Upholding the Australian Constitution Volume Twenty-four

Proceedings of the Twenty-fourth Conference of The Samuel Griffith Society

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Introduction

Julian Leeser

The 24th Conference of The Samuel Griffith Society was held in Brisbane during the weekend of 17-19 August 2012. It marked the 20th anniversary of the Society's birth.

1992 was undoubtedly a momentous year in Australia's constitutional history.

On 2 January 1992 the perspicacious John and Nancy Stone decided to incorporate the Samuel Griffith Society thirteen days after Paul Keating was appointed Prime Minister.

On 1 February 1992 Prime Minister Keating called for a new Australian flag. On 24 February 1992 Prime Minister Keating caused a stir by making republican references in a speech welcoming Her Majesty the Queen to Australia.

On 5 May 1992 John Stone wrote to like-minded individuals inviting them to join the Society.

On 3 June 1992 the High Court delivered its decision in the Mabo case.

On 4 June 1992 Australians for a Constitutional Monarchy was formed.

On 25 June 1992 Justices Deane and Toohey found an implied notion of equality in the preamble to the Constitution in the Leeth case.

The first conference of the Samuel Griffith Society was held in Melbourne from 24 to 26 July 1992.

On 30 September 1992 the High Court discovered an implied freedom of communication in the Constitution in the Australian Capital Television and Nationwide News cases.

A day later High Court Justice John Toohey delivered a speech entitled, "A Government of Laws and Not of Men." In it he suggested that if the people did not enact a bill of rights in the Constitution, the High Court might imply one, over time, at any rate.

On 13 November 1992 Justices Deane and Gaudron found an implication in the Constitution of a right to a fair trial in the Dietrich case.

Constitutionally Australia was, as the Chinese curse suggests, living in interesting times. The atmosphere in 1992 was quite different to 2012, but there were also many similarities.

In 1992 many thought that an Australian republic was "inevitable." In 2012, the prospect of Australia electing a fervently monarchist prime minister has killed off any further idea of an Australian republic.

In 1992 a Labor Government had its political advertising legislation struck down by an activist High Court. In 2012 a Labor Government had its plain packaging legislation upheld by an activist High Court.

In 1992 Australia won seven gold medals at the Barcelona Olympics. It was a cause of national celebration. In 2012 Australia won seven gold medals at the London Olympics. It was a cause of national humiliation!

And, as I was only lately reminded, in 1992, in response to an increase in unauthorised boat arrivals, a Labor government enacted mandatory detention legislation. Some things never change.

Two papers at the 2012 Conference considered the High Court decisions of 1992 which continue to haunt Australia. One, by the Solicitor-General of New South Wales, Michael Sexton, SC, examined the Mason Court's invention of the implied freedom of political communication. Strangely, for a federalist society, we have never previously had a serving State solicitor-general address the Society so we are very honoured to have Michael on this occasion.

The other paper was Gary Johns's address on native title 20 years since Mabo. Gary Johns was a member of the Keating Government when it formulated its response to native title. He has been a significant contributor to debates on indigenous questions ever since.

The 2012 Conference continued the Society's tradition of eclectic scholarship.

The Conference opened with the fourth Sir Harry Gibbs Memorial Oration. It was delivered magnificently by Senator George Brandis, QC. The theme was the threat to freedom of speech arising from the Finkelstein inquiry. What disturbed me most was the passage he quoted from the Finkelstein report:

. . . in order for Mill's conception of freedom of expression to operate, two central components are required: Citizens must have the capacity to engage in debate, in the form of relevant critical reasoning and speaking skills. They must also have equal opportunity to participate, in the form of access to public forums where they can articulate their views and debate with one another. There is real doubt as to whether these capacities are present for all, or even most, citizens.

It was quite an extraordinary statement. Clearly some members of our judicial, academic and journalistic elite hold most Australians in contempt. I read into those comments, however, a more sinister, quasi-eugenistic view of our society which suggested some people do not have the proper mental capacity to participate in the public debate. Clearly the Finkelstein report deserves more criticism.

Our President, Ian Callinan, spoke about how the defamation law may provide a better balance on the power of the media than an Orwellian committee.

A special highlight of the Conference was an address on the life of Sir Samuel Griffith and his role in the making of the Constitution of Australia by Justice Dyson Heydon, whom I have previously described as Australia's finest after-dinner speaker.

Since the conference was held unfortunately Justice Heydon has been forced to retire from the High Court by virtue of section 72 of the Constitution. The Society has been very honoured by the support he has given throughout his time on the Court. He is an outstanding jurist, a generous friend and a great Australian, we are honoured to be associated with him.

A principal concern of this Society, federalism, was the subject of several addresses. Two were given by former Treasurers of Western Australia. Richard Court, also a former Premier, has been an eloquent advocate of the federal cause for many years.

At the time of the conference Christian Porter was in career transition. He had recently retired as Treasurer and Attorney-General of Western Australia before transferring to Canberra as Member for Pearce. He takes to Canberra formidable debating skills, an unrivalled intellectual arsenal, and deep philosophical convictions rooted in the very values for which this Society stands.

To complete our consideration of the federal matters, Keith Kendall revisited the case for State-based income tax.

Three other addresses deserve mention Lorraine Finlay's address on indigenous recognition was most significant. So far no-one has provided proper, scholarly examination of many of the real questions surrounding recognition of indigenous people in the Constitution.

Josephine Kelly examined the external affairs power in relation to the environment and I am pleased to say there is a paper from John Paul, the man who taught political science to me for three years at the University of New South Wales, on the role of the Speaker of the House of Representatives.

The program concluded with a special tour of the Sir Harry Gibbs and Sir Samuel Griffith collections at the new Queen Elizabeth II Court Complex.

Thanks, as always, are due to Bob Day and the irrepressible Joy Montgomery for making the logistical side of the Conference run so smoothly.

The Samuel Griffith Society is not only about the interesting lectures and outstanding presentations we have from speakers, it is also about the interesting people who constitute our membership.

Some of those who joined the cause in 1992 have passed away in the last year and, as always, at this time, it is appropriate to acknowledge the passing of: Francis Dennis, OAM; Dr John Eddy, SJ; Kevin Pownall; Alexander McPherson; and Barry Strong.

Another of our members who has passed away deserves special mention. Emeritus Professor Colin Howard, QC, was one of Australia's outstanding legal scholars. He taught at the universities of Adelaide and Queensland, and was Hearn Professor of Law at the University of Melbourne from 1965 until 1990.

His text books on constitutional and criminal law are still in print. He influenced two very different justices of the High Court, our President, Ian Callinan, to whom he taught criminal law at the University of Queensland, and Lionel Murphy, on whose staff he served as General Counsel.

In the early years of the Society he gave nine papers on subjects as diverse as the external affairs power, the race power, native title and the role of the High Court. They reflected his great scholarship and his scepticism. For all his contribution to Australia, his passing has been inadequately marked but the death of Colin Howard represents a loss to this Society as it does to the nation.

On a happier note, we always have a distinguished audience and it is remiss to acknowledge anyone in particular but I would like to mention the Honourable Norman Moore, MLC, the Minister for Mining in Western Australia. He has announced that he will not be standing for re-election at the 2013 elections in Western Australia.

He has been very active in the affairs of the Society for many years. We hope that he has a happy, healthy and extremely active retirement which includes continued participation in the activities of the Society.

As always we were delighted to welcome our Mannkal scholars. Every year Ron Manners finances a group of Western Australian students to attend the Conference. The competition to win a Mannkal scholarship is fierce. The winners attending the Conference in Brisbane were: Heather Anderson; Karen Andreychuk; Binuk Kodituwakku; Vlada Lemaic; Melita Parker; Jay Tampi; and Molly Greenfield.

In 2012, as an innovation, the Society called upon its members to consider funding additional scholarships so that more students could attend. A number of members were very generous in this regard and we were able to raise sufficient funds for five scholarships. Our thanks for their generosity go to John Richardson; Harold Clough;

Christopher Game; Robert Nixon; John Bell; as well as to a member who wished to remain anonymous.

The 2012 Samuel Griffith Scholars are: Samuel Walpole; Joshua Sproule; Harrison Smith; Kristen Scott; and William Isdale.

Finally, the Society is grateful to Professor James Allen for judging the scholarship.

In Defence of Freedom of Speech
[The Fourth Sir Harry Gibbs Memorial Oration]

Senator the Honourable George Brandis

Sir Harry Gibbs, to whose memory this Oration is dedicated, was the greatest judicial lawyer Queensland produced in the twentieth century, just as Sir Samuel Griffith had been the greatest judicial lawyer Queensland produced in the nineteenth. Both were the leading barristers of their time. Both began their judicial careers as members of the Supreme Court of Queensland. Sir Samuel was appointed as the third Chief Justice in 1893. Sir Harry was appointed to the court in 1962 at the then relatively young age of 44; had he not been recruited to the Federal judiciary in 1967, it is likely that he, too, would have become the Chief Justice of Queensland. Instead, via a detour through the then Federal Court of Bankruptcy, Sir Harry was appointed to the High Court by the Gorton Government in 1970. The Attorney-General who had the good sense to select him was Tom Hughes.

In 1981, Sir Harry Gibbs succeeded to the office first held by Griffith, becoming the eighth Chief Justice of Australia. When Sir Harry joined the High Court the Justices were appointed for life. By accepting the Chief Justiceship Sir Harry became subject to the 1977 amendment to section 72 of the Constitution, which imposed a statutory retirement age of 70 – one of the Fraser Government's worst legacies. So his occupancy of the office was foreshortened after only six years, and he was required to retire from the Court, at the height of his very formidable intellectual powers, in 1987. In 1992, Sir Harry became the inaugural President of The Samuel Griffith Society.

I met Sir Harry only briefly on a few occasions. Although I cannot say I knew him, I had several connections with him. Charles Sheahan, the judge whose Associate I was, had been one of Gibbs's close friends in the small fraternity of the Brisbane Bar in the late 1940s and 1950s, and often regaled me with tales of those days and affectionate anecdotes about Sir Harry (or "Bill", the nickname by which he was known). His former Associate and protégé, David Jackson, was my master when I first went to the Bar, and my cousin, the Brisbane writer Joan Priest, was his biographer.[1] There is a sense in which everyone who practised as a barrister in Queensland in the second half of the twentieth century lived under Sir Harry Gibbs's long shadow, for he was, by common accord, the gold standard of professional excellence.

Similarities notwithstanding, there is one important respect in which the career of Sir Harry Gibbs was quite different from that of Sir Samuel Griffith. Unlike Griffith, who served in the Queensland Parliament for almost 21 years, with two periods as premier, Gibbs never became involved in politics, and Joan Priest's biography contains no suggestion that a political career ever interested him. But it would be a mistake to think that Gibbs did not care deeply about political affairs, as his acceptance of the presidency of The Sir Samuel Griffith Society demonstrates. In the years after his retirement from judicial office, his fine, crystalline mind addressed many of the important constitutional and political issues of the day – on several occasions, in lectures delivered to this Society. It is apparent from his speeches that Gibbs's political values were largely similar to those of Griffith. He was what I would call a liberal conservative – a man who was devoted to the rule of law, who respected tradition, was suspicious of ideology and hostile to radicalism, and who regarded the rights and

freedoms of the individual as paramount values.

It is about one of those freedoms that I want to speak tonight: freedom of speech, and its closely related value, the freedom of the press. For there can be no doubt that those freedoms are under a concerted attack in Australia today, so that which could be taken for granted only a decade or so ago now needs to be defended.

The attack upon freedom of speech is being mounted on many fronts and, I am sorry to say, it has the overt sanction of the current Federal Government. When, last week, the Leader of the Opposition, Tony Abbott, addressed the Institute of Public Affairs in a speech provocatively entitled "The Freedom Wars", and offered a fine, full-throated defence of freedom of speech and of the press,[2] the reaction of the Commonwealth Attorney-General, Nicola Roxon, was to accuse Mr Abbott of having an "obsession with free speech", and – I am not making this up – to liken the right to free speech with the American view of the right to bear arms.[3]

Now if, as the dictionary tells us, an obsession is an idea which dominates the mind, I as a Liberal gladly and willingly confess to sharing Tony Abbott's "obsession" with free speech, and I wonder why the Attorney-General of the Commonwealth does not. But I suppose Ms Roxon's scorn for those who care deeply about freedom of speech merely reflects the spirit of an age characterized by the rise of an alarming new intolerance not merely of the views of those who do not subscribe to the current preferences and values of a conceited, self-anointed cultural elite, but an intolerance of their right to express those views at all.

The measure of a society's commitment to political freedom is the extent of its willingness to respect the right of every one of its citizens to express their views, no matter how offensive, unattractive or eccentric they may seem to others. As Sir Robert Menzies said, in one of the *Forgotten People* broadcasts, in June 1942:

> Let us, on the threshold of our consideration, remember that the whole essence of freedom is that it is freedom for others as well as for ourselves; freedom for people who disagree with us as well as for our supporters, freedom for minorities as well as for majorities . . . The more primitive the community, the less freedom of thought and expression is it likely to concede . . . As you probably know, I am one who has in recent years had a severe battering from many newspapers, but I am still shocked to think that intelligent men, in what they believe to be a free country, can deny to the newspapers or to critics of any degree the right to batter at people or policies whom they dislike or of whom they disapprove.[4]

Menzies quoted with approval John Stuart Mill's observation:

> Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth . . . and on no other terms can a being with human faculties have any rational assurance of being right.[5]

Yet it is that which is under attack in Australia today. Although the attack takes many forms, what they all have in common is a shared intolerance.

Political Correctness

The first of the assaults upon freedom of speech with which I want to deal takes the form of what has come to be known as "political correctness." The origins of the term "political correctness" can be traced to the 1970s, when it began to emerge in the writings of the New Left, particularly in feminist literature, largely as a critique of

language which was seen to be patriarchal or otherwise socially discriminatory. What began as a vaguely annoying quibble about linguistic usages has developed, in the course of the past forty years, into a very deliberate and sophisticated form of political censorship, whose advertent purpose is to eliminate from political discourse ideas which offend the beliefs and prejudices of the Left.

The report of the Finkelstein Inquiry into media regulation, to which I will return later, contains a discussion of various theories of the role of the press. Of the two theories it identifies as "non-democratic models" it has this to say:

> Authoritarian theory . . . reflected societies which held that all persons were not equal, that some were wiser than others and it was those persons whose opinions should be preferred . . . Totalitarian theory shared many of these characteristics, but contained one important additional dimension: the education of the people in the 'correct' truth.[6]

Although Mr Finkelstein was describing authoritarian and totalitarian ideologies, he could hardly have written a better description of political correctness, the whole point of which is to narrow the boundaries of civil discourse by proscribing the expression of opinions which are objectionable to it.

In the 1960s and 1970s, progressives of the Left shared many of the values of liberalism, and they adopted much of its language. The emancipation of women was called women's liberation. Following the Wolfenden Report in England, the repeal of laws which prohibited homosexual conduct came to be called gay liberation. The relaxation of censorship was a liberal cause, supported by the progressive Left, based upon the belief that adults should be free to make their own decisions about what they read and saw. Progressive social policy was all about the extension of freedom. Within the Liberal Party and similar centre-right parties elsewhere, this created tensions between the liberalising elements and conservatives, who continued to value social control over personal freedom.

