this. I was quite excited about the green and white paper process that Tony Abbott put in train. He set up a very good expert panel with my friend Doug McTaggart. He was part of the team and the feedback he gave me was that it

was a very productive process. They had some very good meetings and, particularly, the Premiers – Labor and Liberal – were on board. The trouble was that, for reasons that I am not entirely sure about, it did not suit Malcolm Turnbull to proceed with the process and so it died. But there is a lot of good material in the green paper that was prepared on the reform of the federation, even though there was never a white paper.

Henry Bolte said that the time will come when the federal government will be blamed for everything – an unmade road, the lack of an ambulance, a leaky school tap, at which point the Commonwealth would come to the states and say "take it back". I do not think so. My take is that the states will not take it back. Maybe the Samuel Griffith Society is a group that can think strategically about how we can restart the process of the reform of federation including the absolutely central issue of federal financial relations.

ALFRED DEAKING AND FEDERATION

JUDITH BRETT

Alfred Deakin became committed to the cause of federation when he was a young minister serving in the cabinet of James Service, the twelfth premier of Victoria, who won the 1883 election with a platform that included the commitment to work for federation of the Australian colonies. An intercolonial conference established a Federal Council that year to work towards this goal, so Service's hope was not unrealistic.

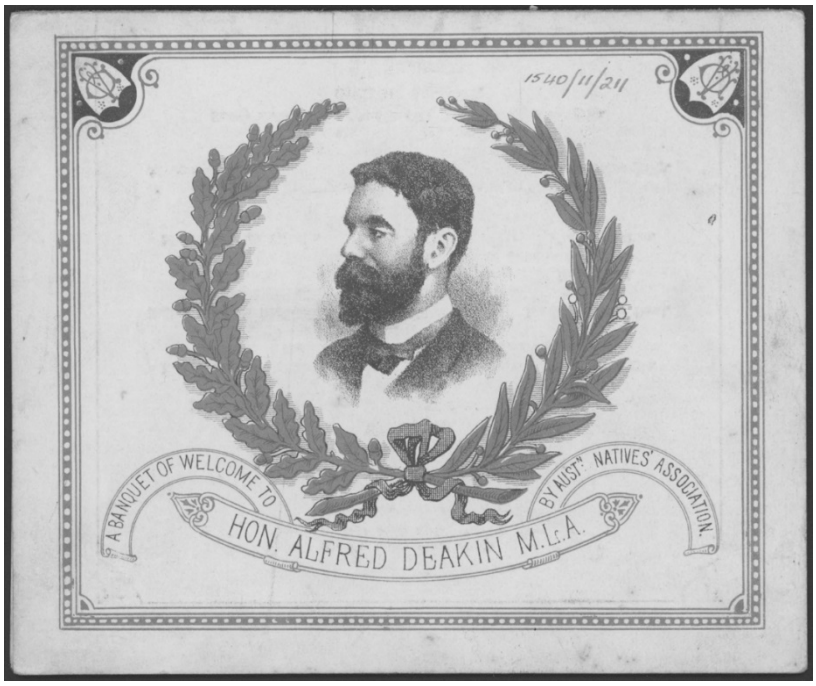
For the Victorians the cause of federation was closely linked to their desire for Britain to annex the New Hebrides. The Dutch had controlled the Western half of New Guinea since 1828, France had annexed New Caledonia in 1853, and Britain had annexed Fiji in 1874. The other islands to Australia's north east, including the eastern half of New Guinea, were as yet unclaimed by a European power, and the Australians wanted Britain to act. But the Liberal government of Gladstone had no interest in claiming new territory in the Pacific.

Service believed that a federated Australia would not only be better able to persuade Britain to its point of view but that it would also have the financial capacity to contribute to the administrative costs of the new imperial possessions, which Britain was sure to demand. Service's entwined dreams of federation and of an Australian imperial presence in the Pacific became Deakin's. Only if the colonies were federated, Deakin believed, would they be entitled to 'speak with the authority of a united people,'[1] and so press their demands on the British government.

Deakin was born in Melbourne in 1856, and his views were shared by other young native born men, especially those in the Victorian-based Australian Natives Association (ANA). These sons of the soil regarded themselves as having a special responsibility for national questions. Deakin joined the Prahran branch in 1884 and as his star rose he became their most celebrated member. He had already been a member of parliament for 4 years.

The colony of Victoria was riding a wave of prosperity and 'Marvellous Melbourne' was in full swing. By 1885 Deakin was the leader of the Liberal Party and Chief Secretary in a coalition government. In 1887, aged 31, he visited London for the first time, as a member of the Victorian delegation to the 1887 Imperial Conference. There he boldly challenged the British Prime Minister, Lord Salisbury, over Britain's reluctance to annex the New Hebrides, and he refused a knighthood. Deakin returned from London a local celebrity. The young men of the ANA saw him as representing the future of young Australia as a proud federated nation.

Below is Deakin's handsome half-profile surrounded by a wattle wreath on the program for the banquet the ANA gave to welcome him home.



Nothing much had come of the Federal Council. In 1889 the cause was revived by the aging NSW premier, Henry Parkes. In his Tenterfield address Parkes called for a national convention to devise a national government. Two were held, to hammer out a draft constitution which would then be endorsed by the colonial parliaments. For this to happen, the constitution needed to balance the sovereignty of the smaller colonies against the democratic rights of the majority of the population in Victoria and New South Wales. Deakin was at both these conferences, and realised that if federation were to be achieved, compromises would be needed.

The institutional framework of this first draft constitution has endured: a popularly elected lower house and an upper house with equal representation of the colonies (states) and equal powers except for money bills. There were, however, serious reservations about this first draft. Deakin and his fellow Victorians were uncomfortable about the upper house having any powers over money bills; there was no agreed means of resolving deadlocks between the houses, and the unequal representation in the Senate rankled with majoritarian democrats' commitment to votes of equal value, as did its indirect election by state parliaments. Deakin was a committed democrat, but if federation was to be achieved, majoritarian democrats would have to give way, as he well knew.

The draft constitution was largely the work of Queensland's Samuel Griffith, Tasmania's Andrew Inglis Clarke, South Australia's Charles Kingston and NSW's Edmund (Toby) Barton. The last two were to become Deakin's comrades in arms as they led the federation cause in their respective states. Both were some years older than Deakin, but native-born lawyers like him with around a decade of parliamentary experience each.

The convention settled the name of the federation — the Commonwealth of Australia. This was Henry Parkes' choice, but Deakin seconded it and lobbied energetically for it against those suspicious of its republican overtones. Deakin judged the Convention to have been 'fairly successful', but was not sure there was yet much public interest in the future of the nation.

In 1893 a people's conference in Corowa revived the cause and came up with a plan that took the process out of the hands of the politicians and gave it to the people. Voters in each colony would elect representatives to a convention, which would determine a Federal Constitution Bill, and which would then be submitted to referenda. Federationists could now move beyond

talk to start mobilising support for the forthcoming popular votes. This was the cause Deakin had been waiting for.

The boom of the 1880s had come to a shuddering end, especially in Victoria where a speculative land and housing boom crashed. The crisis shook Deakin's faith in politics. He resigned from the ministry, returned to practising law and contemplated leaving politics altogether. What held him there was the promise of federation. Federation became a redemption project for Deakin, as it did for many Victorians after the financial disasters of the early 1890s.

After Corowa, Deakin worked tirelessly for federation. Chairing a meeting convened by the ANA he said:[2]

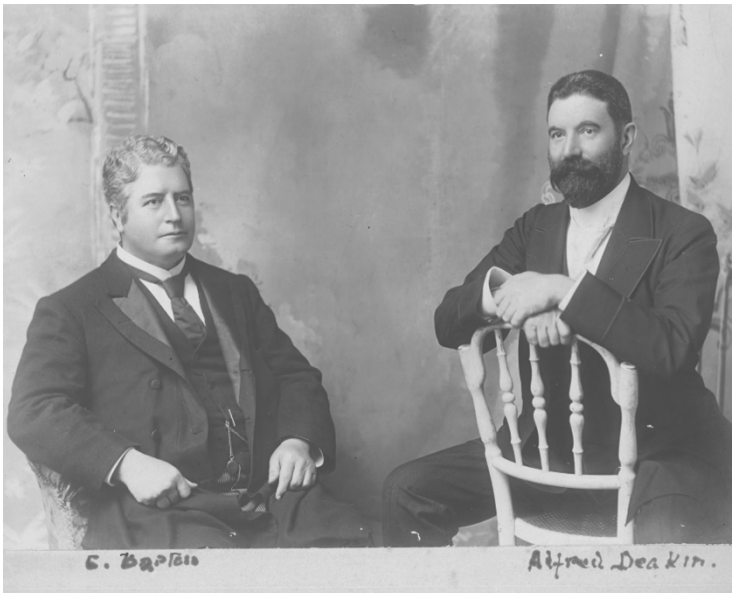
> [L]ong ago he had made up his own mind that no question should be put second to federation. From either the local or national standpoint … the best remedy that could be applied to all the ills, political, social and financial, from which Australia was suffering would be immediate federation.

For the next six years, apart from some engagement with the anti-sweating campaign and a fruitless effort to get religious instruction into state schools, Deakin's main political goal was the achievement of federation.

Deakin had two great political gifts: his oratory and his charm. He could bring a public meeting to its feet, and in private he could talk away doubts and negotiate a compromise. Both were acts of persuasion, the one exercised on halls full of people, the other face to face; one to excite enthusiasm, the other to find common ground. And he brought both these gifts to the hard work of achieving federation. He also brought himself, the brilliant native-born man whose upright and independent public persona embodied the spirit of the emerging nation.

Deakin was elected as a Victorian delegate to the convention that would settle the Constitution that was to be put to the people. He was the only Victorian who had been at previous conventions. He knew well the arguments and sensitivities that would shape the debates.

Deakin's staunchest ally was Edmund Barton, who had taken over the leadership of the cause in New South Wales from Parkes. They were, Deakin wrote, drawn together by the 'bond of sympathy in the cause of Australian Union.'[3] They are pictured together, below.



Deakin was determined to do everything in his power to achieve federation. In his opening speech to the convention, Deakin said:[4]

> Were it a question today … of accepting the Commonwealth Bill or postponing Federation ever for a few years, I should, without hesitation, accept the Commonwealth Bill … It is perhaps possible for us to fail altogether in our high aim, and we may easily fall short of its final achievement; yet it is certain to be long before such another opportunity can present itself… Political opportunities of this sort if missed rarely return again in the same generation.

The big problem, however, was how to resolve the democratic demand for majority rule, being assertively pushed by George Reid (the Premier of NSW), with the small states' fears of being swamped by NSW and Victoria.

Because the Constitution was required to go to referenda in both the most and the least populous states a resolution acceptable to all was necessary. The conflict centred on the role of the Senate which was designed as a states' house with equal number of delegates from each state. Democrats had already won a great victory in that the Senate would be elected by popular vote rather than by the state parliaments, as was the case in the United States of America, but its powers were contentious. New South Wales would not accept a Senate that could veto majority decisions of the House of Representatives and the Victorians too were wary, given the long history of conflict between their two houses. Further, Reid argued that as two-thirds of the future Commonwealth's revenue would come from Victoria and New South Wales, the lower house must control the government's finances.

South Australia, Tasmania and Western Australia would not accept a toothless Senate and if they voted as a block would win every time. If the Senate won control over money bills, New South Wales would withdraw and the federation would be doomed for the foreseeable future.

So Deakin turned his full persuasive powers on federationists from the small colonies. On a trip to Broken Hill he, along with two other Victorians, persuaded three Tasmanians to support a compromise, namely that they must be content to allow the Senate to make suggestions and not amendments in money bills unless they wished to shipwreck the whole Bill. The limitation of the Senate's money powers passed by a single vote and the Bill was saved.

Time and again during the debates Deakin argued that the fears of the small states were unfounded. The lines of division in the Senate would not be between the less and more populous states, he said, but between two parties, divided by the line of 'more progress and faster' and 'less progress and slower', or in other words, liberals and conservatives.

He also argued that the federation principle — and the endurance of state sovereignty — did not depend on the Senate's approval of federal laws but on the division of powers in the Constitution. It was the Constitution and the High Court rather than the Senate which would be the real, effective guarantor of states' rights, he argued, with most of the federal government's actions having no effect on state interests.[5] On the first, Deakin's prediction was prescient, but the second was to prove completely wrong.

After the convention had settled on the Constitution, the next step was the referenda. In March 1898, on the eve of the first referendum, prospects of success were not looking good.

Neither the premiers of New South Wales or Victoria had yet endorsed the bill. *The Age* newspaper looked set to oppose it on democratic grounds and its powerful editor, David Syme was pressuring Deakin to do the same. Instead, Deakin made a speech which turned the tide. Delivered without notes to the ANA banquet at the Shamrock hotel in Bendigo, this is the supreme oratorical feat of Deakin's life as he told the men of the ANA that their 'hour has come':[6]

> These are the times that try men's souls ... But it is not a time to surrender. Let us nail our standard to the mast. Let us stand shoulder to shoulder in defence of the enlightened liberalism of the constitution. Let us recognise that we live in an unstable era, and that, if we fail in the hour of crisis, we may never be able to recall our lost national opportunities…. The contest in which you are about to engage is one in which it is a privilege to be enrolled. It lifts your labours to the loftiest political levels, where they may be inspired with the purest patriotic passion for national life and being.

When he finished, the Natives rose to their feet, yelling and cheering and waving their handkerchiefs. Deakin was the mirror for their idealism. In him they saw their best and noblest selves; together they would stare down the doubters and prevaricators and make history.

The Natives went back to their branches filled with zeal to mobilise the Yes campaign.[7] With operating branches across the colony, in all the major regional towns and suburbs, the ANA had a formidable organisational base. The weeks between the end of the Convention and the referendum in early June were frenetic. Deakin was inundated with invitations from ANA branches to address meetings, and he accepted as many as was physically possible, addressing four of five meetings a week.

Deakin hoped popular enthusiasm would scare *The Age* off a campaign against the Bill, but he was also active behind the scenes bringing pressure to bear on doubting parliamentary colleagues, including the Victorian premier, George Turner.

Victoria embraced the Bill: not so New South Wales, where the majority of parliamentarians opposed the Bill and premier George Reid had prevaricated. Reid suggested a meeting of the premiers to see if they could agree on an amended bill that he could support whole-heartedly. Federalists were furious with Reid, whom they regarded as a saboteur, but they could not easily oppose him when he was offering a way forward. Deakin urged Turner to co-operate with Reid, suggesting to him the compromise on the location of the capital, that although in New South Wales it be at least 100 square miles and 100 miles from Sydney. In closed meetings in Melbourne early in 1899 the premiers agreed to an amended bill to be put to the people at a second referendum. Once again Deakin took to the campaign trail, and this time the referendum succeeded, with Victoria returning an even larger majority.

Deakin could set out the arguments for and rebut those against the Constitution Bill as well as any other federationist. His special gift was to create the imagined nation of Australia as an object worthy of sacrifice and devotion, elevating it above sectional and parochial interests. On the eve of the vote in late July, as torchlight processions marched down Swanston Street and up Bourke Street to Fitzroy and Collingwood, Deakin addressed a final meeting in the Town Hall:[8]

> When Australia raises its flag it would be the flag of a united nation and not even a Colonial Secretary in Her Majesty's Imperial Government would venture to pull it down … The swinging of this globe is bringing us nearer to tomorrow's dawn. When its sunlight

> silvers the vast panorama of this continent and the richly jewelled islands that lie within its seas, it shall shine upon a territory by which the act you will then perform and the solemn compact in to which you will then enter will be bound once and forever in a united commonwealth, an indissoluble union, everlasting and strong – into an Australia – one and indivisible.

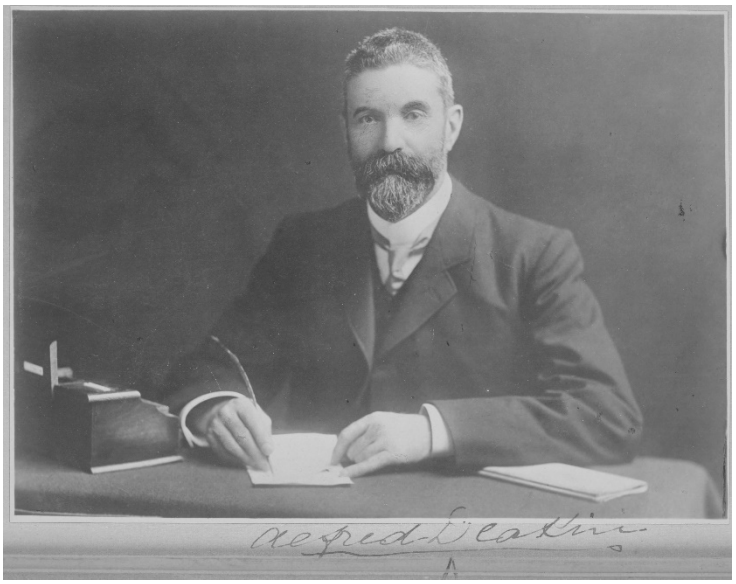
Deakin appealed to the idea of the nation which had captured the nineteenth-century Western political imagination: that a people united by territory, history, religion, race and culture should be joined under a political rule to which they consent. Barton's catch cry — 'A nation for a continent' — had unfurled the territory and Deakin's final images of the swinging globe and the sun silvering the land imbued federation with cosmic significance.

With federation achieved, Deakin became Attorney General in the first Commonwealth government, and after Edmund Barton retired to the High Court, its second Prime Minister. When the Constitution was finally law and the Commonwealth inaugurated, Deakin saw it as the duty of those who had argued for federation to make it work, a compact between the people who had voted 'Yes' and their elected representatives.

The Constitution provided a framework for the government of the nation, but that was all — it was only a framework. Federal institutions had to be built and federal laws passed for areas of federal responsibility. Support for the federal union slumped in the early years, once voters confronted the expense and the states realised how much they had given up. There was, for example, fierce resistance to the establishment of the High Court because of the expense entailed. Deakin fought hard for the court, arguing that its establishment was 'a direction from

the people from whom the constitution came.' Without his advocacy it is likely it would have been long delayed.

There was a real danger that if these early Commonwealth governments failed, the new federation itself would fail, foundering on partisan differences, parochial jealousies and personal animosities. Federal sentiment and a wide federal perspective had to be nurtured. Again and again in his speeches after federation, Deakin conjured up the map of Australia, reminding his audience that they were no longer just Victorians or South Australians or Tasmanians, they were now also Australians. This was Deakin's great mission after federation: to make real the promise of a nation carried in the Constitution.



Endnotes

1 Victorian Parliamentary Debates, 12 June 1884, 85-6.

2 *Argus*, 14 December 1893.

3 Letter from Edmund Barton to Alfred Deakin, 24 July 1894, MS 1540/11/15 (National Library of Australia).

4 Convention Debates, Adelaide, 30 March 1897, 295, 302.

5 Ibid 293-8.

6 Alfred Deakin, Speech, '*These are the times that try men's souls*', 15 March 1898, Bendigo.

7 *Advance Australia*, April 1898.

8 *Argus*, 27 July 1899.

THE ROLE AND APPOINTMENT OF AUSTRALIAN GOVERNORS

THE HONOURABLE ALEX CHERNOV, AC, QC

I propose to deal with the relatively little known, but unique, role of Australian Governors in our governance process and the method of their appointment in the current and possible future circumstances. I will also mention briefly in that context what takes place in this regard in other former British colonies in the Asia Pacific Region.

For ease of reference, when referring to Australian Governors, I will not distinguish between State Governors on the one hand, and the Governor-General on the other. All of them have similar powers and restraints, although, as Sir Paul Hasluck recognised, the personality and qualifications of a Governor plays a role in the way each interprets the Office. I will also use the terms Governor and Governor-General interchangeably, as I will with Prime Minister and Premier. The question is often put, as though a negative answer to it is a foregone conclusion: Why do we need a Governor at all? I suggest that an understanding of the role makes plain that the Office is essential to the maintenance of our democratic governance framework and to the development of the aspirations of our community.

Much of the Governor's work is performed without publicity or knowledge by the wider community. That many of the Governor's functions are not more widely known is not surprising given that schools do not teach the subject, it is not a topic that is studied at the university, and usually a Governor's activities are of little interest to the media. The Governor is, in

essence, a background figure whose exercise of powers is of no real interest to the media until there is a risk that our constitutional process is endangered, as was the case, for example, in 1975. Nevertheless, as I will describe later, the Governor is effectively a hedge against constitutional impropriety by the government. Thus, no news of the Governor's public participation in the governance process tends to indicate that the government of the day is complying with democratic requirements.

An Australian Governor is not only the Queen's representative here but is also the effective Head of State with considerable executive powers that are bestowed by the *Constitution* and other relevant legislation that are essential to our democratic system of government, such as the power to dissolve Parliament, appoint the Prime Minister, give assent to Bills passed by both Houses of Parliament thereby converting them into law, and many other like functions. In essence, the Governor is the nominal chief executive of the State. But as is so often the case in the British-based constitutional arena, these powers are far from absolute. By a binding convention, they can only be exercised in accordance with the decision of the elected Government, usually voiced through the Premier or other relevant Minister. It is this convention that ties the exercise of these powers to the decision of the voters who elected the government.

In order better to understand the role of our Governors it is helpful to look at the evolution of that Office. It is the oldest part of the machinery of government in Australia and has undergone the most substantial change of any public office in our country, having been established in 1788 with the arrival of the First Fleet. The powers that Arthur Phillip held initially as a Viceroy

have since been distributed amongst the Governor, Parliament, Executive Government and the Courts.

With the advent of responsible government of the Australian colonies in the 19th century, the position of the Australian Governors became an ambivalent one until Australia became a Dominion following the Imperial Conferences of 1926 and 1930. Before that occurred, Governors had to balance the advice given to them by the locally elected Ministers with the responsibility of representing the government of the United Kingdom. Since the Imperial Conferences England no longer dictated policy to its former Australian colonies, and relevantly for present purposes, our Prime Ministers and Premiers assumed the sole entitlement to recommend to the Monarch who was to be appointed Governor. Thus in 1931, for example, Sir Isaac Isaacs was the first Australian to be appointed Governor-General of Australia on the recommendation of the Australian Prime Minister (albeit against the wishes of King George V).

A critical development in this area was the passing of the Australia Act of 1985 by the Commonwealth and United Kingdom Parliaments, essentially in matching terms, and corresponding State Acts that followed. So far as is relevant for present purposes, they formally entrenched the Governors as the effective Heads of State including the practice of the Queen appointing Australian Governors only on the advice of the Head of Government, be it Prime Minister or Premier. Save for this power of the Monarch in our governance system, these Acts completed the effective detachment of the Australian system of government from that in the United Kingdom and some say that from that point Australia became a Monarchical Republic.

So how do Australian Governors maintain our democratic framework — what is their role in that regard? In broad terms, the Governors perform two primary functions: one that is based on constitutional responsibilities and the other involves engagement with the community. Both are important to our community.

Turning first to the constitutional role, so far as is relevant that can be summed up as facilitating and ensuring the proper working of our Parliamentary democracy. In practical terms, the Governor does this by overseeing the workings of the government of the day to ensure that it acts within its constitutional boundaries and the Rule of Law. This is done through a process known as Governor in Council by which the government of the day implements its major agenda.

As the name suggests, the Governor in Council is made up of the Governor as chair and senior Ministers who are members of the Executive Council. In Victoria, for example, the Governor usually meets with four Executive Council Ministers every Tuesday morning and they deal with recommendations of various Ministers as to the implementation of government business. A similar process takes place at the Federal level and in other jurisdictions.

There are many Acts of Parliament that delegate to the Governor in Council the power to deal with Ministerial recommendations relating to the implementation of the business of the government which Parliament considers to be too important to be handled by the recommending Minister alone. Those powers include, for example, the power to make various regulations, proclamations and administrative orders regarding the appointment or dismissal of important statutory officers and appointment of judges, just to mention some.

Thus, a wide range of government work is dealt with by the Governor in Council process. As I mentioned, each item of business springs from a recommendation of a Minister, and one of the Governor's responsibilities in that regard is to be satisfied that the Minister's recommendation to the Executive Council was made within power and on a proper basis. This means, of course, that the Governor has to examine all the material on which the Minister has based the recommendation to the Council in order to determine if it has been properly made. This is usually done by the Governor over the weekend and Monday by going through the papers that have been delivered on a Friday for attention at the forthcoming Governor in Council meeting.

Obviously enough, in carrying out this function, the Governor is not concerned with the wisdom of the Minister's proposal, or about issues of politics or public policies; these are matters for the elected government. Similarly, it is for the Courts ultimately to determine the validity or otherwise of the exercise of the power. On occasions, the Governor requires further information about the Minister's proposal in order to be satisfied of its propriety. In that event, the matter is dealt with in the first instance by the Clerk to the Executive Council, and if that does not lead to a resolution of the query the Minister calls on the Governor to clarify the concern. In my experience, Ministers have always been forthcoming in responding helpfully to any query that I had in that context.

Other main constitutional duties of the Governor include giving assent to Bills so as to convert them into Acts, calling an election, dissolving the legislature and swearing in the Premier or Prime Minister and so on. These duties are carried out by the Governor in accordance with the well-established and accepted conventions, usually on the advice of the Premier.

Although the Governor is bound by convention to exercise the powers only on Ministerial advice, as Walter Bagehot said in *The English Constitution*, the Governor has certain important rights when dealing with the government and its Ministers. Essentially, they are the right to be consulted by the government on issues that the Governor considers of importance to the State or the issue at hand, the right to counsel the Premier about the propriety of proposed government action and the right to warn the Premier of the consequences of the proposed course. Such a warning may include, in an exceptional case, a warning of the possibility of the Governor exercising the reserve power. Obviously enough, such warning would be given rarely, having regard to the fact that this power is only to be exercised where there is no alternative, in order to ensure that government acts in accordance with accepted democratic requirements.

Turning to the Governor's second primary role, that of engaging with the community, this function is, without doubt, the most time-consuming one and usually involves not only the Governor, but also his or her spouse. They engage with the community so as to promote attitudes that support democracy, create a strong community and encourage citizens to achieve their best. In exercising this role, the Governor seeks to facilitate social cohesion, mutual respect and confidence amongst members of the community. As Sir Zelman Cowen said, it is through such contacts that the Governor can offer encouragement and recognition to many Australians, some of whom may not be very powerful or visible in the course and bustle of everyday life, and thus applaud the efforts of individuals and groups who work constructively to improve life in Australia. Most of them are, of course, volunteers.

One of the ways in which the Governor engages with the community is through his and her spouse becoming patrons of community organisations. For example, my wife and I were jointly and severely patrons of well over 160 such organisations, nearly all of which were made up of volunteers, or largely so, and which we supported in various ways.

The Governor also holds receptions at Government House to recognise valuable community work by individuals or groups, such as the Order of Australia events, and encourages numerous activities that benefit the community and its volunteer organisations.

The Governor is also involved throughout the year in many ceremonies which instil the shared values of a democratic community and confidence in its operations. Thus, the Governor gives the main public address on Australia Day and Anzac Day and attends many events of importance to the community throughout Victoria such as, for example, unveiling in a regional town statues of three winners of the Victoria Cross who came from the region.

Furthermore, as part of such duties, the Governor travels extensively throughout Victoria and speaks with local communities so as to ensure that it is appreciated that he or she is Governor for the whole of Victoria, not just Melbourne. Such visits include going to areas of development, as well as those that have been affected by natural disasters such as bushfires and floods, or significant economic downturn. When making such visits, the Governor represents the whole community in expressing support for those in the regions and sharing sympathy with those who have suffered from devastations. It is a way of expressing the bond between all Australians in times of trouble.

Furthermore, the Governor often travels overseas on behalf of the State as its effective Head of State in order to develop and strengthen international relationships between Victoria and overseas jurisdictions in areas such as trade, cultural exchange, education and so on.

To sum up, the Australian Governor is the only holder of public office who plays a key role in ensuring that government adheres to constitutional propriety in conducting its operations. He or she also actively engages with the community so as to encourage its members to achieve their potential and to thank those who helped others who find it difficult to cope in a society that seems to be becoming less concerned with the wellbeing of others.

Before concluding, I will touch briefly on the current process of appointing our effective Heads of State and how that might be done should Australia become a Republic. Just to be clear, however, I do not intend to advocate here what course of action we should take in that regard. This complex topic deserves a much more detailed and considered analysis than one that I can provide here as a tail end of a discussion centred around the role of Australian Governors. But my guess is that, in any event, nothing will happen in terms of a referendum until the 'Voice' issue has been settled.

In considering the appointment of Governors it is necessary to appreciate the unique position of our States, more particularly, the retention by them after Federation of direct links with the Crown, thus entitling them to procure the appointment of their respective Governors through the recommendation of their Premiers. As Professor Anne Twomey explains so clearly (*The Chameleon Crown*, 2006, 18-19):

> Federation did not transform Australia into an independent sovereign nation. It merely consolidates six colonies into one federated larger colony ... They had not sunk to the position of the Canadian Provinces, which were subordinated to the Canadian Federal Government. The Constitutional Convention (here) had deliberately rejected the subordination of State Governors to the Governor-General and the severance of direct links between the States and the United Kingdom. The States therefore regarded themselves as "sovereign within their sphere."

It is well known that the current process of the Queen appointing our Governors on the recommendation of the Head of Government has been seamless and, as far as I know, has not involved politics. If one compares this with a like situation in Canada and India, for example, where the role of their Head of State is similar to that of Australian Governors in terms of fundamentals, there are major differences.

First, the President of India is not appointed but is elected by a body akin to an Electoral College, which is primarily made up of many Federal and State Parliamentarians and other stakeholders. Often, if not usually, this engenders public disputes, often along party lines. This is unsurprising given that the Electoral College is made up of a large number of people from cross-sections of various parts of India and various political factions and groups.

Secondly, the Provincial Governors in Canada and India are appointed by the Head of State: the President in India and the Governor-General in Canada. Importantly, in each case the appointment is made on the recommendation or direction of the Central government of the day. Thus, the Premier, or Chief

Minister, of the Province has no final say as to who is to be the Provincial Governor, or on the matter of his or her termination.

Given our present stable and effective position in relation to the appointment of our effective Head of State, I suggest that it is important not to rush to embrace constitutional models operating overseas which have direct elections of the Head of State and which appear to work satisfactorily there. These models may not be appropriate here, such as the model in India. For completeness, I mention in this context that comparison with Ireland may not be helpful either because, amongst other matters, the President there does not have the executive powers of our Governor-General. A like observation can be made in relation to Malaysia (which is also a Federation based on the Westminster system) where the Head of State, the King, is elected on a rotating basis every few years from the Sultans of the various Provinces (which avoids political controversy). It is to be remembered that our governance process in that regard is unique to Australia.

When considering whether Australia should change the process of appointing its Governors, and in that context effectively sever completely its ties with the British Crown, it is vital to ensure that whatever form that separation takes it does not put at risk the quality, strength and safeguards of our democracy, which is one of the oldest, most stable and most successful in the world. As I have mentioned, its form is unique to Australia and has been moulded for almost two hundred years to the Australian context.

As many of you will recall, almost 20 years ago serious consideration was given in Australia to whether we should become a Republic. In the result, at the 1998 Constitutional Convention four principal models for such change were eventually put forward concerning the changing of the

appointment of our Head of State: known respectively as the Turnbull, Gallop, Hayden and McGarvie models.

Time does not permit a detailed consideration of these proposals, but I will briefly mention some of their features, beginning with those that are common to them all. First, they were concerned only with the position at the Federal level. Next, the Head of State, no matter under which model he or she was elected or appointed, was to have essentially the same powers as the present Governor-General and was to be bound essentially by the same conventions that now operate in respect of that Office.

Unsurprisingly, there were sharp differences between the four proposals. Under the Gallop model, for example, the Head of State was to be elected by Australian voters from no less than three candidates selected by a two-thirds majority of a joint sitting of the Commonwealth Parliament. The Hayden model allowed any citizen to stand for election for the office if he or she was endorsed by at least 1% of enrolled Federal voters. Under the Turnbull model candidature was to be open to all registered Federal voters and a Short List Committee, to be established by the Commonwealth Parliament, was to prepare a list of candidates for consideration by the Prime Minister. Then, the Head of State was to be appointed by a two-thirds majority of a joint sitting of the Commonwealth Parliament on a motion of the Prime Minister and seconded by the Leader of the Opposition.

In the case of these three models, the Head of State would be known as ‘President’. There were other differences between these proposals on matters such as tenure and the question of dismissal, which are not necessary to discuss here.

The McGarvie model contemplated the fewest changes in this regard. It proposed the establishment by the Commonwealth Parliament of a Constitutional Council comprising the most recently retired Governor-General, Chief Justice of Australia and State Governor. The appointment (and dismissal) of the Head of State was to be made by the Council on the advice of the Prime Minister, who would choose the candidate from citizens nominated for that Office by Australian individuals or organisations.

In my view, none of these proposals is without difficulty. In particular, the two models that call for direct election of the Head of State create the risk, as Sir Samuel Griffith said during the Convention debates, of politicising the office. As most of you know, the Conventions rejected the proposal for an elected Governor-General.

Another difficulty with the 'election' model is that as a matter of reality most candidates seeking to be elected President are likely to have been supported by a political party or a special interest group, so there would be a real risk that once elected the party or group would have at least some influence over them. Moreover, a directly elected President would be the only high office holder in Australia to have been elected by voters, so there is the real risk that this process may produce a political Head of State. Furthermore, over time he or she may become potentially a powerful rival of the Prime Minster in at least some political affairs. Elections give authority and authority gives effective power!

The Turnbull model also risked politicising the process through the contemplated deal-making between the Prime Minister and the Leader of the Opposition. Moreover, labelling our Head of State as 'President' under the three models to which I have referred would risk creating an expectation that the holder

of the Office would increase his or her direct participation in governance activities, at least some of which are commonly performed by the Prime Minister.

Most importantly, I think, all the three models would discourage people of considerable public reputation in the community, like the late Sir Ninian Stephen or Sir Paul Hasluck, from standing for office.

It seems to me that *if* there is a popular move in Australia for it to make its own appointment of the Head of State, the simplest (known) model to adopt would be that of the late Richard McGarvie, a former Supreme Court Judge and Governor of Victoria which, as I have mentioned, contemplates an effective substitute of the Constitution Council for the current role of Her Majesty without involving political parties in that process and without it risking disrupting the presently enjoyed democratic process.

As I said earlier, the question of Australia becoming a Republic without putting at the risk our present democratic process warrants a more careful and comprehensive analysis than I have been able to provide here, given the constraints of time.

Nevertheless, I hope that my brief summary of the possible options for the appointment of an Australian Head of State gives a broad picture of what may be involved in seeking to remove totally the Monarchy from our present Constitutional governance model.

CAN THERE BE A PLEBISCITE ON THE ROAD TO AN AUSTRALIAN REPUBLIC?

ALISTER HENSKENS, SC, MP

This paper offers what I hope is a pragmatic and unsentimental defence of our current Constitutional arrangements. My contribution here is motivated by a desire to protect our system of government from well-meaning constitutional vandals.

I INTRODUCTION

The *Constitution* was the product of careful consideration and compromise over 100 years ago. Every citizen entitled to vote had the opportunity during multiple referenda to approve every word of it and ultimately it received the approval of a majority of voters in all of the Australian states.

In this paper I use the terms 'plebiscite' and 'referendum'. Neither term is used in the *Constitution*. I use them as the terms are used generally in the community.

A referendum is the term usually used to describe the process for a change to the *Constitution* mandated by section 128 of the *Constitution*.

A plebiscite, by contrast, is a word used to describe the process for the government obtaining the views of the community, which is not burdened by the discipline or strictness as to detail of the process required by section 128. A plebiscite is a non-legally binding opinion poll usually on a straightforward issue like: (i) Which song from a small number of choices do you want as the national anthem? (ii) Do you agree with same sex marriage (yes or no)?

However, it is significant that to the ordinary member of the community a plebiscite and a referendum seem to be deceptively the same because they both involve a poll of the community by the government which is attended with some formality.

In this paper I wish to advance two essential propositions.

Firstly, far too much ink has been wasted talking about an almost completely ceremonial and for reasons that I will develop relatively weak player in political terms under the Constitution, namely Australia's Monarch.

Not enough has been said about our current almost uniquely Australian arrangements that all adult citizens entitled to vote must decide any Constitutional change. I argue that these arrangements make the people the true sovereign under the Australian Constitution and ultimately sovereign over the Monarch and any so-called Head of State.

It is a special majority of those people and not a group of elites who must agree to change the Constitution on issues including abolishing the Monarch, changing the role of the Governor General, Parliament or the Judiciary or any other rules around the institutions of government created under the Constitution.

Secondly, I will argue that a preliminary vote via a plebiscite on whether Australia should become a Republic is unconstitutional and a perversion of section 128 of the Constitution. A general vote on any contentious policy issue is inherently dangerous as Brexit has recently demonstrated when that plebiscite did not identify the key elements of any withdrawal from the European Union.

II THE NEW PROPOSAL FOR AUSTRALIA TO BECOME A REPUBLIC

A *The Proposed Process of a Plebiscite before a Referendum*

It is fair to say that the Scott Morrison's 'silent' Australians would rather talk about football than whether 'Will and Kate' should be the future King and Queen of Australia.

It is interesting to note that the major high profile proponents of an Australian Republic in the last 25 years, Paul Keating, Malcolm Turnbull and Peter Fitzsimons, are all men (and they are all men) more renowned for their considerable egos rather than their deep understanding of what makes the common man or woman tick. But to them must be joined one other of their ilk.

At a speech at the annual dinner of the Australian Republican Movement in 2017, the then Federal Leader of the Australian Labor Party, Bill Shorten, said that:

> [B]y the end of the first term [of a Shorten ALP Government], we will put a simple straightforward question to the people of Australia: Do you support an Australian Republic with an Australian Head of State? And if the yes vote prevails then we can move on in a second term to discussing how that Head of State is chosen.

It is a matter of record that there is never likely to be a Shorten Labor Government or at least certainly not at any time in the near future. But, unless demonstrated to be wrong in law, this two-staged process is likely to be the preferred *modus operandi* for contentious constitutional change in the future — thereby making this paper of a broader relevance to any future changes.

There are a few immediate things that come to mind when considering Mr Shorten's proposed question. First, there is no reference in the *Constitution* to a 'Head of State'. Secondly, this two-staged question process to the community is a procedure unknown to the *Constitution*. And thirdly, the question treats the concept of a 'Republic' as if it is a term of art with an obvious meaning, which it is not.

Mr Shorten's proposed process of constitutional change involving a plebiscite carefully hides the kind of Republic which is proposed. Surely on matters like this the devil is in the detail and the Australian people are entitled to know (before they answer any question of the kind posed by so called Republicans like Mr Shorten) what kind of a Republic is being proposed?

But before I go into those issues, I want to make a few things very clear.

B *Is a Republic Justified?*

In setting the tone for a consideration of section 128 of the *Constitution* I should disclose my prejudices on whether Australia should become a Republic. I am not a sentimental royalist. I consider myself to have a pragmatic interest in political and constitutional matters.

What is called a Republican system of government has in practise turned out to be more autocratic than a European style Constitutional monarchy.

The authority and power that somebody like Donald Trump has, is a direct result of the Republican system of government which operates in the United States of America. It involves at least in some respects an autocratic President.

Very few advocates for an Australian republic would also want a figure like Donald Trump to be the President of Australia. But a person like Mr Trump is more likely to be President under an Australian Republic than the personality type that is likely to be a Governor General under our current arrangements.

I think a head of government like a Prime Minister or Premier accountable to Parliament and their party is preferable to an independent President or Governor accountable to a legislature in only certain and defined ways. This is because whatever the ultimate model of a Republic, the President or Governor will think of themselves as more important than the Prime Minister or Premier. In turn, this will likely create the potential for institutional conflict between the head of the executive government and the head of government which means greater political instability and less freedom than we currently have.

But, rather than having a sensible discussion about whether a Republic is the best form of government for Australia, an Australian Republic has become a proxy for the argument to remove the English Monarch as Australia's Monarch. This is a mistake and if there were good reasons to replace the Monarch, we should find pragmatic Australian solutions rather than just following the American or Chinese models of Republican government.

There are two essential reasons usually given for justifying the abolition of the Australian Monarch.

The first reason often cited by Australian Republicans is that having the Queen of England as also the Queen of Australia is a confusing national embarrassment. So, the argument goes, our current arrangements create an Australian identity crisis. It is said that people around the world are apt to believe that Australia

is still a colony of England and that England still exercises dominion over Australia.

The second reason usually given to justify the change is that every Australian should be able to become the country's Head of State, as if to do so (rather than become the Prime Minister) is some ultimate aspiration in a person's life. This immediately sees the role of Australia's Head of State as a political or occupational aspiration rather than a benign ceremonial role. The Governor General is currently non-political and not a role for political aspiration as it is usually filled by retired Judges, former military figures and occasionally retired politicians.

Most Australians have little or no knowledge of our *Constitution*. That is not surprising as it is a fairly impenetrable legal document. But it does explain the naivety of even educated people who advocate for an Australian Republic. The notion that people from other parts of the planet sit around considering who may or may not be the Australian Head of State is quite absurd.

If people around the world in fact have a mistaken view as to our constitutional arrangements it is curious that such people do not appear to say the same about Canada or New Zealand — there is no significant republican movement to remove the Queen in those two countries. Furthermore, if people in other countries or indeed Australia have the view that Australia is subordinate to the English Crown, it is a view that is entirely wrong in constitutional law and ill informed.

Why should our carefully crafted constitutional arrangements, which took decades of compromises to draft and multiple referenda to the Colonial citizenry to approve, be changed because of Australian fears about the ignorant views of people from other countries?

C *The Comparative Superiority of Constitutional Monarchies*

On my analysis, of the 193 member nations[1] of the United Nations, about 43 of those nations (22%) have constitutional monarchies and about 90 (46%) call themselves Republics. The rest are something else — probably some other form of totalitarian government of one kind or another.

Separately, the independent *Freedom House* ranks countries on their adherence to the Universal Declaration on Human Rights. In its 2019 'Freedom in the World' Report, *Freedom House* ranked the top ten most free countries in the world as Norway, Sweden, Finland, Canada, Netherlands, Luxenberg, New Zealand, Australia, Uruguay and Denmark.[2] None of these countries are a single party or totalitarian state.

Of the top ten free countries, only 2 (Finland and Uruguay) are Republics and the rest are all constitutional monarchies. These results are out of kilter with the proportion of these types of constitutions in the world as a whole.

But of the top ten free countries in the world, according to *Freedom House* in its 2019 report, 8 out of 10, or nearly 4 times the United Nations average, are constitutional monarchies.

Queen Elizabeth II is the monarch of three out of the top ten free countries — Australia, Canada and New Zealand as well as being Queen of the United Kingdom of England, Scotland, Wales and Northern Ireland which ranks highly but is not in the top ten (the United Kingdom may enter the top ten free countries if it ever manages to leave the European Union).

This basic but revealing analysis suggests that a constitutional monarchy is more beneficial to the freedom of its citizens than a Republic and is a very desirable form of constitutional government.

Such an analysis is completely devoid of any sentimental affection for the British Monarchy, Queen Elizabeth II or celebrity worship of Will, Kate, Harry, Meghan or any of their children and ignores their capacity to sell magazines.

Apart from the undeniably comparatively free country that Australia is and the risks of tampering with its constitutional arrangements, since 1965 the Governor General has been exclusively an Australian citizen and has performed most of the ceremonial and constitutional roles of the Crown since then with their appointment being on the sole advice of the Australian Prime Minister.

There is some confusion about whether the Queen or the Governor General is the Australian Head of State. As I have already said, the Head of State is not a term which is used in the Australian Constitution. Malcolm Turnbull and other prominent republicans have frequently used the term 'Head of State' to refer to the Governor General.[3]

If the desires of the Australian republicans can be satisfied by having an Australian Head of State, all that is required are simple constitutional changes making it clear that the Governor General is our Head of State and formalising the current practice that the Governor General must be a citizen of Australia.

As a Country which enjoys consensus and does not like conflict, why doesn't Peter Fitzsimons and his followers embrace this as a way forward? We can have an Australian Head of State and retain the Queen at the same time under this model.

Perhaps this should be suggested by the defenders of the current political balance in the *Constitution* as the best way to neutralise the possibility of Australia having a president and worse still, one that is elected. Changes to create an Australian President would seriously alter the mix of power in our

Constitution away from the people via their elected parliamentary representatives.

When we speak about Parliamentary sovereignty, we refer to the Parliament as the ultimate law-making body in our nation. Using the term 'sovereign' consistently must mean that the Australian people are the Sovereign under the Australian Constitution because as I will now examine it is the people through section 128 who must approve any change to the *Constitution*, including the institutions of the Crown, the Parliament and the Chapter III Courts created under the *Constitution*. The Australian Republicans never do but should acknowledge that Queen Elizabeth II holds her constitutional position only at the pleasure of a majority of the Australian people in a majority of its States.

III THE PEOPLE AS THE ULTIMATE SOVEREIGN UNDER THE AUSTRALIAN CONSTITUTION

A *The Terms of Section 128*

Section 128 of the *Constitution* gives ultimate power to the people of Australia and is in the following terms:

> This Constitution shall not be altered except in the following manner:
>
> The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.
>
> But if either House passes any such proposed law by an absolute majority, and the other House rejects or

fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any

> manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.
>
> In this section, Territory means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

B *Why was this Method of Constitutional Change Chosen?*

Section 128 was quite revolutionary as it allowed the *Constitution* to be changed without any reference to the United Kingdom Parliament.[4] This contrasts with, for example, the position in Canada which until 1982 had to request the Imperial Parliament for changes to the British North America Act.

In its current form, section 128 was the outcome of three different drafts which came into existence prior to 1901.[5] It is quite clear from the Constitutional Debates that section 128 was designed to make constitutional change difficult and not subject to the momentary sway of demagogues, that any changes had to be approved by the people who were also the approvers of the original version of the *Constitution* finalised in 1900, and that there was to be protection of the concept of Federalism through the extra requirement of approval by a majority of states.[6]

These objectives have been achieved. In the 118 years since Federation, only eight of the 44 proposed changes to the *Constitution* have been passed.