Today, it is the self-styled progressives of the Left who want to ban things. In particular, they want to eliminate the expression of opinions which they find offensive. Sometimes this takes the form of overt prohibitions, of which section 18C of the *Racial Discrimination Act* is an egregious example. As witnessed in the Bolt case, freedom of speech – and its corollary, freedom of the press – are, for these people, values of less importance than "respect" for certain favoured groups which are identified in their minds by their alleged victimhood. Thus, paradoxically, victimhood becomes the basis of a new kind of privilege: showing respect to their special status is a more important value than the freedom to call that status into question. And so, as in the Bolt case, by making certain classes of citizens immune from criticism, the boundaries of legitimate political discussion are restricted.

When he introduced section 18C in 1995, the then Minister for Immigration, Senator Nick Bolkus, oblivious to the Orwellian resonances of his rhetoric, told the Parliament that it was designed to eliminate "speechcrimes."[7]

Is it really the role of government to be telling people what they might say? But this is the very point of the political correctness movement: to shape the language so that ideas of which it disapproves are eliminated from public discourse. This insidious tactic has never been better described than by George Orwell (who was himself a victim of it):

> At any given moment there is an orthodoxy, a body of ideas which it is assumed that all right-thinking people will accept without question. It is not exactly forbidden to say this, that or the other, but it is 'not done' to say it, just as in mid-Victorian times it was 'not done' to mention trousers in the presence of a lady. Anyone who challenges the prevailing orthodoxy finds himself silenced with surprising effectiveness. A genuinely unfashionable opinion is almost never given a fair hearing, either in the popular press or in the highbrow periodicals.[8]

The manipulation of language to limit public discourse has an even more dangerous consequence. The practitioners of political correctness have grasped the close connection between language and thought, so that by limiting that which may be said, they seek to limit that which may be thought. (It is no coincidence that one of the early prophets of political correctness, the American writer Noam Chomsky, began his career as a professor of linguistics, whose pathbreaking work was in the study of the relationship between language and the cognitive structures of the brain.) As Winston Smith discovered, there is hardly any distance at all between speechcrime and thoughtcrime. So the attack upon freedom of speech is not merely about the censorship of language which the Left finds objectionable. At a deeper level, it is an attack upon intellectual freedom itself.

Death by Silence

Sometimes the elimination of language takes the form of overt prohibitions like section 18C. But the attack upon freedom of speech is usually more subtle. Another technique which is used by the practitioners of political correctness is to eliminate competing views from the debate by denying them a platform at all – whether in the media, the academy, or any other public forum where ideas are discussed. Janet Albrechtsen calls this technique "death by silence":

> The trick is to exclude certain people from the national discourse. It is best summed up by a German word. The word is *totschweigtaktik*. To be "totsched" is to be subject to death by silence – books, ideas, people that challenge the status quo are simply ignored . . . Those who are totsched find "their efforts left to expire soundlessly like a butterfly in a jar." It happened to Orwell when he wrote his 1938 classic *Homage to Catalonia*, which addressed Stalinist Russia's involvement in the Spanish Civil War. The left-wing *literati* simply ignored it. By the time Orwell died in 1950, barely 1,500 copies had been sold.[9]

We have seen many examples of this technique in Australia in recent years: for example, the silencing of the journalist Chris Kenny, when he sought to expose the fraudulent claims of the so-called "secret women's business" in the Hindmarsh Island Bridge affair; and the refusal for years of most of the mainstream media to give appropriate coverage to the then-heretical views about aboriginal disadvantage championed by Noel Pearson.

Perhaps the most infamous application of the technique was the conspiracy of silence which sought to eliminate from the important national debate on climate change the views of the so-called climate sceptics. Aping the Government line on anthropogenic global warming, the national broadcaster, in particular, sought so

strenuously to deny the sceptics a hearing that when, on one infamous occasion, it eventually deigned to broadcast a sceptical documentary, it was bookended with a one-sided panel discussion put to air specifically for the purpose of explaining why the claims made in the documentary were wrong.

The debate – or, at least in its early stages, the non-debate – on climate change brings me to another of the techniques used to erode freedom of expression: the attempt to convert public policy questions into technical questions, in which the opinions of the Government's preferred experts are deployed as a means to remove essentially contestable issues from the scrutiny of ordinary political debate. This is a technique which the Gillard Government has used again and again. I have lost count of the number of times I have heard Senator Penny Wong declare to the Senate, in relation to the complex question of climate change, and the equally complex question of what is the appropriate design of policies to deal with its alleged consequences – "the science is settled." This is a profoundly ignorant thing to say, a denial of the very essence of the scientific method. More disturbingly, however, it is an assertion that this is not an issue which can properly be the subject of political debate, because it is a technical issue – an issue for scientists to decide; not an issue about which the general public – or even the Parliament – are capable of having an informed opinion, and so not a matter of legitimate public discussion at all.

It has become a standard tactic of the Gillard Government to seek to place controversial issues beyond public discussion by invoking the superior wisdom of favoured "experts". You disagree with the mining tax? But Dr Henry says it is a good thing, and who are you to disagree with Dr Henry? You disagree about global warming? Who are you to disagree with Professor Garnaut? You disagree with onshore processing of refugees? Who are you to disagree with Mr Andrew Metcalfe? (Unless you are Air Chief Marshal Houston.) And so it goes on.

Although this is, at one level, merely a tactic to stifle public debate, the impulse behind it is an ancient and profoundly anti-democratic one. It lies in the Platonic conception of rule by the wise. It is a recurring theme throughout the ages. Saint Augustine imagined a ruling class of clergy – and so it was in Western Christendom for more than a millennium. At the dawn of the Industrial Revolution, Saint-Simon envisaged an ideal society ruled by technocrats and scientists. In the twentieth century, social theorists such as Max Weber and Julien Benda identified an elite class of bureaucratic rulers, to which the American sociologist Robert Nisbet gave a new name, "the clerisy", which suitably evoked its quasi-priestly nature.[10]

In every iteration, across every age, faith in a ruling caste of the good and the wise has, at heart, been based on the belief that the core questions should be decided for the good of the people, but not by them. And, therefore, since these are not matters fit for public decision, they are hardly matters requiring public discussion.

Censorship of opinions deemed to offend the canons of political correctness, and the attempt to place matters of legitimate public interest beyond the reach of public debate by dressing them up as matters exclusively within the understanding of favoured "experts", are but two of the ways in which not merely freedom of speech, but intellectual freedom itself, is under attack in Australia today. But there is a third front in the freedom wars that I cannot forbear from addressing. That is the attack by the Gillard Government on freedom of the press itself.

The Attack on Freedom of the Press

Let us remember how the current attack on press freedom began. In 2011, the Prime Minister, seeking to distract public attention from her Government's failings on so many fronts, used the revelations of the *News of the World* scandal in the United Kingdom to create a straw man argument to justify an attack upon the media in Australia. Notwithstanding the complete absence of any evidence of similar abuses here, the Prime Minister said that News Limited had "hard questions" to answer, and misrepresented the findings of an Australian Law Reform Commission report on privacy to provide an additional, specious, ground to justify a public inquiry into media regulation. On 14 September 2011, terms of reference were issued and the Honourable Ray Finkelstein, QC, a retired judge of the Federal Court, was appointed to conduct the inquiry. He reported on 28 February 2012. The principal recommendation was to replace the existing industry-based Australian Press Council by a new regulatory body, a "News Media Council", funded by the government and whose decisions are enforceable in the same way as the decisions of government agencies – in other words, by the imposition, in certain circumstances, of punitive sanctions.

The Opposition has announced that it will oppose the creation of our own antipodean version of Orwell's Ministry of Truth. The Government has yet to announce its response to the recommendations of the Finkelstein Inquiry, although there seems little reason to doubt that Ms Gillard's or Senator Conroy's appetite for ever-increasing government control of the news media is likely to result in the recommendations being embraced.

For those who take the trouble to read the Finkelstein Report, of even greater concern than the recommendations is their rationale. For the underlying argument of the Finkelstein Report is itself an attack upon what he calls the "libertarian" case for press freedom, in favour of what he describes as the principle of "social responsibility". Now, there are few who would argue that the press, as a powerful institution, does not have responsibilities to society. But Finkelstein's approach goes much further than that: by favouring the "social responsibility" argument over the "libertarian" argument, freedom of the press is not seen as the paramount public value, qualified by necessary but jealously circumscribed exceptions. Rather, it is displaced.

Much of the second chapter of the Report, which deals with the justifications for freedom of the press, is devoted to a sustained critique of Mill's argument for the liberty of thought and discussion. Finkelstein makes no secret of his own ideological sympathies. He writes:

> Libertarian theory was developed in the period of the Enlightenment … The theory was informed by a liberal belief that truth would emerge from the clash of competing opinions, and by a belief in the 'self-righting' capacities of public debate to ensure that in rational and reasoned discourse, error would be vanquished. It was analogous to the free market theories of Adam Smith . . . However, Libertarian theory was to prove inadequate in the face of the new forces created by the industrialisation of the press and by the realities of 19th and 20th century media economics. … On top of these economic and technological challenges to Libertarian theory, the intellectual climate of the 20th century was radically different from that of the 17th and 18th centuries, when Libertarian ideals flourished. The new intellectual climate placed higher store in collectivist, societal

values and less on individualistic values.[11]

Elsewhere, he adopts the patronizing tone towards public opinion which has become so wearily familiar among cultural elitists. Thus, criticizing Mill's argument that freedom of speech is essential for an active and engaged citizenry, he quotes with approval the evidence of one witness that "citizens must have the capacity to engage in debate, in the form of the relevant critical reasoning and speaking skills", and observes:

> There is real doubt as to whether these capacities are present for all, or even most, citizens and, even if they are, both speakers and audiences are often motivated by interests or concerns other than a desire for truth – including, of course, the desire to make money and personal, political and religious motivations . . .[12]

Shame on them!

Finkelstein is unambiguous about the purposes of the new regulatory body which he proposes:

> It could not be denied that whatever mechanism is chosen to ensure accountability speech will be restricted. In a sense, that is the purpose of the mechanism.[13]

So there is no excuse for us having any doubt about the purposes and rationale of the Finkelstein Report, for its author could not have been more explicit.

At the risk of being stubbornly out of sympathy with what Mr Finkelstein is pleased to call "the new intellectual climate," I must confess to being something of an admirer of the Enlightenment, and less than an admirer of the *dirigiste* philosophies which disfigured so much of the 20th century. And although there is somewhat of a mocking tone in Mr Finkelstein's reference to the 17th and 18th centuries, those ages saw many of the most notable advances in the history of liberty. I freely admit that I prefer the Cavaliers who restored the theatres to the Puritans who closed them; I prefer Milton's *Areopagitica* to Hobbes's *Leviathan*; and I certainly prefer the Declaration of Independence to *The Communist Manifesto*.

Conversely, the past century, in which emerged the "new intellectual climate" of which Mr Finkelstein is apparently so enamoured, which "placed higher store in collectivist values," witnessed a greater sacrifice of human lives, in the name of the power of the state, than in the whole course of human history beforehand. So I am unashamed of being at odds with the *zeitgeist* in believing that Adam Smith still has more useful things to teach us than any of the avatars of the "new intellectual climate"; and of preferring the teachings of Mill to those of Marx, or Mao, or Marcuse.

And so it is with Mill – the political philosopher who, when I was a teenager, first inspired my lifelong commitment to liberalism – that I close. Writing in 1859, he said:

> The time, it is to be hoped, is gone by when any defence would be necessary of the 'liberty of the press' as one of the securities against corrupt or tyrannical government. No argument, we may suppose, can now be needed against permitting a legislature or an executive . . . to prescribe opinions to [the people] and determine what doctrines or what arguments they shall be allowed to hear.[14]

What Mill thought was no longer necessary in mid-Victorian England more than a century and a half ago is, now, astonishingly, necessary in Australia in the second decade of the twenty-first century.

Almost four centuries after Milton's ageless plea for the freedom of the press, more than two centuries after the newly-born American republic adopted the First Amendment, we in Australia find that fundamental prerequisite to political freedom challenged. And the challenge is not merely a challenge to the freedom of the press arising from an expert report. It is a comprehensive challenge – arising from a modern-day Puritanism, driven by an ideologue's intolerance of alternative or dissenting views, and condoned if not actually encouraged by a complicit Government – to the very centrality of freedom of speech as one of our society's core values.

It is a challenge whose techniques are sometimes subtle, like the manipulation of language and the silencing of alternative voices; sometimes explicit, like section 18C; and sometimes stunningly brazen, like the Gillard Government's attempts to limit the freedom of the press. But the danger to our liberal democratic polity must not be underestimated, and therefore it is a challenge to which those who share my political values – the political values of Sir Robert Menzies, of Sir Samuel Griffith and of Sir Harry Gibbs – must and will respond resolutely and without compromise.

Endnotes

1. Joan Priest, *Sir Harry Gibbs: Without Fear or Favour*, Scribblers Publishing, 1995.

2. The Honourable Tony Abbott, "The Freedom Wars", speech delivered to the Institute of Public Affairs, Sydney, 6 August 2012.

3. The Honourable Nicola Roxon, interview with Rafael Epstein, ABC Radio 774, Melbourne, 8 August 2012.

4. Robert Menzies, "The Four Freedoms – Freedom of Speech and Expression", in *The Forgotten People and other Studies in Democracy*, Sydney, Angus & Robertson, 1943, 11-12.

5. *ibid.* p. 14, quoting John Stuart Mill, *On Liberty* (1859), ch. 2.

6. *Report of the Independent Inquiry into the Media and Media Regulation* (Chair: Hon. Ray Finkelstein), 2012, 44 [hereafter: *Finkelstein Report*].

7. Senator Nick Bolkus, CPD Senate, 23 August 1995.

8. George Orwell, "Freedom of the Press" (unprinted introduction to *Animal Farm*), first published in *Times Literary Supplement*, 15 September 1972.

9. Janet Albrechtsen, "Freedom in the Western World", address to Institute of Public Affairs, Melbourne, 25 February 2012, quoting Shelley Gare, "Death by Silence in the Writers' Combat Zone", *Quadrant*, July 2010, 28-37.

10. Robert Nisbet, *Twilight of Authority*, New York, New York Oxford University Press, 1975, 4-5; Geoffrey de Q. Walker, *The Rule of Law*, Melbourne University Press, 1988, ch. 9.

11. *Finkelstein Report*, *op. cit.*, 45-46.

12. *ibid.*, 30.

13. *ibid.*, 52.