It is significant that the provision as drafted accepted the Swiss model of direct participation in constitutional change and rejected the more elite American model.

The framers of the Australian Constitution were significantly motivated by the desire to have the people own and decide any changes to the foundational document.

C *The Uniqueness of Section 128*

Most of our constitutional peers do not give the people, by a direct vote, oversight of proposed changes to their Constitution.

England does not have a written constitutional document like Australia. In England, constitutional changes can be made wholly by legislation passing both houses of Parliament.

In the United States, under Article V of its Constitution, there are two methods specified to change their Constitution. The only method that has ever been used is by the Amendment being ratified by two thirds of the House of Representatives and the Senate and then three quarters of the State Legislatures then also affirming the proposed Amendment. The other method, which has never been used, is for the Amendment to be agreed by two thirds of the Legislatures of the States calling a Convention for proposing the Amendment before it being also passed by three quarters of the State Legislatures affirming the proposed Amendment.

As I have already said, the Canadian Constitution was changed as late as 1982 in whole by the UK Parliament. The method for alteration since 1982 has been for a change to be approved by the Senate and House of Commons and at least two thirds of the Parliaments of the Provinces who have in total at least 50% of the total population contained within the consenting Provincial Parliaments.

In the case of England, the USA and Canada, constitutional change may be performed without any consultation with the people via a referendum, plebiscite or otherwise.

The New Zealand Constitution may also be changed by ordinary acts of Parliament (subject, I assume, to those changes being consistent with the Treaty of Waitangi) alone except section 17 of the Constitution. Section 17 of the New Zealand Constitution provides for a fixed three-year term of Parliament. By reason of the *Electoral Act 1993* (NZ), an ordinary Act of the New Zealand Parliament, section 17 may only be changed through a referendum agreed to by 75% of those who have voted.

Most nations of the world are also without any referendum requirement to approve constitutional change. There are a limited number of constitutions in the world which are required to be changed by referenda like Australia. However, voting in those countries is not compulsory like the referenda required under our *Constitution*.[7] Australia should therefore be considered quite unique in the world with regard to the democratic method required for constitutional change.[8]

This analysis of section 128 and comparison with other constitutions demonstrates the uniquely important role in theory and in practice which is exercised by the people in our *Constitution* including the power of the people over the Governor General and Monarch.

IV DEPARTING FROM THE PROCEDURE IN SECTION 128?

The High Court has never had to decide a case which has directly involved a question as to the correct method of performing a vote of the people under section 128 of the *Constitution*, let alone whether a preliminary plebiscite as to a proposed change to the *Constitution* is lawful. The best we can do is interpret the words of section 128 and borrow some of the reasoning of the High Court on cases involving democratic theory.

The process prescribed by section 128 is strict. The introductory words of section 128 ('This Constitution shall not be altered except…') appear to be a clearly mandatory code.

In *Attorney General (WA) v Marquet*, Callinan J observed that: 'Section 128 of the Constitution of this country is itself an example of a provision requiring compliance with a strict process for its operation.'[9]

The words 'referendum' or 'plebiscite' are not included in section 128. The method of voting is prescribed in section 128 and the process does not include a preliminary plebiscite devoid of detail as to the method of enacting the proposed constitutional change.

Furthermore, section 128 requires the full detail of any constitutional amendment — 'the proposed law for the alteration' — to be put to the people. I rhetorically ask, therefore, to what end is a generalised plebiscite directed?

If we take the question proposed by Mr Shorten as an example, it sought to interrogate the citizenry about concepts such as whether they wanted a 'republic' and the person who should be the 'head of state', neither of which appears in our *Constitution*.

A Republic is not a term already used or defined by the *Constitution*. There are many forms of republic. As I have already noted the Republic of the United States of America is a vastly different system of government to the People's Republic of China. But the proposed question treats them as one and the same.

As such the proposal to have a plebiscite on an Australian Republic and its head of state is a tricky way of avoiding the Constitutional strictures of section 128.

I argue that to do so is not only tricky but unlawful. I call in aid the joint judgment of the entire High Court in *Lange v Australian Broadcasting Corporation* which in the context of a defamation case said that:[10]

> Section 128, by directly involving electors in the State and in certain Territories in the process for amendment of the Constitution, necessarily implies a *limitation* on legislative and executive power *to deny* the electors access to information that might be relevant to the vote they cast in a referendum to amend the Constitution. (emphasis added)

The plebiscite proposed by Mr Shorten would withhold information as to the Republican model upon which their decision should be based. It can be thus seen as a tool to mislead and deceive the public by deflecting attention away from the detail of what is actually proposed as required in the later constitutionally mandated vote required under section 128.

At the later stage when there is a section 128 poll of the people and the detail is provided, the people will be excused for thinking that they have already answered and decided the question.

The two staged process is exposed as a tactic to achieve an end rather than a means of illuminating the issue at hand. What other justification remains for this process?

Section 128 was intended, as some of the framers said, to replicate the process which led to the creation of the *Constitution*. Measured against that criteria the plebiscite proposal also fails. Prior to 1901, the citizens of each colony were not asked in abstract, did they want a Commonwealth of Australia. Instead, the full proposed *Constitution* for the new nation was exposed and made public prior to the question being put to the people, so that they knew the detail of the whole

constitution for any Commonwealth of Australia that they were agreeing to and could debate its strengths and weaknesses. For any future Australian Republic, the same should apply and the proposed republican plebiscite will not do that.

For these reasons I argue that it is not constitutionally valid to put a general proposition for constitutional change on a topic to a plebiscite in advance of a referendum required by section 128.

In my view the High Court should upon a challenge, injunct any plebiscite anticipating a Constitutional change from proceeding and require only the manner and form of section 128 of the *Constitution* to be followed, with no preliminary or fake plebiscite to be allowed before it.

The integrity of our constitution should always be preserved and given the uniquely Australian requirement of a compulsory direct ballot under section 128, the integrity of that process should be protected by the High Court.

V CONCLUSION

The Australian Constitution is a bespoke document, deliberately framed with variations from the other constitutions then existing in the world. For example, its combination of the American federal system with an English parliamentary style of government has led the Australia constitution to be called a 'Washminster' system of government.

At its core through section 128 of the constitution is the ideal that the citizens of our nation must approve any constitutional change.

This is both radical and important. It requires information as to the proposed amendment to be given to the people under the constitutional provision allowing change.

The introduction of an office like the American President into the *Constitution* has in my view weak justification but is a change that will involve a substantial departure from the Washminster Australian constitutional model.

To achieve such a radical plan through a process which includes a plebiscite that glosses over the detail of the radical nature of the Constitutional amendment, is both apt to mislead and is also outside of the process prescribed by the *Constitution*.

It is regrettable that a major Australian political party would have supported such a tricky method of achieving Constitutional change. It should be roundly denounced. A constitutional mutation of process of this kind should never be allowed to be undertaken.

Endnotes

1 United Nations, *Member States* (Web Page, August 2019) <https://www.un.org/en/member-states>.

2 Freedom House, *Freedom in the World 2019* (August 2019) <https://freedomhouse.org/report/freedom-world>.

3 Tony Abbott, 'Problems with a Plebiscite for a Republic' (Conference Paper, The Samuel Griffith Society, 4 August 2018).

4 *Attorney General v The Colonial Sugar Refining Company Ltd* (1914) AC 237 at 256. See also *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 236-7 (per Murphy J).

5 Arthur Canaway, 'The Evolution of Section 128 of the Commonwealth Constitution' (1940) 14 *Australian Law Journal* 274.

6 Harry Hobbs and Andrew Trotter, 'The Constitutional Conventions and Constitutional Change: Making Sense of Multiple Intentions' (2017) 38 *Adelaide Law Review* 49.

7 *Referendum (Machinery Provisions) Act 1984* (Cth) ss 4, 45. A question not argued in this paper is whether as section 128 of the *Constitution* allows the referendum vote has to be compulsory. If section 128 is a code, would Parliament derive a power elsewhere under the *Constitution* to so specify by ordinary legislation that it is compulsory?

8 Turkey and Bolivia arguably have compulsory constitutional referenda also but in practice these are not the subject of the high voter turnout in Australia. Augmenting the compulsory method of direct democratic constitutional change in Australia, is the country's historically high relative voter turnout.

In Australia about 92% of those registered voted in the 2016 Federal election and although official figures for the 2019 election have not yet been published about 91% are thought to have voted notwithstanding the large number of newly registered electors (especially amongst the young) because of the Gay marriage plebiscite. About 80% of those eligible to vote had their say in the non-compulsory Gay marriage plebiscite. Only about 48% of eligible voters cast a ballot in the 2018 USA mid-term Congressional elections. This was down from the already low 60% at the 2016 Presidential and Congressional elections. In the United Kingdom, only 66% of voters cast a ballot in the 2015 general election and a slightly higher 69% at the 2017 general election. The Brexit ballot between them, by contrast, secured a slightly higher 72% of eligible voters. Of the eligible voters, 79% participated in the 2017 New Zealand election which elected the minority government now led by Jacinta Ardern. The situation is similar in Canada. There was a 68.3% turnout out for the 19 October 2015 Canadian General Election.

These figures suggest a strong level of participation in Australian elections and referenda produced by a combination of compulsory voting and a political culture that now sees political participation via the ballot box as important.

9 *Attorney-General (WA) v Marquet* (2003) 217 CLR 629 at [268].

10 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

AN INDIGENOUS VOICE: THE ISSUES

SENATOR, THE HONOURABLE ERIC ABETZ

I have chosen the title of this paper as a tribute to Sir Harry Gibbs, who in the earlier years of the Society delivered several typically erudite papers on topical constitutional matters, such as '*A Republic: The Issues*' (to the eighth conference) and '*A Preamble: The Issues*' (to the eleventh conference). Indeed, in the first of these papers, Sir Harry began by saying:

> I remain unconvinced that the Constitution of Australia would be made more democratic, efficient or just by breaking the existing links with the Crown, and I regard as fanciful the suggestion that under a republic the Head of State would give Australia a sense of unity and would heal the divisions that are said to exist in our society. However, this is not the occasion to press arguments of that kind. My present purpose is to discuss what issues would have to be decided before our Constitution could be converted.

It is in this spirit that I approach the subject of a proposed 'Indigenous Voice' to the Commonwealth Parliament, and in so doing highlight some of the many issues that will need to be addressed if this proposal is to be progressed, let alone succeed at a referendum.

In so doing, there are three key issues I wish to traverse. The first is to offer some reflections on the concept of indigenous 'Reconciliation'. What does it actually mean? What has it meant? What may be the implications of an Indigenous Voice?

Second, I will outline some of the issues relating to the details of the proposed Voice, or more precisely, the current lack of details.

Finally, I will offer some hard-headed and pragmatic views on the prospects of success for 'the Voice' at a referendum.

I RECONCILIATION

In considering the debate around a 'Voice', it is important to recognise its origins, which means going back to the concept of 'Reconciliation, which has been a topical issue for over some decades.

Reconciliation begat constitutional Recognition, which, according to its advocates, became necessary to achieve Reconciliation in its desired form. Recognition in turn begat the Voice, which, according to its advocates, is now the only way to achieve Recognition in a form acceptable to Indigenous Australians.

Reconciliation is highly desirable but can mean many things to many people. The New Shorter Oxford English Dictionary defines 'reconciliation' as: '*The action or act of reconciling a person to oneself or another, or estranged parties to one another; the fact or condition of being reconciled; harmony, concord*.'

In the context of the current debate, I think it is timely to illustrate two approaches to reconciliation and constitutional recognition. The first was articulated by Nelson Mandela, who said: '*Take your guns, your knives and your pangas and throw them into the sea; If you are negotiating you must do so in a spirit of reconciliation, not from the point of view of issuing ultimatums*.'

An alternate, and rather different, approach was articulated earlier this month by Indigenous leader Galarrwuy Yunipingu, when he made what he describes as a final demand for substantive constitutional change, threatening that the '*Yolgnu people of Arnhem Land will throw the constitution into the sea if change does not come soon*.'

The quest for Reconciliation has a long history. The *Council for Aboriginal Reconciliation Act 1991* (Cth) was based on the objective of reconciliation by the centenary of Federation. Its legislation empowered the Council to consult Aboriginal and Torres Strait Islanders and the wider Australian community on whether reconciliation would be advanced by a formal document or documents of reconciliation. There was no suggestion that such a document should have constitutional status.

The Council was replaced in 2001 by 'Reconciliation Australia', which still exists today. On its website are a number of helpful links, including one entitled '*What is Reconciliation*'. Sadly, at the time of writing, the link was broken so I was not able to inform myself as to how Reconciliation Australia currently defines the concept.

Reconciliation in Australia has at various times meant various things. It can be a temporal concept, with what we would now term a 'hard deadline'. It can be an ongoing, and presumably indefinite process of living together in greater harmony. It can mean the achievement of specified goals, such as 'Closing the Gap' on quantifiable social and economic measures. It can be 'symbolic', 'practical' or a combination of the two.

In 1991, it was felt that Reconciliation could be achieved through a non-constitutional document. By 1999, discussion had moved beyond this to the concept of constitutional recognition. Indeed, a referendum was held to amend the Preamble to include a modest statement of recognition. Prime Minister Howard described it as: '*a fair attempt to say what everybody wants to say*.'

Notwithstanding the defeat of this proposal, since 1999, proposals for constitutional Recognition have become more ambitious, to now include a Voice, and the concept of what is required to achieve Reconciliation has also become more expansive.

The Uluru Statement from the Heart states that 'Makarrata is the culmination of our agenda', and that this ought to include 'agreement-making', commonly understood as treaties, the recognition of first nation's sovereignty, and 'self-determination', all of which is now presumably the new yardstick for the achievement of Reconciliation.

II THE DETAILS

The most important issue to consider in relation to the proposed Voice concerns the details of how it would look and function in practice. So far, no advocates of a 'Voice' have, to my knowledge, put forward with specific detail how such a body would be constituted, or made any attempt to outline what its powers or procedures might be. It is over two years since the release of the Uluru Statement from the Heart first proposing the Voice, and still no details have emerged.

In the interests of the discussion, I simply put forward a range of practical questions to ponder for any such 'Voice' and how it will be constituted and how it will function:

1. If such a body was to exist, who would be eligible to be a member of it? How would indigeneity be defined? In the event of any disputes, who would be the arbiter?
2. Would its jurisdiction be limited to simply 'Indigenous issues', or would it also have a say on broader national issues?
3. Will it be elected or appointed?
4. If the former, who gets to nominate for election, and who gets to vote?
5. If the latter, who does the appointing, what are the qualifications to be appointed and what will the term of appointment be?
6. If elected, what will be the constituencies? Electorates, states, regions, relevant 'First Nations' or something else?
7. If elected, will parties or other organised groupings endorse candidates with particular platforms? Will public funding be provided, as in Parliamentary elections?
8. Where will it meet, how often and on what terms? Will its members be paid like Parliamentarians? Will they be free to hold dual citizenship or offices of profit under the Crown? How will potential conflicts of interest be dealt with? Will they also be entitled to paid staff, Comcars and travel allowances whilst on official 'Voice' business?

These questions relate only to the establishment of the Voice. There are a range of equally important questions that will need to be addressed in relation to its operation.

In raising these questions, I wish to borrow the approach used by Chief Justice French in his presentation to the Society's twenty-ninth conference, by starting with 'an anodyne statement of the blindingly obvious', namely that Indigenous Australians are a very diverse people with a range of views on a range of issues, who are unlikely to adopt a monolithic consensus position on any given matter. On this basis, we should ask proponents of the Voice:

1. What will the procedures be for debate and voting with the Voice on particular questions?
2. Will there be caucuses and whips to manage such debates and 'do the numbers'?
3. Will the Voice appoint one of its members as the 'Prime Voice' to speak on its behalf? Will other members be allocated particular portfolios on which they will speak (ie, the Voice Ministry)?
4. In the event of disagreement, will there be scope within the Voice for Her Majesty's Loyal Opposition Voice?
5. If the Voice cannot reach a consensus in its advice to Parliament, what form, if any, will such advice then take? Will the Parliament receive a Majority Voice report and potentially multiple Dissenting Voice reports? If so, what if anything would the Parliament be expected to do?
6. If the Voice cannot reach a view on a particular issue in a timely manner, or not at all because opinion is divided, what should the Parliament do?
7. Will the Voice only consider issues before the Parliament, in response to proposals put to the Parliament, or will it have the ability to put 'own motion' proposals to the Parliament?

8. In either case, what checks and balances, if any, will exist to stop the system being gamed by Members of the Parliament who refer matters to the Voice which have no realistic prospect of being enacted by the Parliament, or by members of the Voice itself in proposing measures that the Government of the day would clearly not support?

III PROSPECTS OF SUCCESS

Having flagged these real live issues I turn to make some observations on the prospects of success at a referendum for either Recognition or the Voice.

A *Recent Attempts*

We are now in the forty-sixth Commonwealth Parliament. By my reckoning, every Parliament since the thirty-ninth Parliament, bar one, has entertained some idea of Recognition.

The thirty-ninth Parliament passed legislation to provide for a referendum to amend the Preamble of the *Constitution* to, in part, recognise the history of Indigenous Australians. It was soundly defeated in all states and nationally.

In the forty-first Parliament, Prime Minister Howard took a proposal to the 2007 election to put a referendum on Indigenous recognition in the life of the next Parliament if he was re-elected.

In each subsequent Parliament, the issue re-emerged, with the in-principle support of the Government of the day.

Now, in the forty-sixth Parliament, Prime Minister Scott Morrison and Minister for Indigenous Australians Ken Wyatt have committed to putting a referendum on recognition during the life of the Parliament, which may not include a

constitutionally-entrenched Voice. Instead, they have floated the possibility of a legislated Voice.

During this time, there have been four specially constituted bodies to progress the issue and design a model for constitutional recognition:

1. After the 2010 Federal Election, Prime Minister Julia Gillard established an Expert Panel on Constitutional Recognition of Indigenous Australians. The Expert Panel then delivered its report on the Constitutional Recognition of Indigenous Australians in January 2012.
2. In November 2012, the forty-third Parliament established a Joint Select Committee on Constitutional Recognition to consider the issues that remained unresolved following the Expert Panel process, and in December 2013, the forty-fourth Parliament resolved to continue that committee. The Joint Select Committee delivered its Final Report on 25 June 2015.
3. In December 2015, the Australian Government established a bipartisan 16-member Referendum Council (a second Expert Panel by another name) to consult widely and take steps to achieve constitutional recognition. The Referendum Council released a discussion paper in October 2016 and delivered a final report to the Prime Minister in mid-2017. The proposal for a Voice emerged from this final report.
4. In response, the Turnbull Government established a second Joint Select Committee to consult on the design of a Voice. It delivered its report in late 2018.

In less than a decade, we have seen two Expert Committees and two Joint Select Committees attempt to design an achievable model for Recognition, yet we are no closer to having one. In fact, with each succeeding Panel or Committee report, we seem to have moved further away.

The most recent of these reports, from the Second Joint Select Committee, included some observations on how the discussion has drifted to ever-more expansive proposals, stating that 'the Uluru Statement from the Heart changed the direction of the debate on constitutional Recognition' and that 'the debate about the form of Recognition has widened to include local and regional Voice proposals.'

The report also concluded, in somewhat diplomatic language:

> In its interim report, the Committee suggested that … addressing questions of details would assist in the development of a proposal … The Committee sought further evidence from stakeholders, outlining a series of approximately 100 questions in relation to the design and implementation of local, regional and national voices. Very few submissions took the time to respond to the questions raised.

The Committee therefore recommended a further 'process of co-design' to consider 'national, regional and local elements of the Voice.'

The challenge is now for this process, being the fifth such process since 2010, to make progress where the previous four processes have not.

B *Conditions for Success*

Finally, it is worth stepping through the process that would need to be traversed for any referendum proposal to succeed. There are two conditions precedent that are required for any successful referendum to be put in the first place. First, a degree of public impetus for such a change. Second, an Executive Government that considers the issue important enough to warrant pursuing, and which believes that such a change has some prospect of success.

Then there are five necessary conditions for it to succeed, namely a specific proposal that: (i) is endorsed by the Executive, (ii) can attract the support of a majority of the House of Representatives, (iii) can attract the support of a majority of the Senate, (iv) can attract the support of a national majority of voters, and (v) can attract the support of a majority of States.

In this case, the history of this debate since the thirty-ninth Parliament shows that the first precedent has been satisfied for some time. That, however, is the easy bit.

The difficulties in satisfying the second condition precedent should not be underestimated. Of the seven proposals floated in the last eight Parliaments, only one achieved the first two conditions (1999), the others did not even get to first base.

Under Prime Ministers Gillard, Abbott and Turnbull, serious attempts were made to initiate processes to come up with a model for recognition that could attract widespread support. In each case they failed because it was clear that the Government of the day did not have confidence it could proceed with a model likely to be supported at a referendum.

Even if a Government was sufficiently confident, and introduced legislation under section 128 of the *Constitution*, there is no guarantee that it would even pass the Parliament.

Under a Coalition Government, each Coalition party would undertake its own, separate processes of evaluation to determine whether it could support a specific proposal. There is no guarantee they each would.

In the past 25 years there have been three bills to amend the constitution that were put to the Parliament. For the first two in 1999 (Republic and Preamble), Coalition MPs and Senators had a free vote. In the third in 2013 (Local Government Recognition), a number of Coalition MPs exercised the right bequeathed by the parties to cross the floor on significant matters and opposed the bill, notwithstanding the official position of their parties.

On this basis, and given the numbers in the House of Representatives, it is not assured that the Executive Government could even get a bill as far as the Senate. This is especially the case when the Opposition's most recent position is that constitutional recognition must include a constitutionally entrenched 'Voice' or else.

Given this reality, let alone the challenges of securing anything close to consensus in the Senate, then a majority of voters and a majority of States, no one who supports a 'Voice' should be under any illusions about the size of the challenge they face.

One could also add that at any point in the five-stage process outlined above, when it comes to securing consensus, or even a bare majority, the argument that, for example, 'Qantas, BHP and the AFL all think it's a good idea' is hardly going to be very effective.

IV CONCLUSION

Advocates of a Voice to Parliament need to be clear on what they are ultimately seeking from a Voice. Is it to bring Australians closer together regardless of race? Is it desirable to have a permanent, separate structure for one race? When we speak of Reconciliation, does it now mean using the Voice as a vehicle to achieve treaties and sovereignty?

As John Farnham once said, '*You're the Voice, try to understand it*.' I am very confident that the Australian people won't vote for a Voice they don't understand. The onus is on its advocates to fully explain what it all means to their fellow Australians.

In terms of devising the basic necessary details of the proposed Voice and achieving sufficient public confidence for it to succeed at a referendum, I would estimate that, thus far, barely 1 per cent, if that, of the work that will need to done has been done.

And finally, will the advocates of the Voice be able to persuade practical Australians exactly how the Voice will lead to any better outcomes in social, economic, health, housing, employment and education indicators for those Australians for which it purports to speak?

What we need is as many statements from the head as we've been getting from the heart.