14. John Stuart Mill, *On Liberty*, ch. 2.

Chapter One

Defamation, Privacy, the Finkelstein Report and the Regulation of the Media

The Honourable Ian Callinan

The fact that the media may have an excessive opinion of their relevance and importance in public affairs does not mean that they are unimportant or irrelevant. Their relevance lies more, however, in their capacity to influence politicians than in their ability to persuade ordinary viewers, readers and listeners. Polls regularly taken of the public show consistently that the public distrust the media. We all favour those of the same mind as ours, just as we are resistant to those who are not. Even talk-back radio which those on the Left of the political divide seek to denounce as rabble rousers generally speaks, I believe, to the like-minded. Even so, a simple message clearly and repeatedly stated does have public impact. But, ironically, the greatest impact of the media is upon those who should themselves be persuading or influencing the media, the politicians. It is by this means that the media wield their greatest influence.

Some years ago, on separate occasions, I had conversations with a prime minister and the Leader of the Opposition. I suggested that politicians were far too reactive, too responsive to what the media were saying. Why, I asked, was this so, if, as I believed to be the case, and the polls consistently demonstrated, the public was so deeply sceptical about and distrustful of the media? The Prime Minister disagreed with me. He said that the relentless 24-hour news cycle compelled close attention and immediate responses to the media. The Leader of the Opposition was more receptive: *"You're quite right"*, he said. *"I don't know why for the life of me we do it."*

Now is not the time to debate that. The media do have an established role in public life. No matter how badly they may behave on occasions, deplorably so, in distortion, commercialism, omission [quasi censorship], sensationalism and bias, I cannot imagine how democracy could properly function without them.

There is no question that the media are not what the political class would wish for. Their ideal is of a far less questioning, less critical and more malleable institution. Politicians are interested in power. Most can never get enough of it. It is not unnatural that they would wish to have power and control over the media. For hundreds of years after the invention of the printing press they exercised that power.

Equally, it is not surprising that politicians might seize upon revelations of grave media misconduct even though it occurred, albeit under the same ownership of media outlets as exists here, on the other side of the world, as an opportunity to regain a long lost grip on the media. Although there does not appear to be evidence of that sort of misconduct here, on any view the Australian media are not Caesar's wife.

In 2011 the Federal Labor Government established an inquiry into the media and media regulation, to be conducted by a recently retired Federal Court judge, the Honourable Ray Finkelstein. Mr Finkelstein was assisted by a number of people and was able to report by 28 February 2012. The principal term of reference for the inquiry

was the effectiveness of the current media codes of practice in Australia, particularly in light of technological change, leading to the migration of print media to digital and on-line platforms.

Mr Finkelstein was very conscious of the advent of the internet and the problems, he said, which it raised, not only for the commerciality of existing orthodox media outlets, but also for standards of accuracy generally in the dissemination of news and comment. His focus, however, having regard to the terms of reference, and the climate in which the inquiry was established, was upon the orthodox media itself.

Mr Finkelstein concluded that there was a serious problem. It was a problem that was incurable simply by competition, competition probably more illusory than real. He formed the view, rather reluctantly I suspect, that there should be an independent statutory body, a regulatory body to be called the "News Media Council", to oversee the enforcement of standards for the news media. He thought that there should be an independent body to appoint the members of the News Media Council.

I have written and spoken elsewhere upon the outsourcing of responsibility by governments, and this, if it were to occur, would be another instance of that, the government appointing another supposedly independent body to appoint yet another independent body.[1] Mr Finkelstein's council would consist of a full-time independent chair, a former judge or other eminent lawyer, and 20 part-time members all of whom would be remunerated. It would be for the new council to develop "standards of conduct which would govern the news media". The same standards so developed would not need to apply across all delivery platforms: some would need to be specific. They would be reviewed every three years. One of the central powers of the council would be to investigate and resolve alleged contraventions of the standards, either upon complaint made, or of its own motion.

It would also have a function of educating the news media about the content of the standards, and the public about the role of the News Media Council. I confess that I tend to baulk at the use of the word "educate". When such a power is conferred upon any regulatory body, I fear that the real purpose is one of "re-education" with all the Stalinist overtones that that word has.

Mr Finkelstein said that the council should not be a "toothless tiger". It would need to have a means of enforcing its decisions. If a media outlet refused to comply with a council determination, then the council should have the right to apply to a court of competent jurisdiction to compel compliance. Any failure to obey the court order would be a contempt of court and punishable as such. This would be, he thought, a deterrent to breaches of standards and an incentive to resolve the complaint by discussion.

This short summary does not do full justice to the thought and good intentions of the author of the report and his discussion of the failures on the part of the media which brought him to the decision which he reached. I have the highest regard for Mr Finkelstein but I cannot help thinking that there is an air of unrealistic idealism in his assessment of the benefits which would flow from the existence of such a council, which included, transparency of dealings with complaints of wrongs by the media, accountability of the media, a restoration of public confidence in them, and the improvement of journalistic standards.

With one important qualification which will become apparent later, I agree that the media, uniquely in institutional public life, are effectively answerable to no one. There

is much more in the Finkelstein Report with which to agree than to disagree. His short summary of the history of attempts to regulate the media is excellent. He charts damningly the ineffectiveness over many years of the Australian Press Council. He is alive to the dangers of government intervention in any form but, in my respectful opinion, underestimates the proclivity of any government to control the media despite that there might be a structure, an independent commission on a term appointment, designed to resist that proclivity.

On occasions no one has been more critical of the media than I have. I have been the object of their disapproval and even, on occasions, much rarer, of their approbation. I have acted for and against them on many occasions. I served for a short period as a director of the Australian Broadcasting Corporation. I have had to adjudicate as a Judge on their conduct. This close personal acquaintance over some 40 odd years has not, I assure you, endeared them to me. I do acknowledge, however, that they have frequently been responsible for the revelation of misconduct and highly beneficial reforms in public and commercial affairs.

I remember once when I was acting for a media outlet it was relevant to know why a journalist had described a relatively modest house in his article as a mansion. "*Mate*", he said, *"We call any house of more than 25 squares a mansion, just as any car of over 6 cylinders, a limousine"*. I was at a Bar conference in London in 1998 at which Philip Knightley, a distinguished Australian journalist and writer, and an expert on the clandestine world, spoke. I was no stranger to the arrogance of the media, but he shocked me when he said that the media had an absolute right to the answer to any question which it chose to ask. He added, *"And if you don't give an answer when they ask you, they'll make it up, and they're fully entitled to do so"*.

I recall a case in Brisbane, *Copley v Queensland Newspapers Pty Ltd*,[2] in which a barrister sued for defamation. The newspaper had published that in prosecuting some police officers he had shouted at the complainant and treated her, in effect, as the Defendant, protecting the police officers and failing in his duty as a prosecutor. There was not a word of truth in it. The Director of Prosecutions, a man of the highest rectitude, who had briefed the barrister, was alarmed by the story. He went down to the court house and listened in full to the tape recording which had been made, as was the practice of those proceedings. Having satisfied himself about the probity and diligence of his prosecutor, he called the editor of the newspaper, for which ironically he had previously acted for many years, to ask for the story to be corrected. He urged the editor or some other senior person at the newspaper to listen to the tapes as he had. The arrogant response was that someone from the paper might do that, at some stage, if he, the Director, arranged for the tapes to be delivered to the newspaper. The tapes were in the custody of the court and necessarily would remain so. No correction was made. The barrister sued. The principal defence of the newspaper was of qualified privilege, a defence which would only succeed if the Plaintiff were able to prove, among other things, an absence of good faith on the part of the newspaper. Good faith requires honesty of purpose but not necessarily accuracy of content. On that, and all other issues, the newspaper produced only one witness, the journalist. The management of the newspaper did not know that the Plaintiff's lawyers had discovered that the journalist, who by then was no longer employed by it, had been guilty of financial irregularities in relation to his employer, in short that its own witness on good faith had breached that very faith owed to his employer. During the course of

the trial, the journalist claimed that some information for the article had come to him from a confidential source which he was honour bound not to reveal, a curious appeal to honour, in view of the newspaper's and its journalist's own conduct. Everyone in the court room was, I believe, sceptical about whether the source existed. The journalist's refusal to answer the question placed him in contempt of court. The Judge had no choice but to send him to prison. He did this very reluctantly after having given the journalist ample opportunity to obtain a release from the supposed source. The sentence imposed by the Judge was 10 days, but, of course, by indicating that he would answer the question, he could have purged his contempt and secured an immediate release.

Why do I tell you this true story? The answer is, because it shows that the media regard themselves as being above the law. The sentence was imposed on a Friday. By Saturday every media outlet in the country with a voice or a newspaper, martyred and sanctified the journalist and vilified the trial Judge. And worse, a pusillanimous Executive crumbled and released the journalist from prison by Tuesday: another example of the politicians' deference to the media.

Legal professional privilege prevents me from telling stories of even more egregious media misconduct. They remain unrepentant, determinedly denying themselves insight into their own failures. I think that many of them have long forgotten the famous edict that opinions are free but facts are sacred.[3] The media conduct businesses. They are not altruistic institutions and should not seek to hide behind the pretence that they are, whenever they are criticised. So, too, they should acknowledge the charade of editorial independence for what it is, a convenient escape hatch of a proprietor, an editor or, indeed, anyone else associated with the media outlet or journalist concerned.

What is editorial independence? A myth, I suggest. Is it independence of the managing editor, or the news editor, or the Opinions Piece editor, or a columnist or some other journalist? There was a time when there was only one editor of a major newspaper, a C. P. Scott-type figure, a person who was known to be fiercely independent, or otherwise transparently inclined to a particular line and view, and honestly expressive of it. I am always amused when I read the grandiose assertion that *"The Australian",* or the *"Sydney Morning Herald"* [insert whichever you wish], says, pronounces, denounces, proclaims, that it is the opinion of it that X or Y should be the next prime minister, or that some other public affair should proceed in a certain way. What does this mean? Have all the staff voted on it? Did the cadet journalist, or the compositor or his contemporary equivalent, or the circulation manager, or the advertising manager, or the major shareholders, have a vote? The notion that the owners, the ultimate funders of the business of a media outlet should always be denied a voice in news or policy of the outlet is quite frankly preposterous.

It is matters such as these, as well as the findings of Mr Finkelstein, and public concern that the sort of conduct which occurred overseas, may just possibly have occurred here, that has brought the politicians and some of the public to the point of considering that the freedom of the press, that the privilege of free speech itself, may have been so abused, that some regulation is necessary.

There are, however, several reasons why, despite all of my concern, and a long and sometimes close, not always approving, acquaintance with the media, that I am nonetheless strongly opposed to any further form of regulation.

First, as abused as free speech may sometimes have been, it is true to say that it is

fundamental to democracy. Any form of regulation of it is far too risky.

Secondly, regulation in almost every aspect of national life tends to be overdone. Some regulatory bodies eventually become over-zealous, over-intrusive, over-numerous, and expensive. They sometimes intervene to justify their own existence rather than because intervention is necessary. Ironically, they sometimes allow themselves be goaded into that by media demands for, as the tabloids say, "more scalps". I do not see Mr Finkelstein's model as a lean one. It contemplates a body of 20 people with an independent chairman and a complaints handling process. That sounds to me like an expensive bureaucracy.

Thirdly, such regulation, and there has been a deal of it, of the media as has occurred has not, in my opinion, been entirely appropriate or successful. The foundation for regulation by the Federal Government is the Post and Telegraphs power. How surprised the founders would be to learn that the power had been exercised to control the sale or purchase by a media company of a newspaper, as a condition of the keeping or gaining of a licence to broadcast or telecast entertainment or, for example, as a threat to a telephone company, that, unless it cooperated in the creation of a national broadband monopoly by the government, it could be compelled to divest itself of its holding in a pay television company.[4] Subject only to the technical constraints imposed by the limits of the spectrum and access to satellites, there is a strong case that anyone, on payment of a modest fee only, should be entitled to a licence to broadcast or telecast. Why should a broadcaster have to pass a "fit and proper" person test, when it is unthinkable that such a test might be applied to a publisher in the print media? Indeed, so appalling on occasions have been some efforts on the part of elements of the print media that one might wonder whether a person can only be such a publisher if he or she is an improper person.

A fourth reason is that the establishment of a Media Council is unnecessary. A little history needs to be addressed for an understanding of why this is so.

The defamation laws of all of the States until recently represented a measured evolution of the balance between free speech and freedom of the press, on the one hand, and the reasonable expectations of fairness to the public on the other. The States had enacted various defamation Acts, generally but not exactly the same. The law rightly allowed the media a great deal of latitude. The media, as always, wished for more, claiming that it was difficult for them to defend defamation cases. That claim was wrong. Anybody who has had to prove the negative, the absence of good faith for a Plaintiff, knows what a formidable defence this is.

In 2005, an Attorney-General in a federal coalition government interested himself in the defamation law. This was not Federal Government business. It was obvious to anybody with any experience in the area that the media would exploit any opportunity to change the law by tilting the balance further in its favour. That is exactly what happened. The Federal Attorney-General effectively imposed a uniform defamation law on all of the States.

This imposition was a particularly unfortunate one in the absence of a right of action for invasion of privacy. What was foreseen happened. The role of the jury was much reduced, leaving it to decide the questions, whether the publication was defamatory or not and some, but not all, of the factual components of the defences. The defence of truth and public benefit was enlarged to a complete defence of truth only. The jury was denied any role in their assessment, and damages were capped.

Exemplary or, as they are sometimes called, punitive damages, were abolished.

Not surprisingly the media had asserted that all of these changes did not go nearly far enough. The extravagance of juries was greatly overstated. The experience of defamation practitioners is that juries are generally measured in their approach to damages. Exemplary damages were reserved only for the worst possible cases, the ones in which the defamer had acted in contumelious disregard of the defamed. The highest award of which I am aware in recent times for exemplary damages was about $35,000 in a case of many blatant improprieties by a newspaper, including an attempt to intimidate a potential witness by the journalist after the proceedings were started, by misrepresenting to the potential witness that the person with her was a Federal police officer: *Griffiths v Queensland Newspapers Pty Ltd.*[5]

In his report, Mr Finkelstein correctly refers to the disadvantage which Plaintiffs suffer when they seek to sue large media outlets for defamation. Even when successful, the Plaintiff can be out of pocket and, if unsuccessful, can be ruined. Any defamation or other relevant law needs to take account of, and seek to remedy, this imbalance.

It is against this background that I state the fourth reason why I am opposed to a statutory or regulatory body. The best way of ensuring both free speech and reasonable media conduct is to restore and, indeed, enhance, in some respects, the former defamation law which the Federal Attorney-General caused to be changed. The full role of the jury should be restored. There should be a right to exemplary damages in extreme cases. Let people actually vindicate their rights and not some large and unwieldy bureaucracy which I think, regrettably, any regulatory body will not do or do well.

There also needs to be enactment of an invasion of privacy law which enables people to sue when their privacy is invaded. There is insufficient time to develop this here. Such a law is now well on the way to being established in the United Kingdom and has been recommended by the Australian Law Reform Commission. I said most of what I want to say on that topic in my dissenting judgment in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd.*[6] It would not be a difficult law to write and should provide at least the same sorts of defences as were provided previously under the various State defamation laws.

I am particularly anxious to see the role of the jury restored. Juries are much maligned. Those who criticise them are very often those who have had little experience of them. There have been few occasions on which I have disagreed with their verdicts, even when I have been on the losing side of the case. What is published, how information is used or misused are peculiarly matters of public interest in the broadest possible sense. The public should be the judge. What is fair, what is decent or proper, is peculiarly a matter for the community. There is no better representative of the community than the jury.

There is a real problem and it is well identified by Mr Finkelstein giving, as he does, examples of costs actually incurred in some cases. How can an ordinary person who has been defamed afford to litigate? My proposal would be that damages be no longer capped as they used not to be, and, as I say, that exemplary damages again be available, and that a proportion, say half the exemplary damages and a quarter of the compensatory damages, be paid into a fund for defamed persons who cannot afford to litigate. Why should this not be so? In flagrant cases of breach of intellectual property,

additional damages can be awarded. To damage a person's reputation can be as distressing, and sometimes as financially damaging, as a breach of intellectual property rights.

Furthermore, all torts, of which defamation is one, are intended to have a deterrent effect, and, in my experience, nothing deters indefensible defamation more than the financial pain that the defamer itself will suffer by an award of damages and costs. Further, an appropriate measure would be that if the defamer be held liable in damages, it pay the whole of the defamed plaintiff's costs on an indemnity basis unless the defamer has made an offer of the same amount, or more than the damages awarded, and has apologised.

A fifth reason is, that I foresee that the regulatory model proposed is unlikely to reduce litigation anyway. Its rulings will inevitably be contested in the courts. Costs for one kind of a proceeding are bound to be incurred in many cases. Those costs will have to be paid by either the public, or the relevant media outlet. A regulatory body that would not be seen to be exercising judicial power could probably be established, but this is not beyond doubt. An ingenious legal mind might well be able to mount at least an arguable case that the matters coming before the council are really legal issues fit for determination by a Chapter III Court only.

A further reason, sometimes overlooked, but, in my view, compelling argument for a strong unfettered commercial media is that there is already a publicly-funded one which, particularly in this electronic age, is publishing (electronically) on a 24-hour basis. The corporate governors of that medium are appointed by the government. That is more than enough, in my view, for any Executive. Mr Finkelstein rightly speaks of commercial barriers to entry. Government-owned broadcasting authorities may not be commercial barriers but in some ways they can operate as barriers, or at least deterrents to entry by other less-handsomely funded potential entrants.

In a sense I have already anticipated the last objection that I have to the regulatory tribunal. It is that despite all the things that might legitimately be said against the media over the years, if a strong media did not exist, society would suffer, and many excesses of power and financial improprieties would go undetected and unpunished. I would want nothing to increase that risk.

Endnotes

1. *"Responsible Government – In Dilution"*, *Quadrant*, April 2008.

2. Queensland Supreme Court, unreported, 30/07/1992, Dowsett J.

3. Charles Prestwich Scott, "A Hundred Years", essay in *Manchester Guardian* (1921).

4. I. D. F. Callinan, "Law, Economics and Interdisciplinary Indeterminacy" in J. Gleeson & R. Higgins (eds), *Constituting Law – Legal Argument and Social Values*, 2011.

5. [1993] 2 Qd R 367.

6. (2001) 208 CLR 199 at 142-166.

Chapter Two

Flights of Fancy: The Implied Freedom of Political Communication 20 Years On

Michael Sexton

The implied freedom of political communication is something of a case study for the discovery and development of implied rights under the Constitution. Following its imaginary origins, twenty years ago, it has had an erratic but steadily upward trajectory in the courts, and most particularly in the High Court. The difficulties in applying this principle in practice reflect the absence of any anchor in the text of the Constitution.

The other striking characteristic of this implied right is the deeply subjective nature of the tests that have been formulated by the High Court to assess whether a particular legislative provision contravenes the implied freedom. First, however, we should look at where all this started.

Australian Capital Television v Commonwealth

This case concerned a challenge by a number of television broadcasters to amendments to the then *Broadcasting Act* 1942 (Cth) introduced by the *Political Broadcasts and Political Disclosures Act* 1991 (Cth). The chief aspects of the legislation under challenge were:

> prohibition – except for the broadcasting of news and current affairs items and talk back radio programs – on the broadcasting during an election campaign period of political advertisements relating to a federal, State, territory or local government election.
>
> an obligation on broadcasters to make available free of charge periods for election broadcasts to political parties and certain other persons and groups.
>
> allowing the broadcast of policy launches by political parties in certain circumstances.

The obvious intention of the legislation was to reduce significantly the need for political parties to raise large sums of money from corporate and individual donors in order to fund political advertisements on television and radio during the course of an election campaign, the rationale being that such a process exposes the parties in question to real or perceived obligations to the donors in return for their donations. At this time political advertisements on television and radio were not permitted in a range of countries including Britain, France, Holland, Austria and the Scandinavian nations.

A majority of the Court struck down the legislation on the ground that it contravened an implied freedom of communication under the Constitution "in relation to public affairs and political discussion," to use the words of the Chief Justice, Sir Anthony Mason.[1] Mason CJ further said that this concept of freedom was not an absolute but that restrictions on communication that targeted ideas or information would need a compelling justification to be upheld. In the case, however, of restrictions on an activity or mode of communication by which ideas or information are transmitted, these required "a balancing of the public interest in free communication against the <u>competing public interest</u> which the restriction is designed

to serve, and for a determination whether the restriction is reasonably necessary to achieve the competing public interest" [emphasis added].[2] It is obvious that there is considerable scope for judicial discretion in making this kind of judgment. Mason CJ considered that the legislation before the Court fell into the second of these categories but took the view that it failed the test put forward by him.

Deane, Toohey, Gaudron and McHugh JJ delivered judgments to similar effect. Dawson J dissented on the ground that there was no warrant in the Constitution for the implication of any guarantee of freedom of communication that operated to limit the legislative power of the Commonwealth.[3] Brennan J also largely dissented but on the basis that the prohibition on political advertisements did not contravene any implied freedom of communication so that the legislation was valid, except insofar as it contravened the *Melbourne Corporation* principle by applying this prohibition to elections for State legislatures and for State local government bodies.[4]

One of the curiosities of the case is that only two of the States intervened. The Attorney-General for South Australia intervened to support the legislation. The Attorney-General for New South Wales appeared to argue that the legislation was invalid. This last intervention is something of an irony, given that the implied freedom of communication was destined to produce many more challenges to State than federal legislation.

The case of *Nationwide News Pty Limited v Wills*[5] was handed down at the same time as *Australian Capital Television*. This decision arose out of a prosecution of a journalist in relation to an article criticising the federal Industrial Relations Commission. The relevant provision of the *Industrial Relations Act* 1988 (Cth) made it an offence to use words "calculated … to bring a member of the Commission or the Commission into disrepute."[6]

All members of the Court held that the provision was invalid. Three members – Brennan, Deane and Toohey JJ – considered that this provision contravened an implied freedom of communication under the Constitution in relation to government and political matters. A majority of the Court – Mason CJ together with Dawson, Gaudron and McHugh JJ – took the view that the provision in question was not authorised by the relevant head of power in section 51 of the Constitution, that is, "conciliation and arbitration for the prevention and settlement of industrial disputes stemming beyond the limits of any one State."

From *Theophanous* to *Lange*

Two years after *Australian Capital Television* the High Court revisited the implied freedom in *Theophanous v Herald & Weekly Times Limited*.[7] Mr Theophanous was a member of the House of Representatives who had sued the defendant newspaper in defamation in relation to an article that was critical of his views on immigration. One of the defences relied on by the newspaper was that the article was protected by the implied freedom.

Although the publication in this case constituted discussion of Commonwealth Government and political matters, Mason CJ together with Toohey and Gaudron JJ quoted (at 124) Barendt's view that "political speech" refers to "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about". They went on to apparently establish a new defence of

qualified privilege to cover publications on government and political matters to the world at large in circumstances where the publication was reasonable.[8] Deane J joined in this view, although he also went further by making no requirement of reasonability in relation to a publication. Brennan, Dawson and McHugh JJ dissented, broadly on the basis that the Victorian law of defamation was not inconsistent with any implied freedom of communication.

The case of *Stephens v West Australian Newspapers Limited*[9] was handed down at the same time as *Theophanous*. The plaintiffs were members of the Western Australian Legislative Council who had sued the defendant newspaper in defamation in relation to an article concerning their conduct as members of parliament. All members of the Court adhered to their views in *Theophanous* on the implied freedom of communication. Also handed down at the same time was the decision in *Cunliffe v Commonwealth*[10] where provisions of the *Migration Act* 1958 (Cth) were challenged on the basis that, by placing restrictions on the services that could be provided by lawyers – for a fee – to aliens, they contravene the implied freedom of communication. Brennan, Dawson, Toohey and McHugh JJ rejected the challenge. Mason CJ, Deane and Gaudron JJ considered that a number of provisions were invalid.

The next and most unusual episode in this saga came in 1997 with the Court's decision in *Lange v Australian Broadcasting Corporation*.[11] Mr David Lange, a former Prime Minister of New Zealand, had sued the ABC in defamation over the broadcast in Australia of a Television New Zealand program concerning the conduct of his administration. The defence – drafted by myself in this instance – contained a paragraph that reflected the Court's judgment in *Theophanous*. Despite the disparate views expressed by five members of the Court in previous decisions on this issue, a joint judgment of all seven members emerged, this being perhaps a tribute to the political skills of Brennan CJ. The judgment noted the source of the implied freedom:

> The freedom of communication required by ss 7 and 24 [dealing respectively with the creation of the Senate and the House of Representatives] and reinforced by the sections concerning responsible government and the amendment of the Constitution operates as a restriction on legislative power.[12]

The Court then set out a two stage test to be used in determining whether a federal or State law contravened the implied freedom:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law <u>reasonably appropriate and adapted</u> to serve a legitimate end the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively 'the system of government prescribed by the Constitution'). If the first question is answered 'yes' and the second is answered 'no', the law is invalid.[13] [Emphasis added].

Again, the scope for judicial discretion, particularly in the second limb of the test, is obvious.

The Court considered that the NSW law of defamation did not contravene the implied freedom but struck out the paragraph of the defence based on the judgment in

Theophanous, seemingly on the ground that it referred to publication pursuant to the implied freedom rather than relying on the common law defence of qualified privilege which the Court found had developed in accordance with the implied freedom. This might seem a rather fine point of distinction after a week of argument before the Court.

As to how the subject matter of the program related to representative and responsible government under the Constitution, the Court simply noted in one sentence:[14]

> By reason of matters of geography, history, and constitutional and trading arrangements, however, the discussion of matters concerning New Zealand may often affect or throw light on government or political matters in Australia.

The shift from defamation to issues of public order

In the wake of *Lange* there were a number of libel cases where the question was whether the publication in question constituted a discussion of government and political matters as those terms were used in *Lange* and so allowed the pleading of the expanded defence of qualified privilege at common law.[15] But the real difficulties in the application of the tests set out in *Lange* were to emerge some years later in a case concerning legislation dealing with public order. This was presaged in a case heard at the same time as *Lange* and handed down shortly afterwards. This was *Levy v State of Victoria*[16] where the plaintiff had been charged with entering an area reserved for duck hunting without the requisite authority. The plaintiff argued that the purpose of entering the hunting area was to protest against the shooting of the ducks and the relevant Victorian laws, including by way of statements to the media. All members of the Court, albeit in slightly different terms, appeared to consider that the second question posed in *Lange* could be answered "yes" with the result that the validity of the challenged law was upheld. The connection between the plaintiff's conduct and the notion of representative and responsible government under the Constitution might appear to be tenuous but was only addressed by two members of the court – Brennan CJ and McHugh J who left this question open.[17]

In *Coleman v Power*[18] the High Court had to consider Queensland legislation that made it an offence to use any "threatening, abusive or insulting words".[19] Mr Coleman called a police officer corrupt to his face and was charged under this provision with using insulting words. The Attorney-General of Queensland conceded that this might constitute political comment, although this hardly seems obvious. Some members of the Court – Gummow, Hayne and Kirby JJ – construed the term "insulting" as a referring to words that were either intended or reasonably likely to provoke unlawful physical retaliation. They then considered that it met the test in the second limb of the *Lange* principle, slightly reformulated from the original decision to ask whether the law in question is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the system of representative government enshrined in the Constitution. Other members of the Court – Gleeson CJ, Callinan and Heydon JJ – rejected the limited construction of the provision but effectively took the view that it met the requirements of the second limb in any event. McHugh J rejected the limited construction and found the reference to insulting words invalid insofar as it applied to political and government discussion. One reason *Coleman v Power* illustrates the real difficulties with applying the second limb of the *Lange* test is that their Honours'

conclusions as to what limits could be placed on insulting words without offending the implied freedom arose, at least in part, from their very different individual notions of the character of Australian public debate.[20]

In 2011 a somewhat similar issue came before the NSW Court of Criminal Appeal in *Monis v The Queen*.[21] Mr Monis was charged with several counts of abusing the postal service in a way that "reasonable persons would regard as being, in all the circumstances … offensive".[22] The charges related to letters sent by Mr Monis to the families of Australian soldiers killed serving in Afghanistan. The charges were challenged on the basis that the provision quoted was invalid as a contravention of the implied freedom of political communication.

Bathurst CJ noted that the word "offensive" was used in the relevant provision in conjunction with the words "menacing" and "harassing." He went on to say:

> In these circumstances, in my opinion, for the use of a postal service to be offensive within the meaning of s 471.12 it is necessary that the use be calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances. However, it is not sufficient if the use would only hurt or wound the feelings of the recipient, in the mind of a reasonable person.[23]

Bathurst CJ held that such a law met the requirements of the second limb, adding that words of this kind had the potential to provoke physical retaliation and, at the very least, cause an emotional reaction.[24] Allsop P substantially agreed with Bathurst CJ, noting that an important feature of the post is that it enters into the home or place of work or business of the recipient as an addressee.[25] McClellan CJ at Common Law agreed with these conclusions and said:

> The section will only be breached if reasonable persons, being persons who are mindful of the robust nature of political debate in Australia and who have considered the accepted boundaries of that debate, would conclude that the particular use of the postal service is offensive.[26]

The judgments in this case tend to underline the absence of objective criteria in the application of the second limb of the test. What is the "legitimate end" served by the law in question? How is it to be determined whether the law is "reasonably appropriate and adapted" to serve that end? And how is it to be determined whether this is being done "in a manner that is consistent with the system of representative government enshrined in the Constitution"? As Heydon J noted in *Wotton v Queensland*,[27] the constant reliance on the second limb of the test:

> … is to bring into play indeterminate considerations and render them crucial in every or almost every case. Those considerations are capable of being applied by each particular judge in a different way. Considerations which tend to lead to sharp divisions of judicial opinion …

Two members of the Bench in *Monis* sat on the NSW Court of Appeal, with Basten JA, when the second limb of the test was again considered in *Sunol v Collier (No. 2)*.[28] This was a challenge to a provision of the *Anti-Discrimination Act* 1997 (NSW) that made it unlawful – subject to some qualifications – for a person by a public act "to incite hatred towards, serious contempt for, or serious ridicule of, a

person or group of persons on the ground of the homosexuality of the person or members of the group."[29] All members of the Court considered that the second limb of the test was satisfied, although some of the problems associated with the *Lange* principle illustrated by the following passage from the judgment of Basten J (who dissented as to the application of the first limb of the test):

> It should be accepted that discussion regarding sexual preference may legitimately arise in the course of political discourse, whether it be concerned with the character, status or conduct of individuals or of groups. It may also be accepted that insult and invective are a legitimate part of political debate … However, to concede that protected political speech may permit hostility, abuse and invective does not require a constitutionally demanded tolerance of speech capable of inciting hatred, serious contempt or severe ridicule.[30]

A similar result, though on a somewhat different basis, was reached by the Queensland Court of Appeal in *Owen v Menzies*, decided in late June 2012.[31] The provision of the *Anti-Discrimination Act* 1991 (Qld) in issue was nearly identically worded to the section in dispute in *Sunol v Collier (No. 2)*. A majority of the Court of Appeal held that the law satisfied the second limb of the Lange test, so did not find it necessary to consider the first limb.[32] McMurdo P preferred Basten JA's view in *Sunol v Collier (No. 2)* and held that the section did not effectively burden freedom of communication.[33]

Yet another application of the *Lange* principle in the context of public order legislation occurred in *Corporation of the City of Adelaide v Corneloup*.[34] The relevant by-law provided that no person was to without permission on any road "preach, canvass [or] harangue" or "give out or distribute to any by-stander or pass-by any handbill, book, notice, or other printed matter" (except for electoral material).[35] The defendants had been charged with preaching and canvassing in a city mall, although the content of their addressees did not seem to figure at all in the proceedings. Nor had they seemingly been charged with haranguing or with distributing printed material. Nevertheless, the Full Court of the Supreme Court of South Australia held both the by-laws quoted above to be invalid on the basis that they failed the second limb of the test.[36] The High Court has granted special leave in this case, which should be heard later this year.