THE ROLE OF QUANGOS

THE HONOURABLE NICHOLAS HASLUCK, AM, QC

Members of the Society and friends. While wondering what to say my mind went to a cartoon I saw recently in *The Spectator*. It shows a protester holding up a placard that is completely blank. When questioned by a passer-by, the protester says he's demonstrating in support of free speech. But as to his blank sign he adds: 'You have to be so careful what you say these days.'

That is certainly true in contemporary times, especially in politics. According to the famous American columnist and wit Henry Louis Mencken, a politician is a creature who sits on the fence while keeping both ears to the ground. And that indeed is what so many politicians increasingly do. The story goes that during the Brexit debate, while one leading politician was staring at a riot in the street below from the windows of his London club, he was asked which side he was on. Like a modern-day Machiavelli, he calmly replied: 'Tell me who's winning and I'll tell you which side I'm on.'

However, as I was asked to say something about the themes of the Conference, and the exercise of power these days, I thought it might be useful to say a few words about ministerial responsibility and the role of Quangos; that is, the role of quasi-autonomous non-governmental organisations. These are generally defined as bodies that have a role in the process of government but are not a government department or part of one. They operate, to a greater or lesser extent, at arm's length from Ministers.

Not so long ago, I completed a three-year term as Chairman of the Art Gallery of Western Australia. So the role of governmental boards in trying to spend taxpayers' money wisely has been on my mind of late. Do people appointed to these boards help or hinder the work of elected governments? I have little doubt that there are many people in this room who have served on boards and have asked themselves the same question.

I will return to that central question, but first some personal background. I have served on various boards over the years, mostly in the arts, and indeed some years ago I was privileged to serve on the Australia Council as Deputy Chairman to Geoffrey Blainey, well-known to us all, who is also speaking at this Conference. My background is principally in law and literature, but I was asked to chair the Western Australia Art Gallery board for a short period to help sort out some financial issues that had arisen.

I wasn't entirely naïve in taking on the role. I knew that artistic types can often be difficult. For example, I recall being at a literary festival early in my career as a writer when people were lining up at the book signing table. But no one wanted *me* to sign *my* book. A famous writer at the table next to me placed a kindly, avuncular hand on my shoulder and said: 'Don't feel too bad. The same thing once happened to me.' 'Oh, gee, gosh!' I said, brimming with gratitude. 'Did it really?' 'No. it didn't,' he replied, with a pleasant smile. 'That never happened.'

Well, I should have guessed. It turned out that the writer at the next table was famed for writing *fiction*, proud of his ability to concoct fantastic tales at a moment's notice.

I soon discovered that visual artists can be equally difficult, and equally egotistical. The story goes that a brash young artist fronted up to a leading critic at a new exhibition and said: 'So what's your opinion of my painting?' 'It's *worthless*,' the critic said. To which the egotistical artist replied. 'Don't worry. I *know* your opinion is worthless, but I would like to hear it anyway.'

Egotism and sensitivities in the visual arts! The Chair of a gallery board is expected to attend a good many exhibition openings and when asked for his opinion is obliged to be excessively tactful, especially about works of contemporary art. I sought advice about this from a friend in the visual arts world. Renowned for his black sense of humour and mischievous wit, he said that in responding to some mish-mash of paint on canvas, or a quagmire of something ghastly on the gallery floor, my best course would be to draw upon the manual of pre-hospital guidelines providing advice to ambulance officers. He quoted from the manual: 'If a patient asks, "I'm dying, aren't I?" respond smoothly with something reassuring like: "You have some very serious problems, but we're not giving up on you".'

I never actually said those words to an *avant garde* artist, but I was tempted. They came to mind the night we had a gala opening on the rooftop of the gallery, in the presence of the Minister for Arts and the Leader of the Opposition, while exhibiting video installations by the American artist Ryan Trecartin. In the first phase of the artist's 'early' work he filmed undergraduates smashing suburban letter-boxes with sledge-hammers. His 'mature' work, on display at our gala opening, consisted of much the same mob, a little older perhaps, trashing a motel room, before jumping into the motel pool with the remnants of a TV set and an air-conditioner.

No pun intended, but it seemed that Ryan's work often led to the creation of rubbish. Or perhaps it was an illustration of the old political aphorism that the student leader of today may well turn out to be the student leader of tomorrow. Needless to say, the gallery curators orchestrating our exhibition had a bundle of clippings from *The New Yorker* and other prestigious publications to say that Ryan Trecartin was the latest, much-admired thing. The Minister didn't have to agree, because he wasn't responsible for the exhibition, although, in art as in politics, as Machiavelli might suggest, it would probably be safest to have a bet each way by exclaiming loudly: 'How good is Ryan Trecartin?' An echo of the PM's recently-invented catch cry: 'How good is Australia?'

All of this brings me back to the central question I mentioned earlier: do quasi-autonomous boards help or hinder the sensible spending of taxpayers' funds? Governing boards in the arts are perhaps a special case because taste and standards in all the arts are a matter of fashion, critical appraisal and personal opinion. What seems bizarre today may be widely accepted tomorrow.

When it comes to artistic judgements, the tradition is for the board of a gallery, or even the board of a lavishly-funded Ballet or Opera company, to be guided principally by curators or a well-qualified artistic director. I suspect that much the same would occur even if, in a mood of impatience, a proactive minister for arts decided to buck the system and assume greater control of grants and spending decisions in the name of ministerial responsibility. With a view to avoiding unwanted controversy about particular decisions he or she would probably finish up looking to in-house advisers in the shaping of forward plans.

There are, however, certain features of the quango landscape which are common to all boards. Let me touch briefly on some of the pros and cons.

The theory is that appointees to boards will bring with them a layer of expertise or insight that might not otherwise be available to the minister. The presence of knowledgeable advisers from outside the governmental bubble is supposed to leave an impression of diversity and valuable community involvement. But this may be illusory. The process of recruitment tends to be haphazard and, in any event, it is often hard to find suitable people who are actually available. Availability, these days, can also be affected by an increasing risk of legal liability, but that is an argument for another day.

It emerges sometimes that appointees who have achieved a good deal in the running of specific businesses are often at sea in the realm of new ideas and general policies. Even for multi-talented board members it will often be difficult to formulate and press ahead with new initiatives because membership of the board turns over, allies and supporters come and go, and the corporate memory at board level is often hazy, partly because the full-time professional staff of the agency are inclined to keep part-time members of a board at arm's length, and thus not fully informed. It becomes hard for a board to stay on track and to press ahead purposefully.

The presence of a supervisory board may not only deter the minister from taking decisive action but also immunise him to some extent from public critique. In many areas of public administration a case can be made that the voice of the general public will only be heard effectively if ministers assume greater responsibility for what happens in their domain, because a failure to heed the public's voice will result in electoral

repercussions. Ministers thereby have an electoral incentive to explain and defend important decisions.

There is much else I could say about the general issue — the role of Quangos in cutting across the convention of ministerial responsibility under the Westminster system of government — but I trust that I have opened up at least a few points for your consideration.

Let me close by assuring you that my exposure to a few unusual instances of contemporary art hasn't impaired my general appreciation of the visual arts. A leading critic said, not so long ago, 'I don't know what art is, but I know what it isn't.' And it isn't, he added, *sotto voce,* 'Tracey Emin's unmade bed or someone walking round with a salmon over his shoulder or embroidering the name of everyone he has ever slept with on the inside of a tent.'

Nicholas Hasluck's book 'Art in Law' (Connor Court, 2019) was launched during the weekend of the Conference.

FREEDOM OF SPEECH

MICHAEL SEXTON, SC

Freedom of speech, even under the protection of the First Amendment in the United States of America, has never been an absolute value but has always been subject to a range of qualifications. Everyone is aware of Oliver Wendell Holmes' dictum that no one is at liberty to shout 'Fire' in a crowded theatre. Another time-honoured example was the publication of details of war-time convoys so exposing them to enemy attack, although this is not really a contemporary example, given that convoys seem to have dropped out of modern warfare.

So I want to start by talking about some of the legislative and common law restrictions on freedom of speech in Australia before moving on to the cultural climate that can also have a significant impact on the kind of public debate that can take place in relation to social, economic and political issues.

In terms of legislation, s 18C of the *Racial Discrimination Act 1975* (Cth) is a useful place to begin, if only because it has been the subject of a long-standing debate and in many ways symbolises the recent discussion of free speech in Australia. It is also useful to look at s 18C because there are somewhat similar provisions in legislation at the State and Territory level.

Section 18C makes it unlawful to do an act that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people because of the race, colour or national or ethnic origin of the other person or some or all of the persons in the group. There is an exemption in s 18D for anything said or done reasonably and in good faith in a number of situations, including academic and

scientific discussions or for 'any other genuine purpose in the public interest.'

The real complaint in 2015 about s 18C by various persons, including myself, was that it is not always possible to have a robust public debate without offending or insulting persons or groups with a high level of sensitivity. There are some exemptions in s 18D but, amongst other problems, it is necessary to show that what was said was said reasonably and in good faith. This can be a highly subjective judgment on the part of a court or tribunal and, in any case, can only occur after the publisher has already been involved in lengthy and costly legal proceedings. It was Voltaire who said that he had only been ruined twice in his life — once when he lost a lawsuit and on the other occasion when he won a legal action.

As everyone knows, the proponents of freedom of speech lost the contest over s 18C. The Abbott government promised to substantially repeal this provision prior to their election but quickly reneged on this promise when it was opposed by a range of ethnic groups and legal professional bodies. There was a flood of submissions from these organisations but naturally very little from the other side because there are no community bodies established to defend freedom of speech. The Turnbull government tried to amend this legislation in 2017 but could not obtain enough votes in the Senate to achieve this object.

At the State and Territory level, I will use the example of s 17 of the *Anti-Discrimination Act 1998* (Tas) which prohibits conduct that offends, humiliates, intimidates, insults or ridicules another person on the basis of 14 kinds of status, including marital status, relationship status and family responsibilities. This provision had some publicity in late 2015 when a complaint was made to the Tasmanian Anti-Discrimination Commissioner about a booklet distributed by Church authorities to Catholic

school students on the subject of marriage. The complaint related to the publication's teaching on same sex marriage but presumably it would be open to anyone in Tasmania living in an unmarried heterosexual relationship to make such a complaint as well. Anyone who has read *Brideshead Revisited* will recall that it is Catholic teaching that unmarried heterosexual couples are 'living in sin' and doomed to the eternal fires of hell. That sounds like an insult to me!

It is true that, unlike s 18C, the Tasmanian provision has the requirement that a reasonable person would have anticipated that the other person would be offended or insulted. But, putting aside the fact that this is another value judgment for a court or tribunal, it may well be that a publisher does anticipate that some persons would be offended or insulted in the course of a vigorous public debate on moral questions. It is also true that, somewhat similar to s 18C, the Tasmanian legislation has an exception for a public act done in good faith for any purpose in the public interest. But again this can involve highly subjective judgments and requires this defence to be made out affirmatively by a publisher in the course of lengthy and expensive legal proceedings.

One irritating aspect of this debate is that proponents of provisions like s 18C and the Tasmanian legislation almost invariably say that they are in favour of freedom of speech but that this concept is not inhibited by these kinds of statutes. I don't know why they don't simply say that freedom of speech is not an absolute value and that on these occasions it is outweighed by a higher value, that is, the protection of some groups from offence or insult. I would, of course, not accept that proposition but it is at least an argument, unlike the contention that freedom of speech is simply not confined by s 18C and its counterparts.

None of this, of course, is to say that incitements to violence against particular groups in the community should not be unlawful. As it happens, they have always been unlawful under the criminal law. But this is very different from expressions of opinion that may be offensive or insulting. There is a very great difference between 'hate speech' and material that might be offensive to some persons in the context of serious public debate. But for some commentators 'hate speech' is simply anything with which they disagree.

It might be thought that the answer to this and other problems concerning freedom of speech is a bill of rights but there are three reasons why, in my view, that is not a solution. The first reason arises out of democratic political theory because what happens under a bill of rights is that political, social and economic questions as well are transferred from elected parliamentarians to unelected judges. It is important to realise that political, social and economic questions do not become legal questions when given to a court. They remain what they have always been but they are now decided by a court. This is simply the judicialisation of politics.

The second objection to a bill of rights is a more practical one but well-illustrated by the notion of freedom of speech under the First Amendment to the US Constitution. Courts in the United State have started with the general proposition that speech is to be absolutely free and then devised numerous qualifications to that principle. So really nothing has changed except that the qualifications are imposed by courts rather than parliament.

The third objection to a bill of rights provision concerning freedom of speech is that a provision like s 18C would very likely be held by Australian courts not to contravene this principle. This is because what John Kenneth Galbraith used to

call ‘the conventional wisdom’ in Australia is that these kinds of provisions are reasonable restraints on freedom of speech. I will have something more to say about ‘the conventional wisdom’ a bit later.

It is often said, especially by media organisations, that the law of defamation is one of the greatest inhibitions on freedom of speech in Australia. The law of libel had its origins in the common law but there is now in this country uniform legislation in all the States and Territories on this subject. It represents an attempt to strike a balance between freedom of speech and protection of individual reputation. It is easy to be critical of the length and cost of defamation litigation but this is hard to avoid when many defendants are large media organisations and have the resources to engage teams of expensive lawyers.

There has been established a Defamation Working Party — of which I am a member — that will make recommendations to the Council of Attorneys-General who will then decide what changes, if any, are to be made to the existing legislation. There will always be debate as to whether defamation law strikes the right balance between the competing values of freedom of speech and protection of reputation. There are, however, two changes that have been proposed by media organisations that might tilt the balance further towards freedom of speech.

The first is the requirement — introduced into the United Kingdom defamation legislation in 2014 — that a publication must have caused or be likely to cause serious harm to the reputation of the plaintiff before there can be any liability for its dissemination.[1] This would presumably have a chilling effect on trivial claims, although it might be noted that there are already some judgments of Australian courts that would allow these kinds of actions to be dismissed at the outset on the basis that the length and cost of the litigation would be completely

disproportionate to any harm suffered to the plaintiff's reputation.[2]

The other change proposed by media organisations is to the current defence of statutory qualified privilege which requires the conduct of the publisher to be reasonable.[3] This normally involves a consideration of the reliability of the sources relied upon by the journalist in question and the research carried out before publication. The media takes the view that the courts have interpreted this test too stringently and have argued for the test under the English legislation which requires a reasonable belief on the part of the publisher that the publication was in the public interest or for a test of 'responsible journalism'.

What about the problems created by publications on social media? It may be, of course, the first of the changes proposed — the requirement of serious harm to reputation before an action can be made out — might dispose of a sizable proportion of those claims based on items on social media, these claims having increased dramatically in recent years. But, depending on the number of persons with access to them, some publications on social media have the capacity to be extremely damaging to a person's reputation. There cannot be any real solution to this problem until there is a greater realisation in the community that making an allegation against a named person on social media is no different to making the allegation on the front page of a national newspaper. In each case the publisher is exposed to exactly the same risk of liability.

There is, of course, a separate problem about the legal liability of internet hosts like Facebook and Twitter and searches engines like Google for the publications of individuals that they facilitate. These are thorny legal questions with some inconsistency between various decisions of the English and Australian courts and one of the purposes of the defamation

reform process is to provide a legislative solution to these problems. It might be noted that in June 2019, the Supreme Court of New South Wales held that media organisations were responsible for the comments of readers that were added to the organisation's Facebook posts.[4]

One way in which the 2005 defamation legislation did reduce an area of litigation was by banning actions by corporations except for non-profit bodies and small companies with less than ten employees.[5] It might be thought that large corporations have staff whose sole function is to promote and publicise their activities and so are well-placed to respond to any allegations made against them. There was, however, considerable opposition to this provision at the time, although the submissions to the Defamation Working Party would suggest that it has now been generally accepted.

The law of contempt is designed to strike a different balance, between freedom of speech and the administration of justice. Usually this amounts to an inhibition on publications that might prejudice a pending criminal trial, although there can be contempt in relation to civil proceedings by, for example, intimidating litigants to abandon their rights. In relation to criminal trials, however, the explosion of information by way of the internet and social media in recent years raises the question of whether jurors can now be kept completely isolated from material that may be prejudicial to the accused person but will not be adduced in evidence. There is, of course, effectively no law of contempt in the United States because of the First Amendment. It is a criminal offence in New South Wales for a juror to access the internet and obtain information concerning the accused in a trial in which the juror is involved.[6]

It might be thought that in many ways the sheer volume of information now available on any particular subject lessens the impact of individual pieces of information on a prospective juror. There are still some clear contempts, such as publishing the prior criminal record of an accused during the currency of his or her trial but it is obvious that the law of contempt needs to take account of the technological changes of the last two decades. It should also be noted that there is a real public interest in the discussion of some prominent criminal cases and that this has always been a defence to a charge of contempt where the prejudice to the pending trial is incidental to that discussion.[7]

There is a form of contempt known as 'scandalising the court' that is designed to deal with allegations against judicial officers. This form of contempt has seldom been invoked in modern times but the Supreme Court of Victoria threatened to bring proceedings against three Commonwealth Ministers in 2017 when they criticised sentencing decisions of the court for being too lenient. The Ministers were forced to apologise to the court. Their comments were not particularly well-expressed but, in the absence of allegations of dishonest or corrupt conduct, it might be thought that courts should not be over-sensitive to criticism of their decisions at this time.

Another value that competes with freedom of speech is that of national security, a balance that was the subject of some public debate after search warrants were executed by the Australian Federal Police in June on journalists employed by the ABC and News Limited. Using the (out-dated) example of wartime convoy details, almost everyone would agree that this is a legitimate competing interest but historically the tendency of governments in all countries, including Australia, has been to classify as secret a great deal of innocuous information. One of the paradoxes of the Wikileaks saga was that the vast bulk of the

material disclosed presented no real threat to any country's national security, although Mr Assange appears indifferent to these questions in any event. It might be noted that, under the relevant provisions of the federal Criminal Code, every leak by a ministerial office in Parliament House in Canberra constitutes an offence by the person providing the information and possibly also by the journalist receiving it.[8] Needless to say there has never been a prosecution in these circumstances!

These official secrecy provisions were amended in 2018 but it remains an offence for a public servant to provide official material to a journalist and publication by the journalist may also be an offence depending on the security classification of the material and its damage to national security. There are heavier penalties for the disclosure of official material by public servants where the information in question is harmful or potentially harmful to national security. There is a defence for publication of such material by a journalist if he or she reasonably believed that publication was in the public interest, except in the case of the identification of security officers or persons in a witness protection program.

Questions of national security lead perhaps naturally to the issue of terrorism. Under the federal Criminal Code it is an offence for a person to advocate the doing of a terrorist act which is broadly defined to mean conduct that causes and is intended to cause serious harm to persons or property or a serious risk to public health or safety, when done with the intention of advancing a political, religious or ideological cause and with the intention of intimidating a government in or out of Australia or the public or a section of the public.[9]

I doubt that anyone would object to it being an offence to advocate the placing of a bomb in a suburban shopping mall in Sydney but it may be that these provisions are wide enough to

extend to the advocacy of violent acts in conflicts outside Australia. What about someone in Australia who calls publicly for the launching of rockets into Israeli suburbs from Palestinian territory or the killing of Palestinian militants by Israeli security services? If these laws had been in place, would they have extended to someone in Australia in the mid-1930s who proposed the assassination of Adolf Hitler? Those persons who recommend violence from the safety of their own armchairs may often not be the most attractive beneficiaries of freedom of speech but, to paraphrase Oliver Wendell Holmes again, the doctrine of freedom of speech is really only tested when the speech in question is hateful to most members of the community.[10]

How does the doctrine of freedom of political communication that has been implied in the *Constitution* by the High Court over the last three decades fit into this mosaic? The cases before the Court over this period can broadly be divided into those where there has been a challenge to what might be described as public order legislation and a challenge to legislation on the subject of electoral funding. Almost all the former challenges have failed, including those in 2018 to Victorian and Tasmanian statutes that effectively established zones in the vicinity of abortion clinics where persons attending the clinics could not be the subject of confrontation by those opposed to the operation of the clinics.[11]

A number of challenges, on the other hand, to electoral funding regulation have been successful, including those brought against New South Wales legislation in 2013 that prohibited donations to corporations and unions and in 2018 that limited electoral expenditure by third party campaigners to $500,000.[12] In many ways these cases might seem to be not about free speech but very expensive speech and to overlook

many of the problems caused by political donations. It might be remembered that the original decision of the High Court in 1992 that discovered the implied freedom of communication in the *Constitution* struck down federal legislation that was designed to remove the cost of political advertising on radio and television for political parties and so avoid much of their fund-raising activities.[13] There is, of course, now considerable public funding for political parties and their campaigns.

I mentioned earlier Galbraith's notion of the 'conventional wisdom' and there has developed in Australia in recent years a conventional wisdom on a whole range of subjects, for example, climate change, border security and freedom of speech, to name a few. This consensus is maintained by large sections of the media; all legal professional bodies; most teaching staff in universities; major sporting bodies; literary festivals; and quite a number of the boards of large corporations. Some of these views may be quite supportable. You yourselves may hold some or all of them. But that is not the point. The point is that no young person in our society could publicly espouse a contrary view if he or she wished to pursue a serious career in any of these areas.

You may think that all this is wildly exaggerated. But, as someone who was once very familiar with university common rooms, I would be prepared to wager a large sum that any young aspiring academic who consistently contradicted the conventional wisdom at morning tea in the staff common room in 2019 would find his or her career prospects severely affected. And most young academics would know this and would confine their public views accordingly. Much the same position would hold for young persons working in federal or state bureaucracies and in many large corporations. I don't suppose these bodies have a tearoom anymore but they no doubt have office lunches and other social events where contradiction of the conventional

wisdom will not be favourably received. This is not because everyone in such organisations subscribes to the conventional wisdom but those that do not know better than to expose their views.

When I was at law school in the late 1960s the conventional wisdom was rather different and would be considered in comparison with today's variety as quite conservative. There is a very interesting question as to how and why this turn-around occurred in a relatively short space of time, by which I mean between the 1970s and the 1990s, a relatively short period for any historical perspective. One difference, however, between the two periods seem to me to be the degree of intolerance on the part of current proponents of the conventional wisdom. As an example, until relatively late in the 1960s the war in Vietnam enjoyed quite strong support in the Australian community. It was not until it became clear that the war could not be won by the United States that public disenchantment set in in Australia. So being opposed to the war was not a fashionable or popular stance for most of that decade. But I doubt that opponents of the war were held in the same contempt for their views as opponents of any aspect of the conventional wisdom are subjected to now. Almost everyone I knew at Melbourne University was in favour of the war but it did not stop me being on good terms with them and having friendly debates on this and other subjects.

So it seems to me in many ways that the conventional wisdom is the greatest inhibition on freedom of speech in Australia at this time. There are, of course, strong strains of what is sometimes known as political correctness in England and the United States but, for reasons that are not entirely clear, this development seems to have been taken to extremes in this country. One factor may be that in a much smaller society there

is simply less scope for diversity of opinion than in England or the United States.

All of these may sound rather pessimistic when considering the position of freedom of speech in Australia in the immediate future. And it is certainly true, in my view, that public debate on important political and social questions has become more inhibited in this country over recent years. There are, however, still individuals and journals who are prepared to initiate robust public discussions. They often have a problem getting any response from the smug holders of the conventional wisdom but hopefully there will be a reaction against the current claustrophobic climate of opinion at some stage. In the meantime, proponents of freedom of speech will just have to get used to causing a stir at normally polite and otherwise peaceful dinner parties!