Proceedings have also been commenced in the Federal Court by two members of the Occupy Sydney group who were charged with contravening a notice in Martin Place prohibiting camping or staying overnight in that area. Such notices are authorised by the *Local Government Act* 1993 (NSW). This case has not yet been heard but presumably that will occur before the end of this year. A similar case involving the Occupy Melbourne movement is before the Federal Court in Melbourne.

Is there any scope for reducing value judgments under the *Lange* test?

It has already been suggested there is considerable scope for value judgments under the second limb of the test and that is unlikely to change. It is tempting to imagine that there could be less reliance on the second limb if greater emphasis were given to the first limb – in other words, if there was more focus on the question of whether the law in question burdened the implied freedom at all. This would, however, depend, at least in part, on whether the relevant communication be categorised as political or

government discussion. Yet this question itself requires an obvious value judgment. At one level, the number of actual or potential issues in a federal election might seem to be a relatively well-defined group of subjects. But the authorities indicate that it is possible to make an argument that almost any publication relates in some way to an area of federal legislation or to a real or desired role for government at the Commonwealth or State level. It will be recalled that in *Theophanous*, Mason CJ, Toohey and Gaudron JJ quoted Barendt to say that political speech "refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about".

One decision in which the first limb of the test proved decisive was *Brown v Classification Review Board*[37] where Heerey and Sundberg JJ considered that an article in a student newspaper that amounted to instruction in shoplifting did not constitute political or government discussion.[38] It had been, however, argued to the contrary with reference to various anarchist writings and even to Oscar Wilde's, *The Soul of Man under Socialism*! The challenged law was the source of the respondent's decision to deny classification to the edition of the newspaper that contained the article in question. There was a similar result in *NSW Council for Civil Liberties Inc v Classification Review Board (No. 2)*[39] where the publications in question – which the Board considered advocated acts of terrorism – were refused classification on the ground that they promoted criminal conduct or violence.

It can hardly be right that every law dealing with some form of communication fails the first limb of the test because there could conceivably be a communication with some element of political content. Otherwise this would be true of the offence of, for example, blackmail under the criminal law or the regulation of copyright and trademarks.[40] Heydon J's call for further consideration of whether the burden to which the first limb refers is "meaningful"[41] – that is, not insubstantial or de minimus – is apposite in this context.

In many of the cases concerning the application of the *Lange* principle the character of the communication in question as political and government discussions has been either assumed or conceded and so has the question of whether the relevant law places a burden on the implied freedom. Even if this trend were to change, however, it would, of course, result in a new series of value judgments as to the character of the communication and the weight of the burden, perhaps followed in any event by the old series of value judgments already observed in relation to the second limb of the test. At least, however, a focus on these two earlier questions might allow a greater connection with the "text and structure of the Constitution" than has occurred in most of the cases to date.

Endnotes

1. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 per Mason CJ at 138.

2. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 per Mason CJ at 142-143.

3. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 per Dawson J at 184.

4. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 per Brennan J at 162-164. See also *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

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

6. Section 299(1)(d)(ii) *Industrial Relations Act* 1988 (Cth).

7. *Theophanous v Herald & Weekly Times Limited* (1994) 182 CLR 104.

8. *Theophanous v Herald & Weekly Times Limited* (1994) 182 CLR 104 at 137 and 140.

9. *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211.

10. *Cunliffe v Commonwealth* (1994) 182 CLR 272.

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

12. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.

13. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568.

14. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-576.

15. See, for example, *Herald and Weekly Times Ltd v Popovic* (2003) 9 VR 1; *Amalgamated Television Services Pty Ltd v Marsden* (2002) NSW CA 419; *John Fairfax Publications Pty Limited v O'Shane* [2005] NSWCA 164; *Peek v Channel Seven Adelaide Pty Ltd* [2006] SASC 63.

16. *Levy v State of Victoria* (1997) 189 CLR 579.

17. *Levy v State of Victoria* (1997) 189 CLR 596 and 626.

18. *Coleman v Power* (2004) 220 CLR 1.

19. Section 7(1)(d) *Vagrants, Gaming and Other Offences Act* 1931 (Qld).

20. For a further discussion, see Adrienne Stone, "The Limits of Constitutional Text and Structure Revisited" (2005) 28(3) *University of New South Wales Law Journal* 842.

21. *Monis v The Queen* [2011] NSWCA 231.

22. See s 471.12 Criminal Code 1995 (Cth).

23. *Monis v The Queen* [2011] NSWCA 231 at [44].

24. *Monis v The Queen* [2011] NSWCA 231 at [67].

25. *Monis v The Queen* [2011] NSWCA 231 at [87] and [91].

26. *Monis v The Queen* [2011] NSWCA 231 at [118].

27. *Wotton v Queensland* (2012) 285 ALR 1 at [53].

28. *Sunol v Collier (No. 2)* [2012] NSWCA 44. See also *Jones v Scully* (2002) 120 FCR 243 for a similar approach by Hely J to provisions of the *Racial Discrimination Act* 1975 (Cth).

29. Section 49ZT *Anti-Discrimination Act* 1977 (NSW).

30. *Sunol v Collier (No. 2)* [2012] NSWCA 44 at [87].

31. *Owen v Menzies* [2012] QCA 170.

32. *Owen v Menzies* [2012] QCA 170 at [156] per Muir J, de Jersey CJ agreeing.

33. *Owen v Menzies* [2012] QCA 170 at [76].

34. *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334.

35. The relevant by-laws were made under s 667 of the *Local Government Act* 1934 (SA).

36. *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at [157]-[161] and [173].

37. *Brown v Classification Review Board* (1998) 82 FCR 225.

38. *Brown v Classification Review Board* (1998) 82 FCR 225 at 246 and 258.

39. *NSW Council for Civil Liberties Inc v Classification Review Board (No. 2)* (2008) 241 ALR 564.

40. *Wotton v Queensland* (2012) 285 ALR 1 at [51].

41. *Wotton v Queensland* (2012) 285 ALR 1 at [54].

Chapter Three

Sir Samuel Griffith and the Making of the Australian Constitution

The Honourable Justice J. D. Heydon

Julian Leeser explained earlier the reasons why tonight's topic has been chosen. There is another reason why it is apposite. It emerged this morning.

Shakespeare's play, *Macbeth*, is thought by actors to be unlucky. They think that whenever it is performed something goes wrong. So they commonly call it, not *Macbeth*, but "the Scottish play". By that grey and vague expression they hope to dilute unpleasant associations and avert unforeseeable perils. For the same reason there is a recent case which was much discussed this morning which will be called below only "this morning's case". There are two things to be said about it.

The first concerns the fact that this morning's case was suggested to be a great friend to federalism. Every time it was mentioned a warm purr of pleasure rose up around the room. It may actually be a grave error to treat it as a friend to federalism. There may be reason to think that it is actually the greatest threat to federalism since the *Engineers* case. It may be that the plaintiff, and the State solicitors-general whose arguments succeeded in this morning's case, whether they realised it or not, are in the same position as the Japanese when they attacked Pearl Harbour: they have woken up a drowsy tiger which will take a grim and terrible revenge. This morning reference was made to a remark by Alfred Deakin – whose glittering career is very prominent in our history, but contains some regrettable deeds and utterances – which is quoted in this morning's case but is open to question: "wherever the executive power of the Commonwealth extends, that of the States is correspondingly reduced". It is questionable because s 109 of the Constitution suspends the validity of State legislation which is inconsistent with Commonwealth legislation. But there is no s 109A suspending the validity of State executive action, or State legislation, in the face of Commonwealth executive action.

With that gnomic utterance, I turn to the second point. The majority construction of the Constitution given in this morning's case, taken at its simplest, is completely inconsistent with what Sir Samuel Griffith, at the 1891 Convention, explicitly said was its construction. A famous judge of the early 14th century, Bereford, CJ, on hearing counsel propound a construction of a statute which Bereford, CJ, had drafted, said menacingly: "Sir, do not gloss the statute. We know better than you, for we made it." To use an expression which Ian Callinan used this morning, it was shocking to hear a case praised which states a construction of the Constitution flatly contradictory of the opinion of the man who made it – the man after whom this Society is named. Griffith is no longer treated in the Court he presided over as an authority on the meaning of the very words in the Constitution he drafted. Any doctrine of "original intent" or "original meaning" in construing the Constitution thus now appears to be dead. That means that Griffith has moved from legal doctrine into legal history.

The Constitution was a creature of the 19th century. The 19th century was an age of nationalism. In many ways nationalism was a destructive force. It gravely weakened

both the Hapsburg and the Ottoman empires, with terrible consequences for the world. It fostered a dream of unification – the unification of nations, sub-continents, half-continents and continents. In some respects the dream was self-contradictory. In many places the dream was unfulfilled. Bolivar spent his life unsuccessfully trying to unify South America: he said it was like ploughing the sea. In Africa the attempt was not even made. China was actually breaking up. In some places appalling force had to be employed – in Russia to acquire the lands of disparate nationalities; in the United States to keep them together. In India, British military power and diplomatic skill from Clive to Curzon created a unity which not even the Mughals could achieve, and which had not existed since the time of the great Emperor Ashoka three centuries before Christ. After a series of engineered wars, Germany and Italy attained unification in 1870. Only Canada, in 1867, and ourselves, in 1901, achieved continental unity by non-violent means. As Lorraine Finlay said in her paper, our Constitution did not come out of any revolution, or any dark moment like a civil war.

In our fortunate and peaceful, but not easy, path to unification, the life of Sir Samuel Walker Griffith is one bright thread. He was born at Merthyr Tydfil, Wales. He was the son of a Congregationalist Minister. The family came to Australia in 1854. They lived in Ipswich, Maitland and Brisbane. Griffith left Brisbane to enter the University of Sydney in 1860. He was 15 years old. In 1863, he completed a Bachelor of Arts degree with first class honours in mathematics and classics. Then 18 years old, he applied to be Headmaster of Ipswich Grammar School. This event is but one manifestation of the powerful ambition and self-confidence which marked his whole career. The application failed, and he became an articled clerk and studied law.

In 1866, he undertook a "grand tour" of Europe. He visited England, France, Switzerland, Germany, Belgium and Italy. He was in Italy just before the start of the Austro-Prussian War – a key event in German and Italian unification, and Bismarck's second war of aggression. That crafty Prussian statesman will re-enter our story some years later. That Italian visit began Griffith's life-long interest in the Italian language and in Italian literature.

In 1867, he completed his articles. After passing the examinations, he was called to the Bar. He was the 26th practising barrister in Queensland in order of seniority. He started slowly. But by 1870 his practice became busy. That year, he married and obtained a Master of Arts degree from the University of Sydney.

In 1872, he was elected to the Queensland legislature. He quickly came to prominence. In 1874, he drafted a long private member's bill on insolvency. After some vicissitudes in the Legislative Council, it was enacted. It remained law until superseded by Commonwealth legislation 50 years later. That was a significant achievement for so junior a member of Parliament.[1] He drafted other legislation as well.[2] It was valuable training for his great drafting achievements of the 1890s. In 1874, he became Attorney-General. He also took on the Education and Public Works portfolios in 1876 and 1878 respectively. In these offices he continued to draft legislation. In 1876, he took silk. He worked extremely hard at his double career. He was disappointed at not becoming Premier in 1877, though he was still only 32. In 1879, he refused appointment to the Supreme Court of Queensland. In the same year, the ministry fell, and he was elected Leader of the Opposition. He was the Leader of the Liberal Party for his remaining 13 years in politics.

At this point, Bismarck, now Chancellor of a united Germany, enters the federation

story. It is still unclear whether Bismarck himself favoured colonial expansion. On being urged to expand in Africa, he said, pointing to a map of Europe: "On the left is France. On the right is Russia. Here we are, in the middle. That is my map of Africa." There is no equivalent anecdote about Bismarck's map of Papua, but Queenslanders became worried about German occupation of Papua, whether Bismarck himself favoured it or not. The Premier of Queensland, Sir Thomas McIlwraith, attempted to annex the non-Dutch half of Papua to forestall the Germans. The Colonial Secretary, Lord Derby, repudiated that action on the ground that "no colony could be permitted to enlarge the Empire in this spontaneous fashion".[3] Because of McIlwraith's conduct, Alfred Deakin described him as "perhaps the most masterful political leader of the continent."[4] Deakin also compared Griffith to McIlwraith in these words: "Sir Thomas was a man of business, stout, florid, choleric, curt and Cromwellian; Griffith, the leading barrister of his colony, was lean, ascetic, cold, clear, collected and acidulated."[5]

In 1883, Griffith defeated McIlwraith in a general election and became Premier. He went at once to an Inter-colonial Convention in Sydney. According to Deakin, it met because of "[d]read of German aggression in New Guinea and of a French annexation of the New Hebrides coupled with the alarm occasioned by the arrival of escaped criminals from the penal settlement in New Caledonia".[6]

The 1883 Convention marks the first contribution Griffith made to the framing of the Constitution. He proposed a motion to create a Federal Australasian Council. The motion passed. He then drafted the Bill which the Imperial Parliament later enacted as the *Federal Council of Australasia Act* 1885. While New South Wales and New Zealand did not join the Federal Council, the other Australian colonies and the Crown colony of Fiji did. The Council had two representatives from each participating colony, though the South Australian representatives had only a brief tenure. Since New South Wales, and, for most of the Council's life, South Australia, were not members, the participating colonies were not contiguous, but were separated by the sea or by non-members.

The Council met eight times between 1886 and 1899. It had legislative power. In this, it was like the modern Senate. But it shared no legislative power with a directly elected lower house. Its decisions were not enforceable by the power of any executive responsible to it. Under section 31 of Griffith's Act, any colony could secede. And one member of the Council, Fiji, did not enjoy responsible government. The Council's legislative power depended on the assent of the Governor of the colony in which the Council was sitting. There was vice-regal power to reserve Bills for signification of Her Majesty's pleasure or to assent subject to amendments being made.[7] Deakin said of this Act:

> Unique as the platypus, like that extraordinary animal it is a perfectly original development compounded from familiar but previously unassociated types. It remains singular even among all the brood of local Governments of which the House of Commons has been the prolific parent.[8]

Deakin also said of the Federal Council:

> How far it has travelled from the customary British model may be gathered from the circumstance that it transacts its business without a Ministry or a department, without a leader or an Opposition, without a party or a programme, that there is no necessary continuity of representation, or similarity in the mode of appointment of representatives, or fixed area within which its legislation has force, that it is vagrant in domicile, and without a roof to shelter it, without a foot

of territory to rest upon, without a ship or a soldier to protect it, without a single man in its service, or a shilling of its own to pay one.[9]

It was thus very different from the post-1901 Commonwealth. But it looked forward to section 51 of our Constitution in certain respects. Section 15(a)-(f) and (h) of the 1885 Act granted the Council powers similar to those granted to the Commonwealth by section 51 – (xxx), (xxviii), (x), (xxiv) and (xxxvii) (that is, using s 51 terminology, relations with the islands of the Pacific, the influx of criminals, fisheries in Australian waters beyond territorial limits, the service and execution of process and judgments, and powers referred to the Commonwealth legislature by a State legislature.)

On the strength of the fisheries power, Deakin made the perhaps technically correct but exaggerated claim that the Council had been "endowed with an extra-territorial sphere of legislation wider than that conceded to Canada, or, indeed, to any other local Government under the Crown."[10] But the Council had further powers. Section 15(h) gave the Council power over any matter which, following a request by the colonial legislatures, the Queen by Order in Council thought fit to refer to it. Section 15(i) gave the Council a wider legislative authority still. It granted power over matters referred by the legislatures of two or more colonies. Those matters corresponded completely or to some degree with the following placita in section 51 – (vi), (ix), (xviii), (xvi), (xv), (xxi), (xxii), (xix) and (xx). That is, they included or foreshadowed the powers relating to defence; quarantine; intellectual property; bills of exchange and promissory notes; weights and measures; marriage and divorce; aliens; and corporations.

There was one power in the 1885 Act which was not replicated in 1900: a power to legislate on "any other matter of general Australasian interest with respect to which the legislatures of the several colonies can legislate within their own limits, and as to which it is deemed desirable that there should be a law of general application". If that vague power had been transferred into the Constitution, and made available to federal politicians with an appetite for the centralisation of government – of specific names it is tactful not to speak – this country would by now have ceased in large measure to be a federation.

The Council's actual legislative achievements, though far from negligible, were not large. Like the Confederation of the American ex-colonies before 1789, it was only an indirect precursor of federation. But in some of its underlying conceptions the 1885 Act was a significant dummy-run for the approach the Constitution takes to the distribution of legislative power in a federal system.

In the course of Griffith's career as Premier of Queensland after 1883, one event took place with some significance for his constitutional work. Griffith was, de facto, the senior Australian representative at the 1887 Colonial Conference in London.[11] That role confirmed him as a prominent advocate of a federated Australia within the Empire. On that visit he also travelled to the United States. There Griffith had dealings with Mr Justice Field of the United States Supreme Court and his brother, a celebrated codifier.

In 1890, although New South Wales was not a member of the Federal Council, its Premier, Sir Henry Parkes, organised an informal meeting of the colonies to discuss a closer union. Among those he consulted were Griffith and McIlwraith. The informal meeting took place in Melbourne in February 1890. Griffith was by then again the Leader of the Opposition in Queensland. He addressed the meeting on the *British*

North America Act 1867 (Imp). That Act had created a federal system of government in Canada. In relation to legislative power, the Canadian federation and its United States counterpart reflect different approaches. In Canada, specific powers were given to the provinces, other specific powers were given to the central government, and the balance were given to the central government.[12] In the United States, specific powers were given to the central government and the balance to the States. In that respect, our Constitution was to follow the United States model. But in his address Griffith pointed out how extensive the powers left to the central government in Canada were. His enumeration of them finds many counterparts in section 51 of our Constitution.

In August 1890, Griffith became Premier of Queensland for the second time. He succeeded in defeating a proposal by J. M. Macrossan, his colleague at the February 1890 meeting, for the separation of North Queensland from Queensland. In November, Griffith proposed instead that Queensland be divided into three provincial legislatures. He drafted a constitution for this sub-federated Queensland. The central legislature for this body was called the "Legislature of the United Provinces" – a romantic name, whispering echoes of the Dutch struggle against the tyranny of Spanish kings, with their dwarves, buffoons and dogs. It was given many of the powers of the Canadian central legislature. That draft constitution was Griffith's second dummy-run at drafting a federal constitution. The idea of sub-federating Queensland survives in the Constitution of 1900. Section 7 permits the Queensland legislature to divide the State into divisions and determine the number of Senators for each division. But in 1890 Griffith's proposal for a Federal Constitution of Queensland was defeated.

Having reached the end of 1890, it is convenient to pause. Griffith's life was to witness many further distinguished achievements. One was his drafting of the *Defamation Act* 1899 (Qld). Another was his drafting of the *Criminal Code* 1899 (Qld), which was copied in many parts of Australia, all over the British Empire, and later in some Commonwealth countries. Another was the drafting of the *Judiciary Act* 1903 (Cth). Yet another was his outstanding judicial career. But, as 1891 dawned, Griffith's greatest days were about to arrive. His colony had grown quickly since its separation from New South Wales in 1859. The population of Queensland was approaching 500 000. The population of Brisbane was about to reach 100 000.[13] He was an experienced Premier, toughened by the youthful boisterousness and vitality of local politics. He had had two experiences of constitutional drafting, in 1885 and in 1890. At the age of 45 he was in the prime of life. He had seen men and cities. He enjoyed a high reputation across the continent. His intellectual powers were at their peak.

Some people like to speculate on what the most crucial period in Australian history was. One candidate is the period in which the First Fleet reached Port Jackson just before Admiral La Perouse. Another is the autumn of 1942, with its vital naval victories. But a candidate which is not contemptible is the period 2 March to 9 April 1891. Those five weeks saw the 1891 Constitutional Convention produce the 1891 draft of the Constitution. And the most crucial days in that period were the three days from 23 to 25 March. In those three days Griffith, in an astonishing spurt of creativity, working late into the night, single-handedly produced the draft off which he and others thereafter worked.

There are two key groups of records which reveal the events of that five week period. First, Griffith himself collected various documents so as to record the genesis of the 1891 draft. That collection is called *Successive Stages of the Constitution*. It was

bound and now lies in the Mitchell Library, part of the State Library of New South Wales. It was not a complete collection of the relevant documents, but it has remarkable value. Griffith organised and numbered the 18 most important of them. Many of them contained detailed annotations and amendments in Griffith's handwriting.[14] In 2005, John Williams published a facsimile reproduction as part of a larger work. The second group of records is the Convention Debates for 1891. Those debates were recorded over 964 pages, and Griffith participated in them extensively.[15]

What were the key events of the 1891 Convention?

On 6 February, the Attorney-General for Tasmania, Andrew Inglis Clark, circulated a long memorandum to the delegates to the Convention. The Convention was to begin meeting on 2 March. Clark's memorandum contained a draft Constitution of 96 clauses. All but eight of them are in our Constitution in some form today. Clark greatly admired the United States, and frequently corresponded with Americans. He had both corresponded with and met the famous Mr Justice Holmes. Clark was a republican, but his draft did not depart from the monarchical model.

One of the South Australian delegates was Charles Kingston. His personal life was of a type to be euphemistically described as "untidy". But Kingston was an energetic and capable man. When he received Clark's draft Constitution, he prepared a draft of his own. He was a radical democrat. Though his draft preserved monarchical forms, it provided, for example, for the use of the referendum process to veto federal bills.

On 2 March, the Premiers, together with Clark, attended a meeting in Sir Henry Parkes's office. Parkes propounded some short and general resolutions. Their vagueness disturbed Clark, who suggested to Griffith the need for greater precision.

When the Convention met later that day, Parkes was elected President, and Griffith Vice-President. Parkes's age and his infirmities prevented him playing a major role at the Convention. In all but name, the presidential role was assumed by Griffith. There were many able speeches on the road to federation, from Parkes's Tenterfield speech to Chamberlain's speeches in the House of Commons in the summer of 1900.

One of the ablest was delivered by Griffith on 4 March. He wisely diverted the attention of delegates away from soaring and misty rhetoric, and towards mechanical legal questions. In a tone of mildly pessimistic realism, he reminded delegates of the need to concentrate hard-headedly on the real problems which the Constitution had to solve. What legislative powers should the Federal Government have? What powers should the Senate have in relation to money bills? Should Privy Council appeals be retained? One of his points was that the essential condition of the Constitution should be:

> the separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves.[16]

What those powers might be, of course, is a controversial question. Another point was his opposition to Parkes's idea that "the lower house [should] have the sole power of originating and amending all bills appropriating revenue or imposing taxation". Griffith said that that was "quite inconsistent with the independent existence of the senate, as representing the separate states."[17] A third point was his contention that it was not necessary for responsible government that Ministers sit in parliament.[18]

On 18 March, the Convention resolved to set up three committees. One was a

Finance Committee to deal with "finance, trade and trade regulation". A second was a judiciary committee, to deal with the establishment of a federal judiciary. These two committees were to report to a third committee – the "Constitutional Committee", which was to draft the Constitution. On 19 March Griffith was elected Chairman of the Constitutional Committee. It was a strong committee containing four Premiers, three former Premiers and at least four outstandingly able lawyers – Griffith, Edmund Barton, Clark and Deakin. On 23 March, after days of debate, the Constitutional Committee decided to set up a drafting committee – Griffith, Clark and Kingston, to whose number Barton was later added.

A committee is a highly inefficient instrument of drafting unless it has a precise document to concentrate on. Griffith therefore made a wise decision. On the evening of 23 March, he began to draft a Constitution by himself. Apart from earlier decisions of the Constitutional Committee, he had the draft reports of the Finance and Judiciary committees, and the drafts of Clark and Kingston. He appears to have worked principally from Clark's draft. On 24 March, Griffith spent the day in discussions with other delegates, including a formal meeting of the Convention for an hour. He spent the evening in drafting. He sent a draft Constitution to the printer at 11pm. On 25 March, he continued drafting. He met Clark and Kingston for lunch, after which he worked until 11pm. Throughout this process one must visualise messengers from the printer running back and forth to collect Griffith's changes and deliver new proofs.

There is one thing to be stressed. Griffith received a little organisational assistance from the Clerk to the Convention. But there were no focus groups, no research papers, no staffers, no public servants, no secretaries, no proofers, no parliamentary counsel, no research assistants. A determined and able man simply picked up his pen, examined his colleagues' models, and wrote.

On 26 March – Maundy Thursday – Griffith presented the resulting draft to the Constitutional Committee on a basis of confidentiality.

The Queensland Government owned a steam yacht, the *Lucinda*. It had been brought to Sydney for Griffith's use during the Convention. On the morning of Good Friday, 27 March, Griffith, without the influenza-stricken Clark but with Barton, Kingston and others, went on a cruise up the coast to Broken Bay and the Hawkesbury River – still a place of extraordinary and almost unspoiled beauty. They struck bad weather and suffered seasickness. But they nevertheless worked on Saturday 28 March from 10am to 11pm. On 29 March, they returned to Sydney to collect Clark. At 9pm, the result of the weekend's work was sent to the printer.

The document sent to the printer reflects a great deal of redrafting on the *Lucinda*, much of it attributed to Kingston.[19] But there were few major substantive changes. On 30 March, the revised draft of the Constitution was to hand. Griffith, now himself suffering from influenza, began proofreading it.

On the same day, the Constitutional Committee considered the draft from 10am to 10pm. Griffith's marked up copy was then taken to the printer. On 31 March, in the afternoon, Griffith presented the Bill to the Convention, clause by clause, highlighting difficulties and predicting controversies. It was not radically changed during the debates of the ensuing days. Of the Bill, Deakin remarked: "as a whole and in every clause the measure bore the stamp of Sir Samuel Griffith's patient and untiring handiwork, his terse, clear style and force of expression."[20] And Deakin said that Griffith's "demeanour when in charge of the Bill in Committee before the whole

Convention was almost unimpeachable in temper, courtesy and consideration."[21] The Convention approved the 1891 draft on 9 April.

The fundamental characteristics of the 1891 draft survived thereafter. The 1891 draft and all later versions of the Constitution created a compromise between two models. One was the model of a constitutional monarchy involving representative and responsible government formally dependent on Great Britain. The other was the United States model: a federal compact containing an enumerated allocation of legislative powers to the central government. Like both models, the compromise involved a bicameral legislature. In similar fashion to the United States, the system was regulated by the judicial power of the Commonwealth, which gave the courts, in particular the High Court, the power to invalidate unconstitutional action. The Constitution in its final form provided for some individual rights.[22] But it contained no general bill of rights.

It is instructive to go back to the last two points from Griffith's speech of 4 March which were identified earlier. As to the powers of the Senate over money bills, Griffith had abandoned his position by the time of the 24 March draft.[23] There was no material change in the final draft of 1891, or indeed in section 53 of the Constitution itself. Clark's draft had adopted a similar position to that of Griffith in his 4 March speech.[24] Kingston's draft was much more like the present section 53.[25] His may have been the influence which persuaded Griffith to change his mind. As for Ministers sitting in Parliament, the final 1891 draft provided that until Parliament otherwise provided, no more than seven Ministers could sit in Parliament.[26] That reflected Griffith's 24 March 1891 draft.[27] The Constitution itself in section 64 now prevents a Minister from holding office for more than three months unless a member of Parliament. That was the position adopted in Kingston's draft.[28] It was also part of the 1898 draft.[29] These developments reveal two things. They reveal that it is not Griffith and Clark alone who can be said to have framed the Constitution. They also reveal in Griffith a statesmanlike willingness to compromise, or perhaps an acute sense of pragmatism. He was not like the Abbé Sieyès in the French Revolution. He was not dedicated to the theoretical devising of formally elegant but, in fact, fragile systems. Nor did he mulishly seek primacy for his own views. He wanted progress towards a practical consensus.