Endnotes

1 *Defamation Act 2013* (UK) s 1.

2 See, e.g., *Bleyer v Google Inc* (2014) 88 NSWLR 670; c.f., *Jameel v Dow Jones & Co Inc* [2005] QB 946.

3 *Defamation Act 2005* (NSW) s 30.

4 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766.

5 *Defamation Act 2005* (NSW) s 9.

6 *Jury Act 1977* (NSW) s 68C.

7 *Ex parte Bread Manufacturers Ltd; re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242.

8 *Criminal Code Act 1995* (Cth) Division 122 of Schedule 1.

9 *Criminal Code Act 1995* (Cth) ss 80.2C and 100.1 of Schedule 1.

10 *Abrams v United States* (1919) 250 US 616, 630-631.

11 *Clubb v Edwards; Preston v Avery* (2019) 366 ALR 1.

12 *Unions NSW (No 1) v New South Wales* (2013) 252 CLR 530; *Unions NSW (No 2) v New South Wales* (2019) 264 CLR 595.

13 *Australian Capital Television Pty Limited v Commonwealth of Australia* (1992) 177 CLR 106.

A SAD TALE OF OUR INTOLERANT AND UNTRUSTWORTHY UNIVERSITIES

PETER RIDD

Our universities are today highly intolerant institutions that do not allow free debate. I think that is nowadays uncontroversial. The problem with our universities is that they have become captured by the cultural-left, which has crushed debate and argument within these organisations. It is, for example, career suicide for a young marine scientist to question the orthodoxy about the supposedly poor condition of the Great Barrier Reef.

My personal experience with such intolerance began in 2017, when my work was showing that the scientific 'consensus' on the Great Barrier Reef had significant problems and was demonstrably wrong in certain respects. Given the enormous implications this consensus was having on the community and industry in Far North Queensland, I thought it was important for the science institutions that were contributing to the 'consensus' to face some hard questions about the trustworthiness of their work.

In particular, during an appearance on the Alan Jones program on Sky News, I presented some of these questions. In doing so, I naively thought the science institutions would mount a counter-argument, identifying shortcomings in my analysis whilst attempting to demonstrate the correctness of their systems and processes. In other words, I thought we might engage in a vigorous but respectful argument about a crucial issue to north-eastern Australia.

Instead, there were complaints about my comments. I was called up to the Faculty Dean's office and, in a very officious meeting, was handed paperwork for two counts of serious misconduct.

Although the Institute of Public Affairs organised some initial legal assistance for me, within a couple of weeks, James Cook University responded by doing a broadscale search of all my email communications, which they had no reason to do except to try and find dirt. They then presented me with a 128-page document with a further 23 serious misconduct charges. It is important to recognise that I was not a public servant but an academic with a broad right to academic freedom that included the ability to 'express opinions about operations of James Cook University and higher education' written into my enterprise agreement.

There is little more intimidating that realising all your correspondence is being read. But to my amazement and great relief, I had not said anything stupid or embarrassing.

I won't list all the charges made against me but it is amusing to look at some of the more ridiculous examples contained within the charges, which demonstrated the extent to which James Cook University had become a bully. For example, the University objected to me sending copies of the charges against me to my wife, accusing me of breaching their secrecy provision.

The University also objected to an email reply I sent to a student who was worried about what the University was doing to me. I said that the University was no worse than other universities and that they were generally 'Orwellian' because of their intolerance of dissent. The University did not like me saying 'Orwellian' and apparently could not see the irony that

by reading my emails to find this transgression they had just proved exactly what I wrote.

There was also a later charge based upon what became known as the 'no-satire directive'. I sent an email with a newspaper article about James Cook University's bad behaviour to an old friend and ex- PhD student. The subject line of my email was: 'for your amusement'. The University alleged that by saying 'for your amusement', I had parodied, vilified or satirised the disciplinary process, which was yet more serious misconduct by me.

Most of all, the University wanted to keep me silent and it was obvious why: if I couldn't communicate, I would be cut-off from help, wouldn't be able to organise resistance, would probably collapse psychologically, and give up.

As things progressed, James Cook University started to insist on vetting the public lectures that I was due to give at the Sydney Institute, and other events. The Faculty Dean wanted my PowerPoint presentation which he, and I suspect the University's lawyers, vetted for offending content. The censors required the removal of slides including one that asked the question of Great Barrier Reef science: '*Is there a robust debate without intimidation*?' I had been using this slide for a few years, and it did not refer to the University's intimidation and bullying, although it now had more poignancy.

It was obvious at this point that I had a choice: give up and shut up or carry on and fight in court. The problem with the latter choice, however, was that litigation is expensive, which meant we had to try and raise funds by way of crowd funding.

This then presented another difficulty. In order to ask for donations, one cannot say: '*I have 40 charges of serious misconduct against me, I can't say what they are about, but*

please give me $260,000'. People need to know the details about what has happened, and they need to have comfort that you are being open and transparent. Understandably, they want to know if there is something genuinely disreputable against you such as a sexual misconduct charge, or that you are not plain incompetent and deserve to be fired. And yet, James Cook University was insisting that I keep everything secret.

My biggest fear was that the crowd funding would be a huge flop, and I would then be fired without the cash to fight the legal case. Fortunately, thanks to the support of many bloggers, we raised $100,000 in 48 hours. In a later campaign we raised another $160,000 in 72 hours and I am indebted to 2400 people from around the world. There is nothing to lift your spirits more than seeing all these people, who you do not know, supporting you. I could scarcely believe it.

The media interest in the case, partly due to the crowd funding success, was considerable and almost entirely on our side irrespective of political inclination. James Cook University had managed the impossible by getting *The Guardian* to agree with *Breitbart*, and *The Australian* to agree with the ABC. The consensus was that James Cook University had acted disgracefully.

To cut a long story short, James Cook University fired me, and I took the matter to Court. With the help of my legal team, led by Stuart Wood, AM, QC, the Court ruled that James Cook University had acted unlawfully in 28 different ways and had taken away my right to intellectual freedom — a right that was written very clearly into the relevant enterprise agreement.

In other words, I was allowed to ask some hard questions about the trustworthiness of science organisations. To the public, it was obvious that I should have this right. James Cook University has signalled its intention to appeal to the Full Court of the Federal Court.

Earlier this year, at the request of the Commonwealth Minister for Education Dan Tehan, the Honourable Robert French AC (former Chief Justice of the High Court of Australia) wrote a review on problems with academic freedom on campuses. One of his main points was that universities must not make up rules, usually called codes of conduct, that restrict academic freedom.

This is exactly what James Cook University did: it used its code of conduct to fire me. Any appeal by the University will mean that it ultimately has to argue that academic freedom is subservient to its code of conduct. Thus, James Cook University is now on a collision course with the federal government but is seemingly unconcerned.

Does this mean that my case will suddenly liberate academics to speak freely? Not at all. It shows that if you can raise ridiculous amounts of money on crowdfunding and can withstand a terrible time, you might get your job back or some sort of compensation. It shows that universities can act with remarkable intolerance and aggressiveness. It also shows without any doubt that the best course for an academic is to stay well within the bounds of what the university administration will tolerate. The truth is irrelevant, and quite possibly dangerous.

But even if the government implements Robert French's recommendations and force intellectual freedom on universities, it will not liberate the academics. There are many ways to get rid of a troublesome academics. The continuous restructuring and reviews create an opportunity to make an academic redundant every three years or so.

The sad truth is that for most academics, intellectual freedom is not a right to which they attach great importance. Most never do research that is controversial. And because most universities are filled with academics with what could be variously described as a left of centre, or progressive, or politically correct viewpoint that is shared by the administrators of universities, their 'controversial' views are tolerated. Academics and their administrators live in a bubble where they never talk to members of the wider community who don't share their views.

Somehow or other we must make university academics, and their administrators, more representative of community values. Only then will we engender debate and argument back into our universities. I do not think it is possible to reform our present universities. Maybe we must abandon universities entirely and reduce them to technical colleges. And perhaps the whole idea of state-funded intellectuals, which university academics ultimately become, must also be abandoned.

Although I am pessimistic about reforming universities, I am optimistic about improving science. In fact, we are already seeing improvements to the peer-review process in disciplines that carry no ideological baggage, such as biomedicine. However, for the Great Barrier Reef, where to deny that the reef is in trouble will get you labelled a 'denier', we have some way to go.

How do we improve the science? A large proportion of science has no application, meaning that whether it is wrong or not may not be a big problem. Science that applies to industry will be checked by industry. This leaves 'policy science', which is the science used to formulate government policy and regulation. Because the government uses this science, the government need to check it.

To this end I have proposed an Office of Science Quality assurance that would do checks on the science that would be far more rigorous and antagonistic than peer review. The Liberal National Party Queensland conference recently voted in favour of such a body.

One problem with this idea is that members of the Office may themselves be captured by the science institutions that they are commissioned to check. In crafting a solution, science should take lessons from the legal system and our systems of financial auditing.

In a court hearing, there is a guaranteed argument between the opposing sides. Evidence will be challenged. Collusion between the defence and prosecution is not possible. This guarantee of a vigorous argument does not occur in science and peer review comes nowhere near achieving it.

Similarly, auditors are independent checkers whose role is to keep the accountants honest. Without auditors, can you imagine how much fraud there would be where nothing was ever checked? In my view, our science system is like an un-audited financial system, so we must not be surprised that problems have occurred. It was inevitable.

At the bottom of this problem is the fact that little argument is tolerated in both our universities and our science institutions. It should be possible to inject into the scientific systems a guaranteed mechanism for debate and review similar to those found in the legal system or auditing. The problem of the universities is far more intractable and can only ultimately be solved if university academics become more representative of the community

JUDICIAL APPOINTMENTS IN THE UNITED STATES OF AMERICA

MURRAY CRANSTON

You would not know it in the mainstream American media today, but a silent transformation is gathering pace inside one of the three core structures of the American polity: the judiciary. A transformation that is seeing an arm of power slowly disappearing from an entire generation of liberal Americans everywhere.

Here is a quick example. Ruth Bader Ginsburg is currently 86 years old. If President Trump's youngest appointment so far to the US Court of Appeals lived to the same age as Ginsburg is now, this recent appointment would still be on the bench in 2069. In fact, most of Trump's 43 appointments to the Court of Appeals to date will still be on the bench in 2054 using the Ginsburg age measure. This is just a glimpse on how a conservative jurisprudential future in the United States is currently being locked down by President Trump and the Republicans.

I BACKGROUND

Article II of the United States Constitution ensures the President's judicial nominees must be approved 'by and with the Advice and Consent of the Senate.' Article III of the Constitution establishes the Supreme Court and also gives Congress the power to create 'inferior' courts. The most important point about Article III is that judges do not have

defined tenure; they serve only on the condition of 'good behaviour.' Effectively, they serve for life.

The foundation of this whole subject matter and what makes it so significant is the lifetime nature of these appointments. To sharpen the context in an Australian setting, imagine a situation where Dyson Heydon would still be on the High Court of Australia right now with at least another full decade to go if we applied the Ginsburg age measure. Or Ian Callinan still looking at another five years on the High Court.

But back to Article III and these 'inferior courts' served by judges only limited by 'good behaviour.' Today this takes the shape of the 678 District Court judges covering 94 districts across 50 American states and the US territories. Sitting above that are the 179 judges on the 13 circuit courts known collectively as the US Court of Appeals.

The appeals circuits are geographical in nature and go in ascending order from the First, Second, Third right up to the Tenth and Eleventh Circuits. In addition, there is the powerful and prestigious DC circuit and the specialist Court of Appeals for the Federal Circuit. Each circuit covers a geographical grouping of American states. The circuits all vary in size from the six judges of the First Circuit that covers four states, to the behemoth of the Ninth circuit with its 27 judges who hear appeals from California and eight other states. Then there is the caseload. The US Court of Appeals system has the final word in around 50,000 cases every year compared to the roughly 70 cases the Supreme Court finally determines each year.

II DONALD TRUMP'S RECORD

On 20 January 2017, Donald J Trump assumed office as President of the United States. Almost 18 months to the day — 18 July 2018 — his Administration achieved an ominous record. On that day, Trump could claim that he had appointed more judges to the Court of Appeals in the first two years of any American Presidency, the most during this timeframe since the Appeals Courts were established back in 1891. And on that day, the person confirmed to the powerful US Court of Appeals for the Fifth Circuit — covering Texas, Louisiana and Mississippi — offers us a statistical snapshot of what a Trump nominee at this level generally looks like.

His name was Andy Oldham, a standard, bespectacled white male with degrees from Cambridge and Harvard. As Trump's twenty-third Appeals Court judge amongst 43 appointments so far, Judge Oldham represents almost the statistical median of this cohort. Using the demographic metrics of the leading liberal organisation opposing Trump's nominees, the Alliance for Justice, Oldham is an Ivy League educated, heterosexual, able bodied, white male who represents the statistical mode in the data set of Trump's nominees: 86% of whom are white, 80% of whom are male. On the statistical mean side of things, this historic appointment under-indexed at just 39 years of age at the time of his appointment compared to the average age of all of Trump's Appeals Court appointments of 49 years.

By the end of his second year, Trump went on to see 30 Appeals court judges in place. This compares to 22 judges confirmed under President Bush Sr by the end of his first two years, with Reagan and Clinton both on 19, the younger Bush on 17, Obama on 16 and the Carter Administration on 12.

The speed with which appointments are made is a crucial measurement and the record setting pace under Trump can be more easily explained when you have a Republican Senate and a man obsessed with judicial confirmations like Senator Mitch McConnell as Majority Leader. In fact, it would be unfair not to feel a little sorry for President Obama not just because a Supreme Court vacancy was forcibly kept open for a year but also because he adhered closely to the conventions at the Appeals Court level. He always deferred to home-State Republican Senators, respected the 'blue slip' process, and sought consensus, bi-partisan candidates. All of this respect for tradition saw the Republican-controlled Senate allow only two Appeals Court nominees to be confirmed in Obama's last two years in office.

Despite forming a minority in the Senate, Democrats today have discovered their own methods of resistance by using certain procedural tactics to delay Trump's nominations. And the record shows such tactics have been used in an unprecedented manner.

III CLOTURE VOTES

The cloture vote is what we would refer to in the Australian Parliament as the guillotine. This is a delaying procedure that you will not find mentioned in the American liberal media. The cloture vote is — to quote the Congressional Research Service — 'the only procedure by which the Senate can vote to set an end to a debate without also rejecting the bill, amendment, conference report, motion, or other matter it has been debating.' To get a nominee confirmed, therefore, you must first end the theoretical debate on the nomination itself. To do that a group of 16 Senators must file a cloture motion and in the Senate's

Congressional Quarterly (or our Hansard) when the Senate is in session, you will notice this form of words that must be signed by at least 16 (in these cases, Republican) Senators: 'We, the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, hereby move to bring to a close the debate upon the nomination of [the nominee in question].'

To establish some context here we should go back to the era of the 'Reagan Revolution', except in terms of judicial appointments and cloture votes there was no revolution. Prior to that, at the Court of Appeals level, the Senate accepted the President's right to make appointments and confined itself to its true Constitutional calling of providing 'advice and consent.' Every one of the 83 Appeals Court judges selected by Reagan was confirmed without having to resort to a guillotine to stop debate and give the nominee an up or down vote.

In fact, from 1789 to 1980, more than 97 percent of the judges confirmed to the District Court, the Court of Appeals, and the Supreme Court had no opposition at all. Remarkably, if we look at judicial nominees that garnered more than 25% opposition on the Senate floor, we can safely claim that none of Reagan's appeals court nominees attracted this level of disapproval. Even the country's most celebrated conservative judge, the late Antonin Scalia, was confirmed by a vote of 98 to 0 in 1986.

The same can be said for the Administration of George Bush Snr, where 40 of his 42 Appeals Court judges were confirmed by unanimous consent. Only one of Bush's Appeals Court nominees went to an actual vote and the other a young African American appointed to the DC Circuit called Clarence Thomas sailed through without any resistance on a voice vote

(with not even the infamous liberal Ted Kennedy voting against him).

So, throughout 12 years of Reagan and Bush, there was not a single occasion where a guillotine was needed to force a vote on a Reagan or Bush nominated Appeals Court judge.

For other Administrations the record was scarcely different. Under the Clinton Administration there was only a single cloture vote amongst his 66 Appeals Court appointments and less than 2% of these nominees garnered more than 25% opposition on the Senate floor.

The Administration of George W Bush endured three such votes, just over 2% of all his judicial nominations. The Obama Administration saw two cloture votes against his Appeals Court nominees comprising less than 4% of all his nominees.

Thus, zero guillotine votes were required under the Reagan and Bush Administrations before such votes eventually reached an historic high of three. Now compare this to the Trump Administration. So far, a massive 38 cloture votes have taken place comprising over 88% of all Trump's Appeals Court nominees. In terms of opposition on the Senate floor we go from around 2% across previous Presidencies to a massive 81% percent of Appeals Court nominees attracting opposition of more than 25% in the Senate; a massive, unprecedented, not talked about spike.

(On a side note, every single one of Trumps Appeals Court nominees have had to face a roll call vote, which is another delaying tactic that requires the presence of every Senator in the chamber.)

IV LIBERALS HIDING – SENIOR STATUS

Despite all this frenzied opposition, Trump's nominees are being processed at a faster rate than his predecessor. It is taking Trump's Appeals court nominees around 151 days from nomination to confirmation, compared to 229 days for Obama's nominees. In fact, Trump is doing so well with the Appeals Court he is running out of vacancies to fill. After 43 appointments only four vacancies are now left open.

It is interesting to observe a tactic emerging amongst judges currently on the bench to use their lifetime tenure to 'wait out' this conservative, Republican executive till after the Presidential election late next year. Since 1984, a federal judge can take what is known as 'senior status' when he or she turns 65 years of age provided he or she has served at least 15 years on the bench. 'Senior status' effectively allows the judge to continue working on a part-time basis but with a full-time salary and benefits. While judges with senior status can still bring down decisions, their place on the bench officially becomes vacant.

Research conducted by the Heritage Foundation on data from the Federal Judicial Centre shows a very large number of Democrat-appointed judges who are currently eligible to retire on full benefits or qualify to work part time with 'senior status' but who are choosing to stay. Of 60 Appeals Court judges currently eligible to move to senior status or retire, 35 are judges appointed by Democrats, a number estimated to grow to 39 by Election Day 2020.

V NO LIBERAL APPOINTMENT SHORTLIST

Liberal Americans have simply never been concerned about judicial appointments as a core political priority. They make very clear who they are against, namely the Brett Kavanaughs and Andy Oldhams of the world, but you will never hear them talk about the nominees they support. Democrats talk about the threats conservative judges pose to LGBTIQ+ issues, abortion, immigration, and climate change but they never campaign for specific, liberal judicial nominees as the solution.

Judicial nominees, especially to the lower courts, have never been advocated for by Democrats during Presidential election campaigns. How this issue was not raised amongst the 20 Democrat hopefuls in their recent debates is astonishing. And it is quite striking that on 18 May, 2016, nearly six months before the 2016 Presidential election, Donald Trump took the unprecedented step of publicly releasing a shortlist of eleven judges from whom he would select a replacement for Antonin Scalia on the Supreme Court if he were elected President. An alternative shortlist in response was never released by Hilary Clinton. And again, on 17 November 2017, Trump expanded and publicly released a further shortlist to include a total of 25 potential nominees for a future seat on the Supreme Court. Again, no alternative list was ever released by any Democrat.

Trump also made clear his potential nominees are vetted and approved by well-known lawyer and conservative activist, Leonard Leo and the Federalist Society more generally. On the Left, there are no prominent individuals or organisations explicitly committed to advancing liberal judicial candidates. One needs to wonder why there is no vast liberal network of young potential judicial nominees equivalent to the Federalist Society and why no liberal version of Leonard Leo exists.

Recently on 13 June 2019, nearly two and a half years after Trump's inauguration, liberals made their first real attempt to match Trump's shortlist. The initiative called 'Building the Bench' is organised by leading liberal legal group, the Alliance for Justice.

But unlike Trump's transparency in 2016 and 2017, the Alliance for Justice and the other groups involved are keeping their lists of potential nominees (if they even exist) secret, and no Democrat presidential candidate is willing to say they would even use the list to select nominees if it were made public.

And the response received by Real Clear Politics when they pursued possible names on this list is instructive:

> RealClearPolitics reached out to a dozen of these [Democrat candidate] campaigns to ask whether they would commit to selecting appointees from the Building the Bench roster, but only a handful responded to repeated requests – and those responses were noncommittal.

The campaigns of the top contenders in the field -- Joe Biden, Bernie Sanders, Elizabeth Warren, Kamala Harris, Pete Buttigieg, Cory Booker, Amy Klobuchar, Kirsten Gillibrand and Julian Castro did not respond to repeated inquiries about this topic.

Jeffrey Toobin, a long-time CNN legal analyst, articulated things best in an article he wrote for the New Yorker magazine in June of this year:

> Democrats are different. Consider what happened after McConnell blocked the Garland nomination. After a few days of perfunctory outrage, most Democratic politicians dropped the issue. Neither President Obama nor Hillary Clinton, in their speeches before the Democratic National

> Convention, in July, 2016, even mentioned Garland—or the Supreme Court.
>
> Four years later, this pattern is recurring. Consider, for example, the Web sites of three leading contenders for the Democratic Presidential nomination: Joe Biden, Bernie Sanders, and Elizabeth Warren. Each site has thousands of words outlining the candidates' positions on the issues—and none of them mentions Supreme Court nominations, much less nominations for lower-court judges. These omissions are especially striking in Biden's case, because he served for decades on the Senate Judiciary Committee, including several years as the chair.

VI CONCLUSION

After just two and a half years in office and despite unprecedented levels of resistance, Trump has already appointed a quarter of all the judges on the Court of Appeals and turned one circuit from a Democrat dominated one to one with a majority of Republican appointments. With nearly 40 Democrat appointed judges becoming eligible to retire or work part time over the next year there's opportunity for Trump to consolidate his record further.

What this all means for abortion, gun rights, immigration and other contentious matters is a story for another day. In the meantime, the Court of Appeals will continue to be ignored by Democrats while a more significant, macabre equation takes hold: can Ruth Bader Ginsburg heroically wait out a Republican presidency and avoid yet further conservative entrenchment on the Supreme Court? Or will she exhaust her seat to Trump, which according to one liberal commentator, will truly earn her the moniker 'Notorious RBG.'

SPECIAL ADDRESS

THE LIFE OF THE TRIAL JUDGE: WHAT HAS OR IS CHANGING?

THE HONOURABLE JOHN MIDDLETON

It is a pleasure to be here at the Thirty-First Conference of The Samuel Griffith Society and to be asked to speak to such a distinguished gathering.