It would be wearisome on this occasion to trace in detail any further differences between the Clark and Kingston drafts, and Griffith's pre-*Lucinda* draft, or to consider the later drafts, and compare them with the draft which the Convention approved on 9 April 1891. It would also be wearisome to trace the differences between the 1891 draft, the 1897-1898 drafts, and the final version of the Constitution. It is enough tonight to note five major insertions that took place after 1891.

The first two concerned the list of Commonwealth legislative powers in Ch I Pt V cl 52 of the 1891 draft. Clause 52 did not include what became section 51(xxxi) – which empowers the Commonwealth to make laws for the acquisition of property for any purpose in respect of which it has legislative power, but only on just terms. And the 1891 draft did not include what became section 51(xxxv) – which grants to the Commonwealth power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. Section 51(xxxi) is a vital check on federal power. Hayek saw this kind of limit as indispensable to justice. Hayek also saw it as a method of ensuring that

administrators, too prone to addressing short-term advantages only, are made to concentrate on the true cost of particular legislation.[30] Like section 51(xxxi), section 51(xxxv) was inserted in 1898. The origins of the latter provision can be traced to Kingston's draft. In 1898, Richard O'Connor opposed it on the ground that the topic was fitter for State control. On the other hand, H. B. Higgins favoured a wider power, dropping the interstate requirement.[31] Like the field to which it applies – the relations of labour and capital – the placitum itself has been controversial.

The third major insertion was the provision in 1897 for double dissolution elections to resolve deadlocks between the Houses of Parliament. This insertion, as modified by the Premiers' Conference of 1899, became section 57 of the Constitution.

The fourth major insertion was the inclusion by the Premiers' Conference of 1899 of what became section 96 of the Constitution. It concerned grants by the federal legislature of financial assistance to the States. It is, of course, a provision now very commonly acted on.

And the fifth change after 1891 to be noted, probably a change less important than the others, was the development of the provision relating to Privy Council appeals.[32]

Subject to other changes made in 1897-1898, it is true to say, as J. A. La Nauze said, that the "draft of 1891 is the Constitution of 1900, not its father or grandfather."[33] Like Griffith's contemporaries, La Nauze considered that the major force behind the 1891 draft was Griffith. For his own part, Griffith praised Clark's draft as laying the "original groundwork", and praised as well the drafting of Barton and Kingston.[34]

Griffith became Chief Justice of Queensland in 1893. In modern times it is thought right that Chief Justices should abstain from the political fray. Griffith did not act on the view. He still had three main roles to play in the framing of the Constitution.

The first is that he remained a pillar of the federalist movement, displaying near-constant activity in speeches, writing and private influence.[35]

The second concerned the 1897-1898 Convention. He corresponded with many delegates to that Convention. He made detailed drafting suggestions to R. R. Garran, Secretary of the drafting committee. La Nauze had observed: "it is fitting that the final form of the Constitution contains not only much of Griffith's text of 1891, but his lofty corrections of the words of the later and lesser draftsmen of 1897."[36] In June 1897, Griffith published an assessment of the work of the Adelaide Convention: *Notes on the Draft Federal Constitution framed by the Adelaide Convention of 1897*. Of his criticisms and expressions of regret, only those of contemporary significance need be noted. He doubted whether it was wise for Senators to be directly elected, and for each State to be recognised as a single constituency. He preferred the 1891 draft as leaving it open for Ministers not to be members of Parliament. He questioned the formulation of section 92, which required, and requires, that trade, commerce and intercourse between the States should be "absolutely free". He raised this question even though it was his own formulation. It is a sign that he pondered difficult problems, constantly and without complacency.

Griffith's third role took place during the period between despatch to London of the draft Constitution approved by the colonial legislatures and by referenda, and the enactment of it by the Westminster Parliament on 9 July 1900 in slightly different form. On 19 October 1899, Griffith informed Joseph Chamberlain, the Secretary of State for the Colonies, that he "had reason to believe that the people of these Colonies would gratefully welcome any suggestions that may be made by Her Majesty's advisers with

the view of perfecting this most important instrument of government."[37] This showed a certain nerve. As Chief Justice Gleeson remarked to this Society 10 years ago, the "confidential solicitation of suggestions to 'perfect' a Constitution that had been drafted in Australia, approved by the colonial Parliaments, and then agreed to by popular referendum, by someone who had been a leading figure in the federal movement, and who was now outside politics, is worth reflecting upon."[38] Apparently with Griffith's approval, Chamberlain suggested the sending of delegates from the colonies to confer with him and his officials.[39] A Premiers' Conference agreed that each colony should appoint a delegate. Those delegates were instructed to press for the passage of the draft Constitution without amendment. This collided with any moves towards "perfection" by British officials or by august Australians like Griffith. Griffith's principal objective was to amend the version of section 74 sent to London to provide for wider rights of appeal to the Privy Council. Indeed, Griffith advocated rights of appeal which were wider than those in the version of section 74 he had favoured in the 1891 draft. The delegates in London defended the version which had been approved in the colonies. Griffith shifted ground a little. He rallied behind the compromise Chamberlain made with the delegates. And he suggested various drafting changes that are reflected in the final form of section 74.

When Chief Justice Dixon was sworn in in 1952, he referred to the debating style of the Griffith court, in which "arguments were torn to shreds before they were fully admitted to the mind".[40]

Chief Justice Dixon's bitter-sweet retirement speech in 1964 was kinder. He said that Griffith and Clark were "probably the two dominant legal figures" in the 1891 Convention. He also said that "the Constitution owes its shape more to them, probably, than anybody." Speaking as a former barrister with nine years' experience of Chief Justice Griffith as a judge, Sir Owen Dixon said that in court Griffith revealed:

> a dominant legal mind. To my way of thinking, it was a legal mind of the Austinian age, representing the thoughts and learning of a period which had gone, but it was dominant and decisive. His mind clearly was of that calibre: he did not hesitate, he just felt that he knew; and that what he knew was right.[41]

The impression which the first Chief Justice of the High Court gave to the young barrister who became its sixth Chief Justice is an impression also to be gathered from his work in helping to frame the Constitution. In that role, however, he seemed to reveal more tact, patience and suppleness than he later did as Chief Justice. But whatever his methods in developing the Constitution, it was the greatest work of an outstanding lawyer and a formidable personality. No doubt if Griffith had never lived, there would still have been a form of federation among the Australian colonies. But without the urgent impetus of his dominant and decisive mind the federal enterprise of the 1890s might have wallowed listlessly, helplessly and unproductively. It might have turned out very differently.

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Chapter Four

Federal-State Relations and the Changing Economy

The Honourable Christian Porter

This analysis will attempt to make an essentially descriptive academic point, but one which may also prove to be a useful theoretical basis for some immediate practical reform of Federal/State financial relations in Australia. The point being made concerns the inter-relationship between what are the two most significant issues in the present landscape of Federal/State financial relations – Vertical Fiscal Imbalance (VFI) and Horizontal Fiscal Equalisation (HFE).

Simply put, this paper will propose that VFI in Australia is not being properly addressed by the existing system of HFE.

HFE operates predominantly through the mechanism of the Commonwealth Grants Commission (CGC) distributing goods and services tax revenues in accordance with a complex formula. The intention of this mechanism was to achieve a pure form of HFE. It has been proposed that HFE is alleviating the problems associated with a very high degree of VFI in Australia.

This paper will argue that this is an irretrievably flawed proposition. In addition, this paper will argue that the alternative, that HFE actually exacerbates rather than alleviates acute VFI in Australia, is an assertion that is entirely accurate but one that has been overlooked.

An appreciation that Australian HFE cannot be properly described as reducing the degree of VFI in Australia is a useful starting point from which to consider the options for achievable and immediate reform of Australia's fiscal federalism.

Ultimately this paper will conclude that, in circumstances where the States of Australia have too little of their own revenue (relative to the Commonwealth given the expenditures they must undertake), it is absurd that the central mechanism operates to redistribute State rather than Commonwealth revenue. Another conclusion is that perceiving the present system of HFE to be a remedy to the problem of VFI is the economic equivalent of the abandoned medical practice of treating patients with anaemia by bleeding them with leeches.

In developing this point, the paper will proceed in three parts, commencing with a brief analysis of the nature and extent of VFI and HFE in Australia; then considering how HFE is seen as a remedy to the problem of VFI; and how, in the present Australian context, this cannot be true.

Vertical Fiscal Imbalance (VFI)

VFI is a term used to describe some substantial degree of revenue-expenditure asymmetry in a federation. In financial terms VFI can be most simply defined as the difference between the share of revenue raised and expenditure made between the different tiers of government in a federation.[1] In this sense VFI describes the situation where the spending by sub-national governments in a decentralized/federal system is larger than the revenue raised by those sub-national governments.[2] Perhaps the

simplest academic measure of the phenomenon is the difference between own source revenue and own spending.[3]

In a federation, both political and fiscal power is divided between the central or Federal government and State or 'sub-national' governments. Given that the Commonwealth fiscal policies associated with re-distribution of taxation revenues presently do not delineate between States and territories, this paper will use the term "States" to refer to both sub-national States and territories. The absence of this delineation and its potential impact upon VFI will be discussed later. Proceeding with the division of fiscal power in broad terms, however, the nature of the fiscal separation that should exist in a federation was described in the *Federalist Papers* thus: "the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants."[4]

Despite the use of the term "should", the paragraph above is a descriptive as well as normative statement. It proposes a description of what a federation should ideally encompass, notably, a very high degree of fiscal autonomy for both the State and Federal layers of the decentralized federal system. The economic definitions and measures of VFI referred to earlier indicate that the term, VFI, is also a descriptive term and, importantly, one that exists in opposition to a perceived ideal. VFI is a term used to describe variance from the model of fiscal autonomy in a federation. In that respect, VFI is said to exist when the situation that actually prevails inside a federation exhibits a divergence from the principle of federal fiscal organisation proposed in the *Federalist Papers*.

There are several arguments as to why a high degree of fiscal autonomy is a good structure in practice and why it is undesirable to stray too far from the model of States possessing independent authority to raise their own revenue. Essentially, these arguments revolve around the contention that, in practice, the best results in the efficient expenditure of tax revenue are achieved when the body responsible for the spending of revenue is also responsible for raising it.

Conversely, the argument is that government accountability is weakened, and transparency reduced, when the link is broken between one layer of government deciding how to spend revenue and another layer of government deciding how to raise and collect revenue.

Both because this is a short paper and because the ground is fairly well-trodden in academic writings, this paper will not focus on the theoretical arguments about why VFI can affect a federal nation's economic performance negatively and/or why the present extent of VFI in Australia is particularly problematic. What should be plain by now is that this paper proceeds from the author's philosophical acceptance (informed also by a little time observing State/Federal financial relations in practice) of the common sense proposition that accountability and transparency are enhanced and practical results improved when the government that spends revenue is also responsible for raising it.

While a division of spending and revenue-raising responsibilities and capacities necessarily exist in any federation, there is sound econometric evidence to suggest that several problems arise when there is an excessive degree of VFI. Chief among these problems are fiscal profligacy, the inefficient or underuse by sub-national governments of their existing taxing powers, and a tendency toward sub-national budget deficits and excessive borrowing.[5] Examples of both State and national fiscal profligacy are not

difficult to identify. On the point of excessive borrowing, it has been said that the two basic ways that VFI can be addressed are through complex systems of inter-governmental grants or the imposition of spending guidelines by national governments upon sub-national governments.[6]

What does require brief examination in this paper is the practical manifestation and measure of VFI in the Australian Federation and an assessment of its comparative extent.

In practical terms, VFI exists in Australia where, from a national revenue pool, the States raise substantially less revenue than they require to meet their standard expenditures; and the Commonwealth Government raises substantially more revenue than it requires to discharge its standard expenditures. That this scenario exists in Australia is beyond doubt, although some debate exists regarding its extent compared to other federations.

There is a strong argument to suggest that, compared to other federations, the level of VFI in Australia is extreme.[7] The recent Senate Select Committee report, *Australian Federation: an agenda for reform*, noted that the extent of VFI in Australia depends upon whether the GST revenues are characterised as State or Federal revenue:

> In considering Australia's VFI, it should also be noted that the extent of the VFI varies depending on the assessment of the Commonwealth's revenue raising capacity. The OECD data notes that Australia's VFI increased with the introduction of the Goods and Services Tax (the GST). This was also noted in evidence to the committee [see NSW Government, *Submission 39*, Appendix A, p. 2]. Australia only has a large VFI if one treats the GST as Commonwealth revenue. Although legally accurate, as all of the revenue is distributed to the states and territories, including the GST when calculating the VFI is a distortion of the fiscal reality. Nevertheless, Australia's VFI is significant and entrenched.

Whether the GST should be properly considered as State or Federal revenue and, therefore, whether Australia's VFI is extreme or merely substantial, is a point to which this paper will return later.

For present purposes, it can be accepted that in measuring VFI, GST revenue is generally treated as Commonwealth revenue. As a consequence, the extent of VFI in Australia is generally characterised as very substantial and problematic and it is accepted that it leads to a range of economic inefficiencies. For instance, it has been noted in a historical summary of VFI in Australia that in

> comparison with the fiscal federalism in advanced economies, the Australian federation is characterised by a substantial vertical fiscal imbalance between revenue and expenditure at the national and sub-national levels of governance. Whereas the Commonwealth government raises about 70 per cent of total public sector revenue, it only accounts for around half of all public expenditure.[8]

More recent figures from the WA State Treasury serve to illustrate the severity of VFI in Australia. Since 2000-01 the Commonwealth's share of revenue has never fallen below 80 percent and its share of overall government expenditure peaked in 2008-09 at 55 percent. Conversely, the States' share of revenue has never exceeded 16 percent and its share of overall government expenditure peaked in 2009-10 at 41 percent.[9]

In a paper presented to the Sir Samuel Griffith Society in 2010, Jonathan Pincus, using gross ABS data (rather than percentages), noted that to displace all Commonwealth grants, the States and territories would need to increase their own tax

revenues by about 140 percent, or their own taxes and charges by about 90 percent. This is because in 2007-08 State and territory tax revenues were $53.1bn and expenditures were $161.3bn, with the Commonwealth in that year making $75.0bn in grants.[10] In the same paper, concurring with the comparative assessment of Twomey and Withers, and Dollery, Pincus described Australia as having "an extraordinarily high degree of vertical fiscal imbalance and tax collection." [11]

Horizontal Fiscal Equalization (HFE)

The other great controversy accompanying fiscal federalism in Australia is horizontal fiscal equalization (HFE). The principle of HFE used by the Commonwealth Grants Commission (CGC) has been defined as follows:

> State governments should receive funding from the pool of goods and services tax revenue such that, after allowing for material factors affecting revenues and expenditures, each would have the fiscal capacity to provide services and the associated infrastructure at the same standard, if each made the same effort to raise revenue from its own sources and operated at the same level of efficiency.
>
> The aim is for all States to have the same fiscal capacity to deliver services to their populations, after the distribution of the GST, and taking into account their capacities to raise revenue from their own sources.[12]

As noted in the recent Western Australian submission to the GST Review Panel, the equalisation principle used by the CGC is essentially an equity (or fairness) concept applied at the State government level. Pursuant to this concept, the "wealthier" States subsidise the "poorer" States (or sub-national governments) so that each has the capacity to provide the same standard of services to its people in fields such as health, education and law and order, without imposing higher taxes. According to Pincus, "roughly the goal of the CGC is to fund each jurisdiction so that it can afford to provide the average level of publicly-provided goods and services if it levied the average level of taxes and charges (and achieved the average net public financial assets).[13]

Two changes in the equalisation process (in 1978 and 2001) are worthy of note.