It is timely I participate in this conference having just attended last Tuesday night at the University of Melbourne the launch of David Kemp's book entitled '*A Free Country: Australians' Search for Utopia 1861-1901*.' The book is about the Australians of that period seeking to establish the legal and moral foundations for a liberal society in Australia. Of course, Sir Samuel Griffith was one of the most influential voices in developing liberalism. As David Kemp wrote, Samuel Griffith's 'self-appointed mission … was to bring the surging frontier under the rule of law, while standing for principle and morality'.[1] It is a mission that is still important today, with 'the surging frontier' perhaps now the so-called fourth and fifth industrial revolutions being the rise of digital technology and the era of artificial intelligence respectively occurring in Australia's diverse community, at a time when many of our public institutions are being critically examined and our democratic values are being tested. The rule of law is essential to our way of living and the justice system we all enjoy, based upon principle and morality according to the social norms that should govern all of us.

You have already heard many learned speakers present on varying topics, such as on federalism, Sir Harry Gibbs, freedom of speech, and judicial appointments. For those of you who have studied the programme, I have been billed to speak to you for thirty minutes on the general topic of Courts and Judges, entitled 'Special address'. Understandably, your expectations are high, although by now (this being the last session of the conference, including two dinners), you are all probably 'conferenced' out. Please treat this presentation as an after-conference address. It is always difficult for any presenter, even at the early stages of a conference, to know at what level to present to the audience, even if just billed as a 'normal' address. Does the presenter try to inform and educate, provide some entertainment and amusement, or attempt to do all four, namely to inform, educate, entertain and amuse? Without any particular destination in mind, like Christopher Columbus, I venture forward regardless.

Mr Eddy Gisonda, the convenor of this conference, when inviting me to speak indicated I could speak on a topic of my choosing, presumably by implication limiting me to something relevant to the law and not some travelogue from my recent time overseas. I have chosen the topic of: 'The Life of the Trial Judge: What has and is Changing?' I want to touch upon a few themes, none of which can be properly developed in the time allotted to me, but which are worthy of recognition and consideration.

I will be focussing on trial judges involved in civil proceedings, although some of what I say will apply to all trial judges. Obviously my comments are heavily influenced by my own experience as a trial and appellate Federal Court judge and as a barrister.

I start by observing that the role of the trial judge has, is, and I think will always primarily be to determine the facts. The finding of facts, often dependent upon the version of events given by witnesses, requires a deep understanding of human nature and social awareness. This has been and will be the crucial role of decision-making. Most cases turn on the facts. In 1921, Benjamin Cardozo observed:[2]

> Lawsuits are rare and catastrophic experiences for the vast majority of men, and even when the catastrophe ensues, the controversy relates most often not to the law, but to the facts.

The trial judge has a very important responsibility to carefully analyse the evidence presented and make clear findings of fact, not the least because it is still difficult to overturn findings of fact of a trial judge on appeal. The importance of the trial judge finally determining a proceeding and doing so according to law cannot be overstated; the appeal process is a safeguard, but a successful appeal can never entirely undo a wrongful decision of a trial judge.

I do not want to sound overconfident in what I am about to say, but determining the applicable principles of law by a trial judge is not necessarily that difficult — guided by precedent, the training as a lawyer, and the assistance of practitioners. However, fact finding is often a time-consuming exercise and the trial judge has to rely on their own judgment in an environment where there is conflict, different versions of fact being urged upon the judge, sometimes difficult evaluations of reliability and credibility, and the constraints of the adversarial system and rules of evidence and practice. On appeal the judges have it easy; in most cases all the evidence and fact finding has been completed.

That the trial judge is exercising their functions in public has always been and will always be the case.

Arguably the notion of open justice commenced as far back at the 12th Century, when King Henry II created the concept of a jury trial making the attendance of trials compulsory.

Today the concept of open justice is well known to all lawyers and judges, developed in the common law and enshrined in statute.

The use of technology is one way to modernise the concept of open justice, and, as many commentators and judges have observed, helps do away with the limitations inherent in the physical and perhaps remote space of a public gallery in a courtroom. Livestreaming, for instance, extends the way a person may view a trial judge in action, without having to attend a courtroom.

Of course, open justice puts the trial judge in the limelight. The question of accountability and scrutiny by the public and the media arises. Jeremy Bentham once stated that open justice was a means 'to keep the judge … whilst trying, under trial'.[3]

Then the trial judge is accountable in other ways, not just by their performance in court. For instance, a former senior judicial officer made some comments (which were published in the press) on the timely delivery of judgments in the Supreme Court of New South Wales and the Federal Court of Australia. These comments were later taken up by a journalist, relying upon various data as to the court's and individual judges' performance. Addressed by Chief Justice James Allsop AO in a speech delivered in January 2019 (now published in the latest edition of the *Australian Law Journal*),[4] the comments and data needed to be put in context.

The point to make for the purposes of today, as the Chief Justice did, is that the work of the courts (including individual trial judges) is becoming more accessible to the public through digital technology. The work and life of a trial judge (not only their activities in court) can now be readily accessed and scrutinised. This is not to be regretted, or seen as undesirable, but it needs to be recognised.

Of course, public scrutiny is not new, even if sometimes pointed. There was the famous incident of the Birmingham newspaper in 1900 which contained a criticism in the following terms of Justice Darling who was holding the local assizes in England:[5]

> If anyone can imagine Little Tich upholding his dignity upon a point of honour in a public house, he has a very fair conception of what Mr Justice Darling looked like in ruling the Press against the printing of indecent evidence. His diminutive Lordship positively glowed with judicial self-consciousness. No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from the imprudent little man in horsehair, a microcosm of conceit and empty headedness. One is almost sorry that the Lord Chancellor had not another relative to provide for on the day that he selected a new judge from among the larrikins of the law. One of Justice Darling's biographers states that "an eccentric left him much money". That misguided testator spoiled a successful bus conductor.

Commentary which is not to the point or even fair needs to be endured to the extent it does not undermine the authority of and the exercise of judicial power by the courts. Reform may be

needed to clarify the scope of the contempt of court offences, although the total abolition of the offence of scandalising the court may go too far. There needs to be a balance. I do not subscribe to the view that malicious comments about a court lead to a total collapse of public confidence in the legal system. As was observed by the High Court of Australia in *Gallagher v Durack*,[6] 'the good sense of the community will be a sufficient safeguard against such a breakdown.'

Sadly, not all criticism of judges comes from outside your own court. One of the best examples (if that is the right phrase) of such criticism can be found in the same-sex marriage case in the Supreme Court of the United States decided in June 2015,[7] and the dissenting opinion of the late Associate Justice Scalia. In that case, it was decided that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and recognise a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.

Justice Scalia did not hold back in his criticisms of the majority:[8]

> But what really astounds is the hubris reflected in today's judicial Putsch … They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds — minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly — could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the

> democratic process when that is called for by their "reasoned judgment" … The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.

Then, continuing in footnote 22, he said:

> If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

There have been instances close to home of justices in the same court being accused of involving themselves in a 'cat fight', with an unfortunate collapse of judicial comity, but Associate Justice Scalia did raise the bar.

Sometimes, subtle criticism of judges occurs. I observe that when I have decided a proceeding in which a commentator approves, they refer to me as Justice John Middleton. When a commentator disapproves, they just refer to me as Middleton and the tone of the report is dismissive. Then when I handed down the penalty decision in the Centro proceeding,[9] there was concern in certain quarters that the Court's penalty was too lenient. This was graphically displayed by a cartoon displaying myself (the actual depiction was in itself flattering) with a person (presumably a Centro director) being bent over my knee with his

pants down being spanked by a feather, the caption being 'You're a very naughty director.' But worse was yet to come. Just the other day there was a very hurtful comment. My Associate brought to me a newspaper article where reference was made to me as a 'long serving' judge with no other accolades — what about 'eminent', 'learned', 'well-respected'? My Associate reminded me that it was not all about me, and the taking of an appointment is not to gain fame, fortune or as is now apparent, flattery!

Whatever the downsides for a trial judge, making court proceedings and the work of the court easily available to the public is important. The media play a vital role in reporting upon and providing to the public accurate accounts of court proceedings. The court, and the trial judge, should facilitate court reporting and media access. In *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority*, [10] a case dealing with the so-called supplements scandal, the media (at least in Victoria) showed an immense interest in the proceedings and the process. I allowed the first case management hearing to be televised (that turned out not to be riveting viewing) and the delivery of a judgment summary (which I was told by some colleagues was a little more interesting than the first case management hearing only because, even after fifteen minutes, no one quite knew which way I would decide — apparently it was read like a detective novel and nobody knew who did it until the end.)

In some instances making digitally available a full judgment and it being read out by the trial judge can be of great benefit; it will explain the complete basis of a particular decision. A recent example is the judgment of Chief Judge Kidd in the County Court of Victoria in the Cardinal George Pell criminal proceeding and the Chief Judge's explanation of his reasons for

that particular sentence. Sentencing is not an exact science, it involves balancing and considering many factors: to have that explained in an objective and logical way by the trial judge to the public, provides transparency to the process and confidence in the legal system.

Undeniably judges in one way or another make decisions that involve public policy and may give rise to a continued controversy after a particular proceeding has completely disposed of the dispute between the parties. Judges are frequently required to consider what is in the public interest, to assess social norms, considering the consequences of their decisions beyond their effects on the parties to a proceeding before them. Then it must be recognised that the modern trial judge's role is strongly affected by the increased intervention of Parliaments. A large part of what judges do now involves the interpretation of and application of legislation, often involving government or public instrumentalities. A trial judge must take care that the rule of law not be used to claim a supervisory role over organs of the State going beyond the true constitutional role of the judiciary.

Undeniably, public perceptions, opinions and beliefs play a role in a judge's approach. Whilst the judicial process is, as it should be, immune from public opinion, judges are increasingly being called upon to consider social norms reflecting public or community values in their decision-making. If judges did not do so, they would lose the confidence and trust of the public and would lose their authority.

A change that has and will continue to impact on the life of the trial judge is the diversity of our society. This has been commented on by Justice Emilios Kyrou in an article entitled 'Judging in a multicultural society'.[11] As his Honour reminded us, an individual's culture may impact their experience of the

court and trial judges need to be able to accommodate these different cultures. A witness's cultural background might affect the way they give evidence. Examples include the body language of a witness, and manner in which they answer questions. Of course, Australia's cultural diversity is so extensive that it would be impossible for judges to become familiar with all the cultural differences that they are likely to encounter. However, the trial judge must now at least have an awareness of those differences so as not to lead to any miscarriage of justice.

Another important element of maintaining public confidence and trust is impartiality. Impartiality, referring to the determination to deal equally with all parties to a proceeding without favour to any, is an essential characteristic of the trial judge. It connotes an absence of bias, actual or perceived; a state of mind where the decision-maker is disinterested in the outcome.

Maintaining complete impartiality is not possible: One must recognise this fact and accommodate this reality. Quoting the American judge Oliver Wendell Holmes:[12]

> (A)ny man who says he is impartial about any subject on which he speaks is either ignorant or a liar, and that the honest is one who, aware of his partiality, guards against its abuse.

All trial judges have their prejudices. Returning to Cardozo, '(T)here is in each of us a stream of tendency … Judges cannot escape that current any more than other mortals'.[13] After all, judging requires drawing upon personal experience. It also relies upon logic, precedent and accepted standards of conduct. It relies upon human feelings and awareness of the human condition.

Which leads me to the next point and the existence of Artificial Intelligence. I doubt whether any system of AI can fully replicate the human brain, or deliver a comparable level of 'intelligence', however that is defined. However, I acknowledge that a great deal of money and human brain power is being employed to develop a computer that is capable of artificial general intelligence, matching its makers or even with superhuman intelligence.

Just the other day I read about the droid that will give you health advice. Tests of socially equipped robots are apparently taking place in medical facilities in the United States, Europe, Japan and here in Australia. Apparently, some patients were happy to talk to a robot for extended periods. (I can see a place for robots with some legal practitioners who take longer than I would like for them to get to the point.) However, even in the medical area, whilst some functions can be carried out by robots, the consensus is that there will not be doctorless hospitals, as doctors and nurses are needed to actually care for people.

Similarly, there will always be the need for the human interface of the trial judge in many disputes. Undoubtedly, we are moving into the world of AI in courts. We have introduced the 'paper-less' court. We are moving to a people-less court to deal with some disputes. But decision-making in many disputes involves many aspects. In addition to the matters I have referred to, it involves the ability to be aware of and assess the social impact of decisions. This does not deny that change is occurring in this space. Judges need to adapt to technological change. The trial judge will need to manage information on a larger scale than ever before. This will continue to be a challenge. In addition, we will need to develop what hopefully will be taught to law students: critical thinking, communication, collaboration and creativity. Even with technology, lawyers need to use their

critical thinking; an example recently given by the dean of law at the University of NSW, Professor George Williams is even when using e-discovery systems, you need to consider whether the system is picking up too many or too few documents.

No doubt technology will help us find the law, assist in informing, supporting and advising people using the justice system, in replacing some human functions, and assist in judges' work.

However, the basic functions of a trial judge will remain: processing litigation and court operations, deciding individual cases efficiently, inexpensively and justly, interpreting the law to apply to new circumstances and technologies, supervising administrative decision-making, and applying the rule of law. Trial judges must continue to demonstrate to the public that their decisions are rational and fair, and according to law. They must act according to the facts and in accordance with reality.

Of course, in carrying out these functions, whilst no longer standing aloof from the community, judges must still be bound by certain limitations such as avoiding making extra judicial comments on contentious public issues, involving themselves in conduct that may impact on their own appearance of impartiality, and acting in any way to undermine their ethical reputation.

After all I have said, you may now be asking why be a judge? Sir Gerard Brennan AC posed this very question in 1996 delivering a paper which was subsequently published in the *Australian Bar Review*.[14] I do not consider the answer to that question is different today or will be in the future. After examining the essential elements of the judicial functions and manner of performance, Sir Gerard concluded:[15]

> Why be a judge whose every professional word or deed is open to public scrutiny and criticism? Why be a judge who cannot reply to critics lest the appearance — if not the reality — of impartiality be lost? Why be a judge who, under the pressure of work, foregoes other delights of intellectual life — not to mention the demands of family life and the abbreviation of recreational or other extra-curricular activities? …
>
> We know that the dignity and the fulfilment of the aspirations of free men and women in our complex society depend on the faithful performance of judicial duty. In a complex society, justice would be unattainable without the sophisticated skills and unquestioned integrity of the judiciary. The high importance of the judicial office makes it a privilege to be invited to the bench; the responsibilities of the office create a continuing challenge to proper performance. The trust reposed by the community in the judiciary is an enduring comfort. The stimulus of judicial work is enhanced and its burdens lightened by the support of other judges whose character, intellect and industry command our unfeigned respect. The satisfactions of judicial life of necessity flow from an inner conviction of the service of society in a pivotal role, from the satisfaction of the aspirations of litigants, of the profession, of the public and most importantly, of oneself, and from the mutual esteem of judicial colleagues. These are the considerations, I suggest, that give the true answer to the question: Why be a judge?

Like Christopher Columbus, I come back to where I started. I think Sir Samuel Griffith today would answer the question Sir Gerard posed and then answered in the same way — emphasising the importance of the rule of law, and adherence to

social norms (being principle and morality). One important aspect which will remain unchanged is a trial judge's judicial function being carried out in accordance with their oath of office. Whilst variously worded, but in essence the same as that taken by a Federal Court judge, 'to do right to all manner of people according to law, without fear or favour, affection or ill will'.

The judicial life of the trial judge has, is and always will be in our society, aimed to fulfil the performance of that judicial duty, to secure the trust of the community and uphold the rule of law in accordance with principle and morality.

Endnotes

1 David Kemp, *A Free Country: Australians' Search for Utopia 1861-1901* (2019), 167.

2 Benjamin Cardozo, *The Nature of the Judicial Process* (1921) 128-9.

3 Jeremy Bentham, *The Works of Jeremy Bentham* (1843) 316.

4 Chief Justice James Allsop, 'Courts as (Living) Institutions and Workplaces' (2019) 93(5) *Australian Law Journal* 375.

5 Robert Megarry, *Miscellany at Law: A Diversion for Lawyers and Others* (1978) 23.

6 (1983) 152 CLR 238, 243.

7 *Obergefell v Hodges*, 192 L Ed 2d 609 (2015).

8 Ibid 6-8.

9 *Australian Securities and Investments Commission v Healey (No 2)* (2011) 196 FCR 430; [2011] FCA 1003.

10 *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2014) 227 FCR 1.

11 Emilios Kyrou, 'Judging in a multicultural society' (2015) 24(4) *Journal of Judicial Administration* 223.

12 Discussed in Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (2018), 259-60.

13 Ibid 12.

14 Sir Gerard Brennan, 'Why be a Judge' (1996) 14 *Australian Bar Review* 89.

15 Ibid 96.

CONCLUDING REMARKS

THE HONOURABLE IAN CALLINAN, AC

Ladies and gentlemen, my last task is to conclude this conference.

In doing that, I think I first should express our appreciation for the people who organised it and have done so much to produce what I think was an absolutely outstanding conference. First, of course, is Stuart Wood. None of this would have happened as well or as smoothly as it has but for him. Next is Eddy Gisonda, who organises all the speakers. And then there are the energetic and very competent assistants and supporters, including Kristy Millen, Marina Antonellis, and Xavier Boffa. On behalf of the Society, I would like to thank them again for everything that they have done.

There has been something of a practice of you allowing me some license to comment on the conference's speakers in my concluding remarks. I have to say that I am finding it increasingly difficult to do that in any useful way, and that is so not only because of the quality of the speakers, but also because of the completeness of their analyses and the outstanding knowledge and depth that they bring to their papers.

However, there are just a few matters — and I will comment on them only briefly because I know a lot of people have to catch aeroplanes — but again, as I say, you indulge me in allowing me to comment, so naturally I select some of the topics that are of particular interest to me. And I think of two immediately, and they are topics, I think, that inevitably intersect. They are the topic of free speech and the topic of a 'third voice', or an 'indigenous voice'.

Now, both obviously intersect because when we talk about an indigenous voice, we are talking about a matter of race. What could be more incendiary than race? But the way that things are at present and, in particular, the ominous presence of section 18C of the *Racial Discrimination Act 1975* (Cth), makes people a little fearful of embarking on that topic.

I do not want to repeat what our other speakers have said, but could I just say this about an indigenous voice: I have enormous concerns about what that involves. I rather suspect that it will include another monolith on the Lake in Canberra, a supporting bureaucracy, agencies in every state — probably in every region, urban and remote. Are there going to be two houses? How are they going to be elected? Will the Electoral Commission to supervise the elections? Leaving aside entirely the trite and irrelevant matter of cost. What will its shape be? Will it be, as Alfred Deakin predicted in respect of the Senate, a party house? Will it have a First People's first minister, kind of a de facto indigenous prime minister? Will there be ministers? Will there be a minister for local government, for example, to see what matters might concern local government and also concern indigenous people? There are all sorts of questions, and we have a million miles to go socially, politically, and legally in relation to this issue.

One thing that concerns me is the doctrine of 'legitimate expectation' imported into the law — it really was the invention of Lord Denning in the United Kingdom that was taken up by the High Court in the case of *Minister of State for Immigration and Ethnic Affairs v Teoh* — that even matters that are not matters of legal obligation have to be taken into account by a decision maker because those who might be affected by a decision have a legitimate expectation that they will be taken into account. And then, of course, that raises debate as to the way

in which they will be taken into account, whether it will be sufficient, and whether all the formalities have been taken into account. Now that is in a legal context, but in a social and political context once the indigenous voice speaks what will follow, I would have thought, will be an expectation that it will be heeded and adopted. And these are all enormous questions, and, frankly, nothing that I have seen myself — and I do not pretend to have any expertise in this area — answers those questions.

Ladies and gentlemen, thank you very much for your attendance and for your constant attentiveness to the great speakers we have had.

Perhaps I should say one other thing — I would be remiss if I did not do it — but I thought, with no disrespect to the other speakers, that Geoffrey Blainey's speech last night was an absolute highlight. What grace, charm, and erudition, and indeed modesty, were contained in that. He really is a living monument to Australia. I talked about section 18C a moment ago and the concern, almost a fear, of talking on that topic. Geoffrey Blainey, of course, has been absolutely fearless, and on occasions he has had to suffer for it. I never thought, when I was a student in university, that a great scholar such as Geoffrey Blainey would be criticised and subjected to all sorts of prejudice for accuracy and telling the truth. Telling, indeed, what other people have said in other contexts, telling inconvenient truths.

Thank you, ladies and gentlemen. I look forward to seeing you at our next conference.

APPENDIX I

CONFERENCE CONTRIBUTORS

Senator the Honourable Eric Abetz has served as a Senator for the State of Tasmania since 1994. Born in Stuttgart, Germany and educated at the University of Tasmania where he graduated with degrees in Arts and Law, he practised as a solicitor in Hobart and was appointed to the Senate for the state of Tasmania in 1994. He was Special Minister of State in the Howard Government from 2001 to 2006, Minister for Fisheries, Forestry and Conservation from 2006 to 2007, and Minister for Employment in the Abbott Government from 2013 to 2015. He also served as Manager of Government Business in the Senate in 2007, and Leader of the Government in the Senate from 2013 to 2015.

Professor Geoffrey Blainey, AC was educated at Ballarat High School, Wesley College and the University of Melbourne, where he subsequently took up what was to prove an illustrious career both as an academic historian and an author. After 15 years in the Economic History department (1962-77), the last nine of them as Professor of Economic History, he became the Ernest Scott Professor of History in 1977 until he retired from this post (and as Dean of the Faculty of Arts) in 1987. At the United Nations in New York in 1988, he was one of five intellectuals who were awarded gold medals for "excellence in the dissemination of knowledge for the benefit of mankind". Both before that time, and since, he has been a prolific author, with such works as *The Peaks of Lyell* (1954), *Mines in the Spinifex* (1960), *The Tyranny of Distance* (1966), and *Triumph of the Nomads* (1975). More recently, he has produced such best-sellers as *A Short History of the World* (2000) and *The Story of Australia's People Volume 1: The Rise and Fall of Ancient Australia*, which won the Prime Minister's Literary Awards for History. He was awarded a Companion of the Order

of Australia in 2000 for his service to academia, research and scholarship. He has served on a wide range of boards and committees, including as Chairman of the Australia Council, a Governor of the Ian Potter Foundation and a member of the Council of the Australian War Memorial. The National Trust lists Blainey as one of Australia's 'Living Treasures'.

Professor Judith Brett is an Emeritus Professor of Politics at La Trobe University. Educated at the University of Melbourne, she joined the Politics Department at La Trobe University in 1989 to teach and research Australian Politics, Political Biography and Political History until her retirement in 2012. She has authored numerous works on Australian political history, including the award-winning *Robert Menzies' Forgotten People* (2007), *Australian Liberals and the Moral Middle Class* (2003) and *From Secret Ballot to Democracy Sausage: How Australia Got Compulsory Voting* (2019). Her 2017 biography of Alfred Deakin, *The Enigmatic Mr Deakin*, won the 2018 National Biography Award. She writes regularly for *The Monthly* on contemporary Australian politics.

The Honourable John Brumby, AO graduated in commerce from The University of Melbourne in 1974 and then attained a Diploma of Education. A teacher, he was elected to the Federal Parliament as the Member for Bendigo in 1983. During his seven years in Federal Parliament he was Chairman of the Parliamentary Committee on Employment, Education and Training. In 1993, he entered the Victorian Parliament and was Leader of the Opposition until 1999. After Labor was elected to Government he served as a senior Minister, most notably as Victoria's longest serving Treasurer, and as Premier of Victoria from 2007 to 2010. Since leaving Government and

political life in 2010, Mr Brumby has taken on a range of roles in the business, not for profit and university sectors. He is chair of a number of business organisations and he teaches as an Enterprise Professor at the University of Melbourne. In the not-for-profit sector Mr Brumby is Chair of the Olivia Newton John Cancer Research Institute and the Fred Hollows Foundation, and the Chancellor of La Trouble University. He was awarded an Order of Australia in 2017 for distinguished service to the Parliament of Victoria, to economic management and medical biotechnology innovation, to improved rural and regional infrastructure, and to the community.

The Honourable Ian Callinan, AC graduated from the University of Queensland and was called to the Queensland Bar in 1965. Appointed Queen's Counsel in 1978, he served as President of the Queensland Bar Association and as President of the Australian Bar Association, before his appointment as a Justice of the High Court of Australia from 1997 to 2007. Outside the law, he has served as the Chairman of Trustees of the Queensland Art Gallery and on the Council of the National Gallery of Australia. He has been the President of the Samuel Griffith Society since 2010.

The Honourable Alex Chernov, AC, QC was born in Lithuania and immigrated to Australia as a young boy. He was educated at Melbourne High School and then at the University of Melbourne where he gained the degrees of Bachelor of Commerce and Laws (Hons). In 1968, he signed the Roll of Counsel at the Victorian Bar and in 1980, was appointed Queens Counsel in Victoria. Whilst a barrister, he played a significant role in the leadership of the legal profession and legal education in Australia and in our region. His career includes Independent Lecturer in Equity for the Council of

Legal Education, Honorary Consultant to the Australian Law Reform Commission, Chairman of the Victorian Bar, Vice President of the Australian Bar Association, President of the Australian Law Council and Vice President of LawAsia. In 1997, he was appointed a Judge of the Trial Division of the Supreme Court of Victoria and, in 1998, was appointed to its Court of Appeal. In 1992, he became a member of the Council of the University of Melbourne and in 2004, he was elected a Deputy Chancellor of the University of Melbourne before he was elected as its Chancellor in 2009. Alex Chernov was appointed an Officer of the Order of Australia in 2008 and was awarded a Companion of the Order of Australia in the 2012 Australia Day Honours. He was sworn in as the 28th Governor of Victoria on 8 April 2011.

Dr Murray Cranston was educated at the University of Queensland and the Australian National University. A senior adviser on the staff of Commonwealth Treasurer the Honourable Joshua Frydenberg, he has previously worked for Prime Minister Tony Abbott, and Senators Bill O'Chee and Jeannie Ferris. In 2008 he worked in the office of Senator Jay Rockefeller IV (Democrat, West Virginia) on a fellowship from the American Political Science Association.

Peter Dunning, QC was educated at Anglican Church Grammar School and the University of Queensland, where he obtained a Bachelor of Commerce and a Bachelor of Laws. A barrister since 1992, in 2005 he was appointed a Queen's Counsel. Between 2014 and 2019 held a commission as the Solicitor-General for Queensland. In that role Peter has appeared many times in the High Court of Australia and other courts for the State of Queensland in the full range of constitutional, native title and public law cases.

Eddy Gisonda, Conference Convenor of The Samuel Griffith Society, is a barrister practising at the Victorian Bar. He has been a solicitor, a tutor and lecturer at the University of Melbourne, an associate to Justice Kenneth Hayne in the High Court of Australia, and legal counsel to the Premier of Victoria.

The Honourable Nicholas Hasluck, AM, QC, is a novelist, poet, and a former Justice of the Supreme Court of Western Australia. He was educated at the University of Western Australia and the University of Oxford (Wadham College). Among the many posts he has held are Chair of the Literature Board of the Australia Council and President of the Equal Opportunity Tribunal of Western Australia.

Alister Henskens, SC, MP is the Cabinet Secretary for New South Wales and has been the Member for Ku-ring-gai in the Parliament of New South Wales since 2015. Educated at the University of Sydney and the University of Toronto, he was admitted to legal practice in New South Wales in 1987, before being called to the bar in 1996. Prior to his election to Parliament, he specialised in general commercial, insolvency, banking, defamation, building and construction law and was appointed silk in 2011. Since his election, he has also served as the Parliamentary Secretary for Finance and as Chair of numerous Parliamentary Committees.

The Honourable John Middleton graduated from the University of Melbourne as Bachelor of Laws (First Class Honours) and from the University of Oxford as Bachelor of Civil Law (First Class Honours), where he was the Winter Williams Scholar. He was admitted to practise as a barrister and solicitor of the Supreme Court of Victoria in 1976. After serving as Associate to Sir Ninian Stephen, then Justice of the

High Court of Australia, he was called to the Bar in 1979 where he practised predominantly in Constitutional and Administrative Law, Resources Law and Commercial Law. He was appointed one of Her Majesty's Counsel for the State of Victoria in 1991 and subsequently became Chairman of the Victorian Bar Council. He was one of the leading barristers in the country. He was appointed a Justice of the Federal Court of Australia in 2006, Deputy President of the Australian Competition Tribunal in 2009, presidential member of the Administrative Appeals Tribunal in 2010, and a part-time Commissioner of the Australian Law Reform Commission. His extra-curial activities include being a Council Member of The University of Melbourne, a member of The American Law Institute, a Council Member of the National Judicial College of Australia, a member of Judicial Liaison Committee for Australian Centre for Commercial International Arbitration, and a Board member of the Victorian Bar Foundation.

The Honourable Geoffrey Nettle, AC graduated in economics from the Australian National University, in law from the University of Melbourne and as a Bachelor of Civil Law from the University of Oxford. He was admitted to legal practice in 1977 and joined the Victorian Bar in 1982. He was appointed a Queen's Counsel in 1992. He practised in state and federal courts principally in commercial, equity, taxation and constitutional matters. In 2002 he was appointed a judge of the Trial Division of the Supreme Court of Victoria, and in 204 he was appointed a judge of the Victorian Court of Appeal. In 2015, he was appointed a Justice of the High Court of Australia.

Professor Peter Ridd was educated at James Cook University, obtaining a PhD in 1980, before he went on to become a professor of physics and, later, head of the University's Department of Physics and Marine Geophysical Laboratory. A member of the Australian Institute of Marine Science, his research primarily focused on ocean currents and the movement of sediment, until his position was terminated by James Cook University in 2018.

Laureate Professor Cheryl Saunders, AO is an eminent law teacher and legal scholar with specialist interests in constitutional law and comparative public law. Educated at Melbourne Church of England Girls' Grammar School and the University of Melbourne, she was the first woman to be appointed as a professor to the University of Melbourne's Faculty of Law, she was also a founding director of its Centre for Comparative Constitutional Studies. She has been awarded several honours in recognition of her work. In 1994 she was appointed an officer of the Order of Australia "for service to the law and to public administration" and in 2003 she received the Centenary Medal. She was elected to the Legion of Honour in France for services to the *Académie Internationale de Droit Constitutionnel* and she is a Fellow of the Academy of Social Sciences in Australia and a Foundation Fellow of the Australian Academy of Law. She was elected as a Fellow of the British Academy in July 2018.

Michael Sexton, SC has been Solicitor-General of New South Wales since 1998. After graduating in Law from the University of Melbourne he was admitted to practice in Victoria in 1970 and was an Associate to Sir Edward McTiernan of the High Court of Australia from 1971 to 1972. He then studied at the University of Virginia and worked for a period in the United

States. He joined the Commonwealth Attorney-General's Department in 1975 and was subsequently attached to the staff of the Attorney-General. He lectured in the Faculty of Law at the University of New South Wales from 1976 to 1984. From 1996 to 1998 he was chairman of the NSW State Rail Authority. A frequent book reviewer for the *Sydney Morning Herald*, he is the author of a number of books on Australian politics and history. In the area of public administration, he has been chairman of the NSW State Rail Authority and a board member of the NSW Public Transport Authority, the NSW Library, the Sydney Writers' Festival and the University of Technology Council.

Professor Judith Sloan is an economist, company director and Honorary Professorial Fellow with the Melbourne Institute of Applied Economic and Social Research at the University of Melbourne. She was educated at Lauriston Girls School, Melbourne, the University of Melbourne and the London School of Economics. After tutoring in economics at Melbourne University, she became a Research Fellow and Senior Research Fellow at the National Institute of Labour Studies, Flinders University of South Australia, before becoming Professor of Labour Studies at that University in 1989 and Director of that Institute in 1991. She has also held various government appointments, including Commissioner of the Productivity Commission, Commissioner of the Australian Fair Pay Commission, and Deputy Chairman of the Australian Broadcasting Corporation.

APPENDIX II

SIR SAMUEL GRIFFITH ESSAY PRIZE WINNER

2019

THE ENGINEERS CASE: FLAWED CONCLUSIONS

CATHERINE BUGLER (BRISBANE)

Few cases have been so fiercely loved and yet so divisive as the *Engineers Case.*[1] *Engineers* has famously been described as 'one of the worst written and organised [cases] in Australian judicial history' by Sawer,[2] written 'with more fervour than clarity' according to Zines,[3] and 'poorly organised and composed' in Sir Anthony Mason's opinion.[4] Delivered a month after the passing of Sir Samuel Griffith, the decision was the antithesis to the Griffith Court's jurisprudence, viewed by some as an act of personal vengeance by Sir Isaac Isaacs, who wrote the majority decision.[5] Whatever its motivation, the analysis of *Engineers* opened the door to Commonwealth expansion at the expense of the federal balance,[6] and, as this essay argues, failed to arbitrate the inevitable rivalry between State and Commonwealth powers.

I ENGINEERS: FLAWED PRINCIPLES

Engineers is regarded as 'the basis of modern Australian Constitutional jurisprudence'.[7] However, as Callinan J remarked, *Engineers* is an 'early instance of judicial activism … which does not deserve the reverence which has been accorded to it'.[8]

This essay will argue that there were three flawed conclusions in *Engineers.* First, that Australia should inherit English tools of interpretation over that of the American. Second, that the *Constitution* should be read literally without

protecting the federal balance. Third, that the reserved powers doctrine should be rejected.

A *The English Prism*

The *Constitution* 'embodies two constitutional traditions': that of the United States and the United Kingdom.[9] The American interpretive style, typically, reads the *Constitution* with reference to its federal structure.[10] Conversely, the UK tradition sees the Constitution read literally as an ordinary Act of Parliament without regard to protecting federal balance, as the UK is not a federation.

The American Supreme Court's role is to ensure that 'the general and regional government are each within a sphere, coordinate and independent'.[11] Prior to *Engineers,* the Griffith Court similarly saw its role as arbitrating between the rival powers of state and Commonwealth, 'preventing either from encroaching on the other',[12] in accordance with the American view.[13]

Engineers eschewed this American view of the High Court and instead relied heavily on English principles. The conclusion in *Engineers* that the *Constitution* should be read literally (in accordance with UK traditions) found its basis, paradoxically, in our system of responsible government. This is paradoxical because the fact of our responsible government is a 'matter extrinsic to strict law', and ironically, 'far less admissible by the English rules of statutory construction'.[14] Furthermore, as Sir John Latham quipped*:* 'it is not easy to discover a case in which the construction of a statute has been affected by the fact that it was passed by a legislature which contained executive ministers as members'.[15] Finally, the UK is 'plainly a unitary state'[16] and, as Nethercote remarked, 'Australia is a federal

nation, and … it is wrong to try to examine its structures and methods of government through a British prism.'[17]

B *Literalism*

With the English traditions applied, *Engineers* established that the *Constitution* should be read literally.[18] *Engineers* treats the *Constitution* as any other Act of Parliament, read in much the same way as a 'telephone directory'.[19] This approach is described as 'intellectually bankrupt' by some because it ignores that the purpose of the *Constitution* was to create a federation evident in its text and structure.[20] The effect of *Engineers* was to further expand the operation of the *Junbunna* principle,[21] which meant that that the powers granted to the Commonwealth in the *Constitution* are given the 'widest possible literal meaning their words could bear'.[22] This literal interpretation has therefore fundamentally altered the balance of power between states and the Commonwealth.

The deficiencies of literalism are seen when one considers that an inherent quirk of the English language is that multiple interpretations of words are possible. For instance, the expression *external affairs* certainly does not refer to extra-marital relations that occur overseas.[23] Accordingly there are occasions when there are interpretive *choices* available.[24]

III *Interpretative Choices and The Reserved Powers Doctrine*

Prior to *Engineers,* the Griffith Court interpreted Commonwealth powers narrowly to not impact upon the reserved powers of the States.[25] *Engineers* interpreted Commonwealth power literally without contemplation of the

maintenance of the federal balance.[26] Accordingly, *Engineers* is 'the most important constitutional decision ever handed down by the High Court of Australia'.[27]

In the proceedings, Robert Menzies represented the engineers. The precocious 25-year-old Menzies opposed the doctrines of reserved powers and state immunities and thought that the newly constituted Knox Court might favour a change.[28]

Upon an hour of, as Menzies put it, 'doing lip service to the Doctrine', the following exchange occurred:

> Starke J: This argument is a lot of nonsense!
>
> Menzies: Sir, I quite agree.
>
> Knox CJ: Well, why are you putting an argument which you admit is nonsense?
>
> Menzies: Because I am compelled by the earlier decisions of this Court … If your Honours will permit me to question all or any of these earlier decisions, I will undertake to advance a sensible argument.

Menzies said he 'then waited for the heavens to fall'.[29] Instead, the Court adjourned, allowed for government interveners, and Menzies could challenge all previous decisions.[30] It was then that *Engineers* was born. Interestingly, when Starke J was a young barrister himself, an English Judge called Starke J's *own* advocacy 'nonsense'. Starke J took such offence that he gathered his papers and stormed out of Court.[31] One can't help but wonder how different our constitutional jurisprudence might be if Menzies had the same temperament?

Although on the facts of the *Engineers* it was unnecessary for the Court to express any view on the reserved powers doctrine, Menzies ultimately got his way: the reasoning adopted meant that it could not stand.[32] However, the reserved powers doctrine is often misunderstood: as Aroney stated, it is not a belief that there are clearly defined state powers, or an 'omnipresence in the sky'.[33] Rather, the Griffith Court recognised that 'where there were interpretive choices available to them, and when it was persuasive to do so, Commonwealth power should be read narrowly to maintain the federal balance'.[34]

II ENGINEERS: LEGACY

As a federation, AV Dicey would regard Australia's High Court as the 'pivot on which the Constitutional arrangements of the country turn'.[35] In federations there will always be a rivalry between the powers of state and central government, and therefore it will fall upon the High Court to arbitrate between those competing powers. However, in *Engineers,* the High Court abnegated this responsibility. Instead, the centralisation of Commonwealth power has been permitted by the High Court's willingness to adopt *Engineers*, which has been invoked in 'virtually every case' where the scope of the Commonwealth's legislative powers has been in issue. [36] This has pivoted in the wrong direction: towards the Commonwealth at the expense of the states.

Would it be possible for federalists to reverse *Engineers*? The following extract from the *Work Choices* proceedings makes clear that the reserved powers doctrine, as it is generally understood, is regarded as 'heresy':[37]

Kirby J:	You are not trying, under the guise of this history, to revive the reserve powers notion, are you?
Sofronoff:	Absolutely not, your Honour. Absolutely not.
Hayne J:	Wash your mouth out with soap.
Kirby J:	I am just looking a bit suspiciously at you.[38]

Evidently, advocating for a return of the reserved powers doctrine may meet some judicial resistance.

However, the reserved powers doctrine has been 'camouflaged' with the concept of 'federal balance'.[39] An example of this approach is found in Callinan J's dissenting judgement in *Work Choices*:[40]

> Objective ascertainment of the drafters' intentions by reference to the structure of the document, the interrelationship of the parts and sections of it with one another, in the setting in which it was drawn, on the basis of the assumptions underlying it, and the manifest purposes to which it was to give effect, relevantly here, a new nation comprising a federation in which the states would not be deprived of powers they formerly possessed, except as identified.

III CONCLUSION

The High Court has, by relying on *Engineers,* permitted the exponential expansion of Commonwealth power.[41] Gageler J writes that *Engineers* provides that the role of balancing the federal system does not lie with the High Court, but with the electorate. [42] This is because the federal compact is not *between* Commonwealth and States as adversaries (as Griffith CJ believed) but, rather, a compact *among* the Australian people

(as per Isaacs J). Such an explanation elucidates why there was such emphasis on responsible government in *Engineers*.

Perhaps to live with *Engineers'* legacy, federalists shouldn't ask the High Court to undo a century of centralisation but look to our parliament instead. That is, contrary to AV Dicey, the pivot on which Australia's Constitutional future turns is not the High Court, but the choices of the Australian electorate. Certainly, *Engineers* and the result in *Work Choices* show the former avenue of redress is near impossible, but perhaps the latter has hope.

Endnotes

1 *Amalgamated Society of Engineers v Adelaide Steamship Company Limited* [1920] HCA 54 ('*Engineers*'). This argumentative essay does not necessarily reflect the views of the competition entrant.

2 Geoffrey Sawer, *Australian Federalism in the Courts* (Oxford University Press, 1967) 130.

3 Leslie Zines, *The High Court and the Constitution* (Federation Press, 1987) 10.

4 Sir Anthony Mason, 'The Constitution in Retrospect and Prospect' in Robert French, Geoffrey Lindell, Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 31.

5 John Nethercote wrote that 'there can be no doubt that Isaacs J dipped his pen in vitriol' before writing *Engineers*: 'The Engineers Case – Seventy Years On' (1996) *Upholding the Australian Constitution Samuel Griffith Society* 6.

6 Leslie Zines, 'Changing Attitudes to Federalism' in Robert French, Geoffrey Lindell, Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 86, 88.

7 Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 Federal Law Review 162, 164.

8 *New South Wales v Commonwealth (WorkChoices Case)* (2006) 229 CLR 1, 369, 350 (Callinan J).

9 Gageler, above n 7.

10 For example: *D'Emden v Pedder* (1904) 1 CLR 91; *Deakin v Webb* (1904) 1 CLR 585; *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 (*Railway Servants' Case*).

11 Kenneth Wheare, *Federal Government* (Oxford University Press, 1946) 12.

12 Gageler, above n 7, 176.

13 See eg: *McCulloch v Maryland* 17 US (4 Wheat) 316 (1819) as interpreted in *Collector v Day* 11 Wall 113 (1870); *United States v EC Knight Co* 156 US 1 (1895).

14 Richard Latham, *The Law and the Commonwealth* (Oxford University Press, 1949).

15 Sir John Latham, 'Interpretation of the Constitution' in Rae Else-Mitchell (ed) *Essays on the Australian Constitution* (The Law Book Co of Australasia, 1961) 28-29.

16 Robert French, 'Australian Federalism – Fathered by a Son of Wales' (Speech, Public Law Society Wales, 15 September 2016) 16. See also Thomas O Hueglin and Alan Fenna (eds) *Comparative Federalism: A Systematic Inquiry* (University of Toronto Press, 2006) 105.

17 Nethercote, above n 5, 1.

18 As all students of constitutional law would be aware: 'Naturally in light of the circumstances in which it was made, with knowledge of the combined fabric of the Common Law, and the statute Law which preceded it': *Engineers*, 153.

19 Greg Craven, 'The Engineers Case: Time for a Change?' in *Upholding the Australian Constitution* (The Samuel Griffith Society, 1997) 1.

20 Ibid.

21 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* [1908] HCA 95*;* Michael Kirby, 'A Century of Jumbunna – Interpretive Principles And International Law' (2018) 9 *Adelaide Law Review* 144.

22 Craven, above n 19, 3.

23 s 51 (xxix) *Constitution*; Ibid, 5.

24 Nicholas Aroney, 'Constitutional Choices in the WorkChoices Case or What Exactly is Wrong with the Reserved Powers Doctrine?' (2007) 32 *Melbourne University Law Review*.

25 French, above n 16, 8.

26 Ibid.

27 Aroney, above n 24, 1. See also: Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of the Commonwealth Power in the Australian Federation* (University of Virginia Press, 1967) 30; Zines, above n 3, 8.

28 Sir Robert Menzies, *Central Power in the Australian Commonwealth* (University of Virginia Press, 1967) 38-39.

29 Ibid.

30 Ibid.

[31] Ibid.

[32] *Engineers* 155 (Knox CJ, Isaacs, Rich and Starke JJ).

[33] Aroney, above n 24, 23.

[34] Ibid.

[35] Albert Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1959) 175.

[36] Aroney, above n 24; see for example: *Payroll Tax Case* (1971) 122 CLR 353, 396 (Windeyer J); *Concrete Pipes Case* (1971) 124 CLR 468, 485, 488-9 (Barwick CJ); *Tasmanian Dam Case* (1983) 158 CLR 1, 128 (Mason J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 44-5 (Brennan J).

[37] *Victoria v Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353, 396 (Windeyer J); see also: Aroney, above n 24.

[38] *New South Wales v Commonwealth* [2006] HCATrans 217.

[39] Aroney, above n 24, 4.

[40] *New South Wales v Commonwealth* (2006) 229 CLR 1, 335 (Callinan J) (emphasis added).

41 See: *South Australia v Commonwealth* (1942) 65 CLR 373 *(*First Uniform Tax Case), *Victoria v Commonwealth* (1957) 99 CLR 575 *(Second Uniform Tax Case)*, *Commonwealth v Tasmania* (1983) 158 CLR 1 *(Tasmanian Dams Case)*, *New South Wales v Commonwealth* (2006) 229 CLR 1 *(Work Choices Case)*.

42 Gageler, above n 7, 164.

APPENDIX III

PRESIDENT'S AUSTRALIA DAY MESSAGES

2008 – 2019

26 JANUARY 2008

AUSTRALIA DAY MESSAGE

SIR DAVID SMITH, KCVO, AO

One of my interests in retirement is to use the internet to keep up with political events around the world. I do this by logging on to the BBC and CNN news services and by browsing among the news pages of British, United States and Canadian newspapers. As 2007 was an election year in Australia, I was particularly interested in elections in other countries. It was often a melancholy experience.

I'll refrain from naming the countries, but Society members will no doubt recognise many of them. All too often, news services reported on election campaigns in which the mud-slinging turned to violence, with the undignified spectacle of a full-blown punch up on the floor of the Parliament; or the imposition of a state of emergency, followed by calls for the release of political prisoners and the immediate reinstatement of the Constitution; or violence leading to the quelling of the rights of citizens to assemble peacefully; or calls on the government to guarantee the independence of the judiciary; or yet another declaration of a state of emergency and the indefinite postponement of the polls; or calls for an end to violence and atrocities against innocent civilians; or an end to chaos, fraud and violence at polling places; or the exile or imprisonment of the Leader of the Opposition. And these are only some examples.

In reflecting on these depressing stories, my thoughts turned to our own federal election held last November, when we

changed our national government. We did this by writing numbers in pencil on pieces of paper. In so many countries around the world, some of whose election processes I have described above, their citizens risk being thrown into prison or shot on the streets in attempting to do what we did that Saturday in November with those pencils and pieces of paper.

Within hours of the polls closing we knew that we had rejected the old government and had elected a new one. That same evening the defeated Prime Minister appeared on national television and made a gracious concession speech in which he congratulated the incoming government. The Leader of the Opposition followed soon after and made a gracious acceptance speech in which he promised to govern for all Australians. The speeches of both John Howard and Kevin Rudd included generous references to their political opponent.

That night some Australians went to bed pleased and happy, others disappointed and sad, but next morning life went on as usual for the vast majority of us. The Australian Electoral Commission resumed its counting of the votes, the Australian Public Service prepared to receive its new masters, and the Governor-General prepared to take the steps which the Constitution required of him in order to install the new government.

On Monday 26 November, two days after polling day, Prime Minister John Howard, in accordance with constitutional convention, resigned his commission as Prime Minster and advised the Governor-General to invite the Leader of the Opposition, Kevin Rudd, to form a government. The Governor-General asked Mr Howard and his Ministers to continue in office in a caretaker capacity until a new government had been sworn in. The Governor-General then invited Mr Rudd to form a government.

On Thursday 29 November, five days after polling day, Mr Rudd advised the Governor-General of his proposed government and received His Excellency's approval to announce it. Mr Rudd and his wife Ms Therese Rein then called at the Prime Minister's Lodge in Canberra where they were warmly welcomed by Mr and Mrs Howard.

On Monday 3 December, nine days after polling day, the Governor-General accepted Mr Howard's resignation; approved a new Administrative Arrangements Order which changed the structure of Commonwealth government departments, allocated functions and legislation to them, and assigned responsibility for those functions and legislation to the respective Ministers and Parliamentary Secretaries; and swore in the new Rudd Government.

At the conclusion of the swearing-in the Governor-General congratulated all Ministers and Parliamentary Secretaries, and particularly Mr Rudd on his appointment as Australia's 26th Prime Minister and Ms Gillard on her appointment as Australia's first female Deputy Prime Minster. His Excellency commented on the conduct of the 2007 federal election campaign, the good will evident after the election, and the courtesies observed in the smooth transition of executive power. The Governor-General described these events as a wonderful example of Australia's democratic process at its best, and a tribute to our proud record as one of the world's oldest democracies. He wished the new government every success in the supreme task of governing our country wisely and well.

The processes and procedures that I have described were all carried out peacefully, orderly, and in accordance with our Constitution, its inherent checks and balances, and its conventions. The task that was begun by those pencils and pieces of paper in polling booths around the country was put

into effect by the Governor-General in a dignified ceremony at a happy family occasion in the Drawing Room at Government House, Canberra.

I am proud to be a member of a Society whose aim is to protect the Constitution that governs our election processes. We really are a fortunate country.

I wish you all a happy Australia Day

26 JANUARY 2009

AUSTRALIA DAY MESSAGE

SIR DAVID SMITH, KCVO, AO

The late Sir Harry Gibbs, our inaugural president, launched the Society at its first conference in Melbourne on 24 July 1992. (As Sir Harry was unavoidably overseas at the time his address was delivered on his behalf by Mr David Russell.) Sir Harry's address was entitled 'Re-Writing the Constitution', and he dealt with some of the changes which were then being suggested to Australia's so-called 'horse and buggy' Constitution. He noted that one of the changes then in fashion was a bill of rights.

Sir Harry noted that: 'At first sight it might appear that a bill of rights could do nothing but good, securing liberty and justice. A little thought will show that it would have disadvantages as well as advantages. Perhaps the greatest disadvantage is that no human mind can foresee the effect which a court may ultimately give to general words intended to guarantee a right. … The Society is launched in the hope that it will take an active part in the discussion of these questions, so that no change is made to the Constitution unless it is clearly seen to be for the good of the people of Australia.'

Today, seventeen years later, bills of rights are in fashion again, for the Australian Government has launched what it has described as the national human rights consultation to seek the community's views on human rights in Australia.

On 10 December 2008, in announcing the names of the committee that is to conduct the consultation, the Attorney-

General said that 'all Australians will be given their chance to have their say. … We want to encourage a broad community debate on a range of human rights issues, not only on whether a Charter or Bill of Rights is necessary.'

On 13 December 2008, *The Australian*'s editor-at-large, Paul Kelly, wrote that: 'The Rudd Government has pressed the button on plans to change Australia's governance to entrench protection of human rights and minority interests by giving fresh authority to judges. The panel announced this week by Attorney-General Robert McClelland is geared to this outcome. … McClelland's panel and his slanted terms of reference suggest it is fanciful to believe that the status quo is an option ... many of McClelland's supporters … seek a change in power and constitutional relationships.'

Many other writers and commentators, including the former Labor Premier of New South Wales, Mr. Bob Carr, and the Attorney-General in the current Labor government of New South Wales, Mr. John Hatzistergos, also attacked the government's proposal, so much so that, on 22 December 2008, the chairman of the national human rights consultation committee, Father Frank Brennan, SJ, was obliged to defend the committee's terms of reference and state that they do not preclude the 'no change' option. He said that his committee 'looks forward to hearing community answers to the three questions set by the Government and to discussing all options (including "do nothing") with neither fear nor favour.'

I urge all members of the Society who have views on the question of a bill or charter of rights for Australia to put their views to the committee and thereby ensure the active discussion of which Sir Harry spoke when he launched the Society.

I wish you all a happy Australia Day.

26 JANUARY 2010

AUSTRALIA DAY MESSAGE

SIR DAVID SMITH, KCVO, AO

The would-be constitutional changers are at it again, or should I say still, for they have never accepted the devastating defeat which the electorate served up to them in the 1999 referendum. Now they are trying to rig the referendum process in the hope that that might make it easier for them next time.

First came the suggestion of a series of plebiscites, none of which would produce constitutional change, but which might serve to keep the issue alive and perhaps pave the way for future success. A plebiscite on the Constitution is simply a deceptive and dishonest way of avoiding a referendum under section 128 of the Constitution. More recently the emphasis has been on tinkering with the referendum process itself, in the hope that that might make it easier to win a future referendum. To that end the House of Representatives Standing Committee on Legal and Constitutional Affairs was asked to inquire into the machinery of referendums. The committee's report was presented to the Speaker out of session on 10 December 2009.

The committee rejected submissions that sought to do away with the Yes and No pamphlet that is distributed to all electors, but has narrowed the availability of information by recommending that the pamphlet be distributed to every household instead of to every elector – surely a strange way of ensuring a well-informed electorate.

One witness before the committee – one with a long professional association with the Australian Labor Party – proposed that only the government's Yes case should be distributed by the Australian Electoral Commission. In his world there would not be a No case except perhaps one championed and funded by private interest groups. Now there spoke a real (sic) democrat!

However, the committee went on to recommend the appointment of a Referendum Panel, specifically for each referendum, 'for the purpose of promoting that referendum and educating voters about the referendum arguments.' The intention, presumably, would be to appoint persons who would be impartial, but I am reminded that whenever former Governor-General Sir Zelman Cowen was told that a person or group of persons was impartial he would ask 'Impartial against whom?'

Well, we had such a panel for the 1999 referendum, and the experience was most instructive. In addition to the official Yes and No case committees, an expert panel, chaired by former Governor-General Sir Ninian Stephen, and with a budget of $4.5 million, was appointed to prepare and distribute a neutral educational pamphlet some months before the referendum campaign. This pamphlet was to explain the proposed republican model, the existing constitutional arrangements, and the referendum process. It was not to present arguments for or against change.

Once the neutral educational pamphlet had been prepared it was submitted to the Yes and No case committees for their comments. The No case committee found serious errors of fact, of emphasis and of omission, and asked that the pamphlet be corrected. Some changes were made to the final pamphlet, leaving the No case committee reasonably satisfied, and the Yes

case committee furious that their campaign had been disadvantaged by the changes.

We should beware of impartial committees appointed by governments.

I wish you all a happy Australia Day.

26 JANUARY 2011

AUSTRALIA DAY MESSAGE

THE HONOURABLE IAN CALLINAN, AC

2010 was a year of intense political activity. It also produced its share of legal controversy.

Whenever there is heightened political activity there is rumbling criticism of the *Constitution*. The Society sometimes regards itself as the only consistent informed defender of the *Constitution*. Among those defenders are monarchists, State's Righters and the instinctively conservative, not necessarily, or invariably conservative in the political sense, and those who fear the enlargement of judicial power at the expense of the elected Parliaments of the Commonwealth of the States. They all have good points to make. But one does not need to have to address these in response to any renewed attempt to replace the *Constitution* until the proposed replacement is on the table. A constitution is not an abstraction. One cannot speak of a model for a new constitution, republican or otherwise. The actual words, clauses, and terms, must be laid out in full before any evaluation of it can be made. A constitution is necessarily a document which will contain within it numerous tensions which can only be resolved judicially. For myself I need to see how the words giving rise to those tensions are expressed before I can make any assessment of the document in which they are contained.

Most advocators of change have not yet produced any complete form of a new constitution. Nor, so far as I am aware, is there any proposal for the establishment of anything like a

Constitutional Convention to do so. The gestation of the current *Constitution* was a long one. Every provision was meticulously, microscopically even, examined. Any new constitution deserves the same process, more perhaps, and should include a similar examination of the numerous decisions of the High Court bearing upon it. All of this needs to be recalled this year, when, as will inevitably occur, there are the usual ill-conceived calls for a new instantaneous constitution.

The year has also been marked by some far-reaching decisions of the High Court. The decision in *Kirk* was important. It and *Kable's* case stand as protection of State judicial systems against any forays against them by State politicians. More controversial has been the urgent decision of the High Court in the *Getup! Case* to set a period, some might say, as if it were a legislature, within which those qualified to vote might rectify their failure to satisfy a statutory obligation of registration to vote.

The message this year is therefore the usual one, that those who respect our *Constitution* and believe in its enduring efficacy need to be eternally vigilant.

I wish all Australians, some of whom are living within the shadow of great natural calamities, a happy and better 2011.

26 JANUARY 2012

AUSTRALIA DAY MESSAGE

THE HONOURABLE IAN CALLINAN, AC

Today is a day for celebration by all Australians of the flexibility and durability of its *Constitution*.

It remains one of the most democratic and elegant constitutions ever written. Today should be a day of celebration of those far-sighted politicians who compiled it, and the free people who chose to adopt it more than a century ago. It is no accident, but a matter of sound judgment that the Australian people approach any proposed changes to it with great caution. These matters should not be lost sight of in the fluttering of flags and self-congratulation upon sporting prowess, as symbolic and attractive as these may be on this important day.

26 JANUARY 2013

AUSTRALIA DAY MESSAGE

THE HONOURABLE IAN CALLINAN, AC

It seems as if each year the *Constitution* and the cohesion of our Australian community are put at some new and entirely unnecessary risk.

The dangers of the current one, of the introduction of a new law to criminalize speech which might cause offence to anyone, should not be underestimated. Even the imaginative powers of George Orwell would not have conceived of an administration that would dare to try to forbid every member of society from passing adverse comment upon any other member of it. The proposed law is such a silly one that it will turn everyone into offenders. A law of this kind fails the elementary test of rational, consistent, and worse, undiscriminating application. In consequence, the cases selected for prosecution will be exactly that, 'selected', that is to say, carefully chosen, under the influence or pressure of the most vociferous pressure groups. Every Australian with an ideal of democracy — and I hope that means most Australians — should do everything they lawfully can to oppose the introduction of this outrageous law. I remain optimistic however that if good political sense does not prevail, and the law is enacted, it will not survive the scrutiny of the courts.

I wish all Australians a happy and prosperous 2013, after the difficult years that we have experienced, since the global financial crisis.

26 JANUARY 2014

AUSTRALIA DAY MESSAGE

THE HONOURABLE IAN CALLINAN, AC

Janus, the pagan god for whom January is named had the capacity to look backwards and forwards. The 26th day of the month, Australia Day provides an appropriate occasion for Australians to reflect upon the past, deploring its failures whilst taking pride in their achievements, and planning, with optimism and care, for the future.

Unlike Janus, we cannot foretell the future, but whatever it is to be, it should be guided by experience of the past. One such experience is of the durability of our *Constitution*. It is not always accorded the credit that it should be, for the ingenuity, learning and nuance that went with its composition. Whoever might wish to change it, monarchist or republican minimalist or radical, would do well to keep in mind those matters.

Another experience to be noted is the tendency of central controllers to overreach. That tendency can be discerned wherever power is intended, usually very deliberately so, to be shared. Devolution is not enough for many Scottish people. Throughout the United Kingdom itself there are many subjects who regard the mandarins of Brussels as excessively avid for power. One reason for the resilience of the United States of America as a federation is the large measure of government insisted upon, and retained by each State. The endeavours of the central government of Australia over the last few decades, especially in areas not under a head of Constitutional Commonwealth power, have had some very unhappy outcomes.

For the future it would be better for the Commonwealth to stretch strictly to its last.

The Society wishes every Australian a happy and prosperous Australia Day and 2014.

26 JANUARY 2015

AUSTRALIA DAY MESSAGE

THE HONOURABLE IAN CALLINAN, AC

When the Commonwealth of Australia came into being on 1 January 1901, the people of this new nation could not have imagined that within 15 years their sons would participate in the largest amphibious operation, if not in history, certainly in hundreds of years.

With the passage of time, 1 January 1901 has, in national terms, receded in remembrance, regrettably, but not in significance. The anniversary of that momentous day, 25 April 1915, has joined 26 January (now called Australia Day) as the great days on which the nation recalls its history.

Australia Day and Anzac Day are in a sense mirrors of each other. The first is a day to honour the fortitude and integrity of Governor Arthur Phillip and his assorted companions who accompanied him from England in establishing the colony at Sydney Cove; and the later intellectual energy and perseverance of the founders of Australia in federating the various colonies to create, without bloodshed, a new nation.

The second, Anzac Day, honours and commemorates the courage, especially the physical courage, and bloodied endurance, of a magnificent volunteer fighting force.

Both are days for reflection and aspiration. Our reflections should be upon how we should seek to fashion the future in a way which does credit to our founders and the courageous volunteers who first represented the nation abroad in a major war. These reflections should be aspirational in character.

The Society allows me in this message the indulgence of stating my own views, but in the expectation that they will accord with the objects of the Society.

Before I state these views, there is a contrast that I would make. Many years ago, when I was a university student, I was invited by some members of my cricket team to play baseball in the off-season. The game is a good one: the skills required to play it are considerable; every player has an opportunity to bat, sometimes two or more times in a match; the rules are simple and easily applied. But I gave up the game after a season. I was repelled by the American practice adopted of players insulting and abusing the opposition and the intrusion of coaches on to the playing field to dispute umpires' decisions.

By contrast, cricket was, in those days, graciously played, without on-field histrionics and the sledging in which players currently and futilely engage. Indeed, most sledging seems to have the opposite effect to that intended.

This is an example of the way in which public discourse has deteriorated and coarsened, elsewhere as much as in Australia. It is a sad example to which hundreds of thousands of young people are exposed.

One of my aspirations is, therefore, that public discourse, including especially political discourse, be better informed, less aggressive, and generally more refined. Refinement is neither to be mocked nor disparaged. It helps to keep the mind on what is in dispute and not simply the rhetoric of verbal exchanges.

This aspiration necessarily for its realisation would require education of those who might otherwise take abrasive discourse for the norm. Better education in this regard, as well as generally, is not to be achieved by a national syllabus. The whole notion that education should be standardised and

centralised is antipathetic to the whole concept of true education.

Social and material improvement depend upon the competition of ideas that only an unregulated system and format of education can provide.

The manner of public discourse, debate and discussion is of immediate pertinence in the coming year and likely to be so for the next few years.

The Australian people may well be asked to consider alterations to the *Constitution*. A principal purpose of the Samuel Griffith Society is to advance understanding of this remarkable document, a deeper appreciation of its stature and merits, and a clear perception of the implications of any proposed alterations.

The *Constitution's* durability in peace and war, in depression and prosperity, above all in the growth and development of the nation, are a formidable reminder that a heavy burden rests upon those proposing alterations. Alterations ought only to be pursued if they unambiguously enhance and enrich a notable document with a conspicuous and enviable history.

In the forthcoming year questions concerning the indigenous people, Aborigines and Torres Strait Islanders, may well be brought forth in the form of possible alteration to the *Constitution*.

Likewise, recognition of local government may, yet again, be revived.

Related matters may return to the active political agenda of the nation. The recent tragic events in France, coming so soon after the tragedy in Martin Place in Sydney, have already

brought section 18C of the *Racial Discrimination Act* back into political contention.

These are all matters which have been the subject of learned papers in the Society's proceedings and will most certainly figure again.

Likewise, proposed policy papers by the Federal Government on federalism and taxation within the federation will engage the most intense interest of the Society and its members and all others who value the federal quality of our Commonwealth and its *Constitution*.

The debates may well be vigorous, robust and strongly argued. And so they should be.

But my message on this Australia Day 2015 is that these national disputations should concentrate on the matters at issue, whether the desired objectives can be achieved, the likely consequences of any alterations to the *Constitution* which may be promoted, and a recollection of the firm foundations which the *Constitution* has for so long provided for the political and governmental life of Australia and its democracy.

In this spirit, the Samuel Griffith Society wishes every Australian a happy and thoughtful Australia Day.

26 JANUARY 2016

AUSTRALIA DAY MESSAGE

THE HONOURABLE IAN CALLINAN, AC

By 1900, the colonies of Australia had achieved a large measure of independence and self-government. They would have had enjoyed even more but for their dependence upon Britain for defence and capital. Indeed, dependence upon the latter, and Britain's determination to protect its colonial investments, were reason for retention of appeals to the Privy Council despite the establishment of a High Court of Australia.

The point is, however, that the residents of the colonies were accustomed to the management of their own affairs, and unwilling to renounce those that were not essential to the proper functioning of the new Commonwealth. The founders would have been astonished by the notion that the Commonwealth would decide whether and which schools, either state or private, should be endowed with school halls, or whether a river in a remote part of Tasmania should or should not be utilised for the generation of hydro-electricity, or that the Commonwealth would decide the precise route of a main road between Brisbane and Ipswich, or whether a hospital which it would neither own nor operate, should be built in Western Sydney or in Melbourne.

In administrative law it is well understood that the Executive has the right to be wrong in its judgements within its spheres of activity and power. This is not simply because the Executive is separate from the Parliament and the courts. It is additionally so because under our constitutional system (state and federal) when the Executive errs, its party can be defeated

at the next election. It is not for a Commonwealth government to act as a senior prefect over the states monitoring their choices and expenditures. One is entitled to ask — I doubt whether a clear answer will be given — how many Commonwealth officials in Australia are engaged in the task of processing, auditing and overseeing the works and expenditure of state activities entirely within the constitutional power of state governments. Any project of any magnitude in prospect in Australia must obtain the approval of the environmental agencies of three elected governments, local authority, state and Commonwealth. Why should the last be necessary, or for that matter superior somehow in wisdom and foresight to the former two?

Unpicking the threads is always more difficult than making the whole cloth. But unless we begin the process of unpicking, income tax and GST will, as with the staff numbers in the multifarious Commonwealth departments, agencies and commissions, invariably and unbearably increase.

There will be much debate in the ensuing year about the need for increased revenues and reduced expenditure, with the emphasis on revenue. The restoration of state authority and responsibility for state affairs may not be an entire solution, but it is an essential part of any viable one.

The Samuel Griffith Society wishes all Australians a joyful and thoughtful Australia Day and a prosperous and happy 2016.

26 JANUARY 2017

AUSTRALIA DAY MESSAGE

THE HONOURABLE IAN CALLINAN, AC

The year that has elapsed since the last Australia Day has been a year of false prophets.

Almost all of the pollsters, political scientists, policy advisors, pundits and professional politicians seriously misjudged the mood and character of the people. They did it in the United Kingdom, the United States of America, Austria, and they are doing it in Holland, France and Australia. It is trite and condescending, and worst, undemocratic to say that the people were wrong. But the question for the Society is, what, if anything, can it and those who support its constitutional, federalist ideals take from the events of 2016? My answer would be, encouragement.

I do not think that people have voted the way they did out of an ignorant contrariety. I believe that an important factor in their vote was a rejection of multiple and cumbersome bureaucracies, layers of unnecessary, inefficient and ill-judged regulation.

The hope for 2017 therefore, is that the realisation that centralism ultimately inevitably fails because power and authority are seductive and addictive, and restraint illusive, will increase. The Society wishes all Australians a happy and reflective Australia Day.

26 JANUARY 2018

AUSTRALIA DAY MESSAGE

THE HONOURABLE IAN CALLINAN, AC

No one would contend that our democracy and the institutions of it are flawless. Most people of good will and free spirit are keen to find and remedy the flaws. But they, of which the members of the Samuel Griffith Society are some, also understand the importance, indeed the crucial importance of recognising and preserving, as well as improving, the initiatives and institutions upon which our nation was founded and which have enabled it to flourish. If it were otherwise, Australia would hardly have been, as it continues to be, the magnet that attracts people from so many other countries.

Australia Day is the day that we have chosen to celebrate our national identity. Celebration of it is not a disparagement of any particular group or groups of Australians. Those who would wish for a different celebration, or a different day for it, would do well to look beyond our shores and contrast what they see there, with our freedoms, the rule of law, the robust parliaments, and the media that keeps them under scrutiny here.

It is for these ideals and the maintenance of the *Constitution* of 1901 that have served us so well in pursuing them, that the Samuel Griffith Society stands.

I wish everyone an enjoyable and reflective Australia Day.

26 JANUARY 2019

AUSTRALIA DAY MESSAGE

THE HONOURABLE IAN CALLINAN, AC

History, a common language, a common law, and geography dictated that the Australian colonies federate. They did that by an exhaustive, generally democratic, and entirely lawful and peaceful process, which gave us a Constitution with a legitimacy and clarity possessed by few others.

Events in some other countries serve as a reminder of our good fortune. There are many politicians among the 48% of voters who voted for the United Kingdom to remain in the European Union, who now wish to treat the vote of the majority as an aberration and irritable failure of a populist cognoscenti to understand where their best interests lie.

The debate in the United Kingdom is rather like the public debate after the failure of the republic referendum in Australia. There is one important difference, however. Our founders wisely inserted section 128 into our *Constitution*. As much as the republicans might complain, or try to explain away the result, or worse, seek to re-engineer a different result, section 128 prevents that. Effectively, the founders set out to ensure that the democratic will would prevail over unwise attempts to tamper with the *Constitution*.

Events in the United Kingdom serve as a further reminder of our good fortune. A degree, perhaps a high degree even, of international cooperation is desirable, but we would do well not to enter into voluntary and binding arrangements which theoretically make provision for withdrawal but which when

invoked are dismissed or punished. All internationalism needs to be cautiously embarked upon.

Sovereignty is not a synonym as it is sometimes represented for aggressive nationalism or even nationalism itself. The politicians have no mandate to defy those who elect them. Those who are elected need to be domestically elected and able therefore to be kept in full view. The External Affairs power (s 51(xxxix) of the *Constitution*) and its exploitation by all three branches of government, the Parliament, the Executive and the Courts, require constant vigilance.

The Samuel Griffith Society, whose whole purpose is to uphold the Australian Constitution, wishes everyone a happy and reflective Australia Day.