The present manifestation of the HFE principle can perhaps be traced back to 1978. In that year, the Commonwealth asked the CGC to review the distribution of financial assistance grants, using what was essentially the modern definition of the HFE principle.

Prior to 1978 the system had remained relatively unchanged from about 1959 and has been described in the following terms:

> From the 1950s the problem of vertical fiscal imbalance was addressed by three types of grants (Groenewegen, 1979); namely, financial assistance grants (previously called tax reimbursement grants), special grants and specific purpose grants. Moreover, increasing weight was attached to specific purpose grants, which escalated from 23.7 per cent of total payments to the states in 1960/61 to 31.4 per cent in 1971/72.[14]

From about 1959 to the advent of the GST, changes to the system essentially entailed the changing proportion of monies allocated under the guise of different types of grants as well as changes to the overall pool of grants.[15]

The year 1978 marked a significant change. The "special grants" process came to an

end and the present HFE framework commenced. Since 1978, an increase in any one State's grant share has been necessarily at the expense of other States.

There was further significant development in 2001-02. Financial assistance grants were replaced with GST revenue grants under the 1999 Intergovernmental Agreement on the Reform of Commonwealth–State Financial Relations (known informally as the "GST Agreement").

The national GST grant pool was larger than the financial assistance grant pool it replaced (and has grown significantly larger still as a consequence of growth in GST revenues). The immediate effect was to increase the base per capita grant for each State rather than altering the proportion of funds received by each State. However, the controversy presently surrounding the CGC distribution of GST derives from the combination of the 1978 adoption of the modern purist HFE principle combined with the 2001-02 replacement of financial assistance grants with GST revenue grants. Essentially, in 1978, a purist form of redistribution was adopted and, from 2001, the amount of funds that were to be distributed according to this purist version of HFE (with the addition of GST revenue) increased significantly.[16]

The formula by which HFE is deployed is notoriously complicated, certainly too complicated to be summarised here. It is the present outcome of the system that produces the modern controversy.[17] From the practical starting point of an equal per capita share of the national GST pool, each State's share is adjusted in accordance with two fundamental principles. First, that States with a higher per capita capacity to raise revenue from their own sources (assuming each applied national average tax/royalty rates) have their GST share reduced; States with low capacity have their GST share increased. Second, States with higher per capita costs of service provision due to factors outside their control have their GST share increased and States with low costs have their GST share reduced.

Inside the above principles, revenue capacity assessments are based on the (per capita) size of each State's revenue base (for example: mining value of production for royalties; wages and salaries for payroll tax; and value of properties transferred for stamp duty on conveyances). Expenditure assessments recognize higher costs in providing services to indigenous people, the aged (in health care), younger people (in education) and remote areas, and may reflect higher service usage rates by some population groups and/or higher costs per service.

The ultimate result for Western Australia has been that its higher revenue raising capacity relative to other States (driven by the strength of its resources sector) now far outweighs its historically higher cost of service provision, which exacerbates the difference between its GST grant share and its population share.[18]

Space does not allow re-argument of the economic questions associated with this distribution or how the inequity of the distribution is presently so great as to require reform. It is relevant to address one argument that often arises regarding the unfairness of the present distribution of GST monies. This is the argument that equity is preserved in the long term because States who may now be donors were previously recipients under the broader history of the HFE system.

The first problem with this argument is that it assumes that some simple measure exists that would allow for comparison of a particular State's gain as a recipient in, say, the period 1930-40, to its losses in a later period between 2010-20. Ultimately, it is not possible to make such comparisons for a number of reasons. While equalisation has

been a feature of the Australian federation from very shortly after 1901, its rationale and various manifestations have changed significantly between even short periods of time. What might have been the purpose of "equalization" in 1930 is not necessarily that of the 1990s, making long-term comparative analysis largely meaningless.

The present system of HFE is a redistributive principle meant to effect a broad outcome of funding each jurisdiction (national and sub-national governments) so that it can afford to provide the average level of publicly provided goods and services if it levied the average level of taxes and charges. Previously, fiscal equalisation was far more ad hoc, from time to time taking account of specific advantages or disadvantages suffered by jurisdictions due to prevailing federal policies. While concerns about the fiscal weakness of some States arose shortly after federation, the arrangements which governed equalisation have changed constantly. The CGC itself notes that the Commonwealth began providing Special Grants in 1910. These were aimed generally at giving the weaker States a fiscal capacity comparable to the stronger States.[19] After being initially addressed through Special Grants to financially distressed States, the equalisation process has been administered by the CGC since 1933, with the CGC seeking to adjust revenue relativities in Federal Government transfers and determine specific purpose payments.[20] However, to characterise the transfers of monies from the Commonwealth to States prior to 1978 as a general attempt to equalise fiscal capacity is only part of the story of Australian equalisation in all its iterations.

For several periods of time, when financially weaker States were beneficiaries of equalisation, a component of the benefit was intended as a direct compensation for a loss in revenue to them occasioned by federal protectionist policies. This was a point noted in the Western Australian Submission to the Review of GST Distribution where it is described that, in the early years of federation, the less populous States of Western Australia, South Australia and Tasmania identified that they were disadvantaged in a number of ways. These stemmed from their primary production-based economies, which were exposed to global competition and thus were adversely affected by tariffs that increased their input costs, which also led to some countries imposing retaliatory tariffs on imports from Australia.[21] Dollery characterises the period 1919-20 to 1932-33 in the following terms:

> The system of equal per capita payments, supplemented by special grants to compensate Western Australia and Tasmania for their high contribution to customs revenue, continued during the twenties, despite growing opposition from the states, especially the less populous South Australia, Tasmania and Western Australia.[22]

Because gains under the 1910 equalisation system often included the payments specifically made to compensate certain States at certain times for specific Commonwealth policies which caused them identifiable disadvantage, the long-term comparison of gains and losses is methodologically difficult and substantially uninstructive. This problem is exacerbated by the ad hoc nature of payments meant to compensate certain States and the often political rather than statistical or economic basis on which compensatory payments were sought and granted. A prime example of the operation of the system involving compensatory payments appears in a history of the CGC which recounts that,

> In 1929 Western Australia approached the Commonwealth seeking an increase in the level of the grant from $600,000 to $1,200,000. The Bruce-Page Government

> offered $900,000 on condition that the State ceded the north-west to the Commonwealth.[23]

To argue, as some do, that present inequity, no matter how gross, is justified because equity is somehow maintained in the long-term on the basis that past gains can be compared with, and quantitatively militate against, present losses is a very superficial and ultimately uninstructive analysis.

To be of any analytical merit, comparisons of gains and losses should be confined to periods when the system that distributed monies was relatively stable. From 1988-89 until 30 June 2000, when financial assistance grants were replaced by the GST revenue grants system, Western Australia was a beneficiary. Its net gain of $5.2bn in that period is being completely eclipsed in the period 2001-02 to 2015-16 by a projected loss of $17.3bn (this is so even accounting for relative changes in the value of the amount over the relevant time period).[24]

The reason for this shift is that, presently, HFE is a comprehensive or purist form of equalization. The redistributive system of personal income tax is not a perfect analogy but is nevertheless able to provide a highly illustrative conceptual comparison. The GST HFE distribution and the Australian income tax systems both seek to transfer wealth from households with more of it to households with less.

Other than the fact that HFE seeks to effect this on an interstate scale, there are two important differences which emerge. The first critical difference is that the CGC HFE scheme pursues a theoretical outcome close to total equalisation. HFE seeks in theory to equalise State fiscal capacities thoroughly and completely by redistributing *all* of what is determined to be above average revenue.[25] This is not a stated objective of the income tax system. What is immediately notable about this objective is that, in other contexts, totally equalising the benefits of above average revenue generation would be considered inequitable and thereby unsustainable (such as, for instance, the application of a 100 percent marginal personal income tax applying to wage and salary income above a determined average).

That this complete and comprehensive level of redistribution, as the aim of HFE, is likely excessive appears to have been accepted in large degree by the recent GST Review. It indicated that one worthwhile option is a redefining of the principle, such that:

> The Panel intends to investigate whether providing comparable capacities for States would be an approach more suitable to current challenges than the present one of providing materially the same capacities. This would improve efficiency by reducing the size of any capacity effects as well as the ability of States to influence average policy. Further, the Panel would be keen to explore the practicalities of equalising to an external standard, or a standard below the average of all States.[26]

The second difference is that the CGC HFE process (unlike the simple income tax formula) distributes according to an immensely complicated formula that seeks to equalise the fiscal capacities of all States by redistributing all of what is determined to be above average fiscal capacity (through the mechanism of reduced share of GST monies) — but only after a contemporaneous assessment of each State's needs. Needs are measured by going beyond the comparative ability (or inability) to raise revenue and assessed in terms of actual needs in service delivery. Needs in this sense are conceptualised as being related to cost variations between the States in delivery of

services to some nominal average level. In this way, the CGC HFE process utilises a formula to determine what amount of redistributed funds should be taken away from a donor State, but the formula simultaneously assesses both capacity (in terms of revenue raising capacity), as well as need, measured in terms of service delivery difficulties (which manifest in higher costs of some determined average level of service delivery).[27]

An obvious problem with this process is the defining of "needs". The recent GST Review was quite correct in its acknowledgment of the incredibly important point in the modern Australian context, that:

> While the current system includes an assessment of infrastructure costs, this primarily recognises the relative growth of each State's total population. This assessment of infrastructure costs does not therefore directly account for the costs borne by States for mining related infrastructure, particularly when it is not recorded in the General Government sector. The Panel is inclined to the view that changes to the current arrangements are required to ensure that all mining related infrastructure is appropriately recognised.[28]

In the end result, Australia's purist and comprehensive form of equalisation is currently the equivalent of a 100 percent marginal tax rate on any above-average fiscal capacity for any State (later balanced against an assessment of those States possessing any greater than average spending needs – but excluding the necessity to spend on the infrastructure that contributes to the revenue generation in the first place). The result is an equalisation process that has become highly divisive.

As was noted in the Western Australian submission to the GST Distribution Review, the problem of divisiveness caused by extreme results is not just a concern of those States adversely affected. It was also recognised by the Commonwealth Treasury in its advice to the Gillard Government following the 2010 federal election when it stated that:

> … recent focus on the Commonwealth Grants Commission methodology, including the impact of Western Australia's growing prosperity, has placed pressure on the principle of horizontal fiscal equalisation, a key element of federal financial relations since the 1930s . . . growing pressures on horizontal fiscal equalisation may require consideration of whether adjustments are needed to ensure sustainability of the arrangements into the future.[29]

As has already been noted, academic unanimity may not attach to a conclusion regarding whether VFI in Australia is extreme by international comparison or only very substantial. However, one area where a strong conventional wisdom does appear to exist is the view that, given the existence of a federal system, the level of VFI in Australia is of a degree significant enough that it must be addressed.

For many decades a variety of mechanisms have been employed to address VFI in Australia. Dollery notes the situation in the following terms: "Given the growing magnitude and chronic nature of fiscal imbalance in the Australian federation, it is not surprising that debate amongst economists during the twentieth century focussed on the best methods of dealing with this difficult question".[30]

The inadequacy of HFE as a remedy to VFI

The methods that can be employed to alleviate VFI are essentially two-fold: decrease State spending or increase State revenue. In a federation, a reduction in sub-national

spending can be achieved either by simply not providing (at all) a range of services or infrastructure traditionally and presently provided by the sub-national governments, or by transferring some spending responsibilities from the sub-national to the national government. Conversely, an increase in State revenue may be achieved either in the form of grants or, more substantively, in the form of the provision to the sub-national governments of powers to levy and collect revenue of some type previously not collected by sub-national governments.

If there is some dispute about the comparative extent of VFI and the magnitude of its negative effects on the Australian economy, then perhaps the strongest indicator of a consensus of opinion that the problem is real and significant is the enormous policy and political effort taken to remedy VFI. Twomey and Withers have noted that Australia has significant VFI balancing simply because Australia, in their view, has the highest level of fiscal equalisation. The Senate Committee, which cites the Twomey and Withers paper, notes that all the mechanisms for equalisation in Australia essentially involve the Commonwealth transferring large sums of money to the States to assist them to meet their expenditure responsibilities.[31] In short, substantial sums of money would not be transferred by the Commonwealth to the States if VFI was not a real and substantial problem.

Given that the existence and negative effects of VFI *and* the operation and extent of HFE are the two central controversies of the modern Australian federal system, it is worth examining why HFE is itself held out to be a remedy for VFI. On this point it is important to note that HFE is not just the basis for the distribution of GST monies; it is also the effective basis of distribution applying to the majority of Commonwealth grant monies other than GST.

The present situation was well described by Pincus when he noted that the existence of VFI in Australia means that almost half of the spending of the Australian States and territories is funded by Commonwealth grants. In 2010-11 the Commonwealth Government budgeted to provide the States with $94bn in payments, being an amount equivalent to 6.7 percent of GDP and just under 30 percent of Commonwealth tax revenues. Importantly, Pincus noted: "The grants are about 50/50 GST and other; and approaching half of the 'other' get pooled with the GST for purposes of fiscal equalisation".[32]

It makes perfect sense to describe the half of Commonwealth grants <u>not</u> pooled with the GST for the purposes of fiscal equalisation as grants directed at achieving an alleviation of VFI. And, further, it makes some sense also to characterise the "other" half of grants that get pooled with the GST for purposes of fiscal equalisation as grants directed at achieving an alleviation of VFI. This is because these grants, in practical terms, represent a true distribution of Commonwealth revenue from the Commonwealth to the States.

The central contention of this paper is, however, that it does not make any sense whatsoever to characterise the GST payments (which are subject to comprehensive HFE) as being properly directed toward, or in any way actually achieving, an alleviation of VFI.

This is because the GST money is already supposed to constitute State money and, accordingly, the GST/CGC system does not in any practical sense represent a shift of revenue from the Commonwealth to the States, but merely a redistribution of State money between States for the purported end of equalisation.

The proposition that the GST monies distributed according to HFE alleviates VFI is no more absurd than Robin Hood arguing that he had effected his end of transferring wealth from rich to poor by redistributing money between poor people: to the very poor from the not quite so poor (in circumstances where the wealth of the rich remained untouched).

So silly is the characterisation of the GST distribution as alleviating VFI that it is both surprising that the contention persists at all and surprising that it is not more often criticised. But the contention is made, nevertheless, and from the most authoritative sources. The recent Senate Committee report was unequivocal when it stated, under the heading, "Managing VFI within the Australian federation," that "measures that have been introduced to attempt to improve the fiscal imbalance between the tiers of government *include GST distribution*, Specific Purpose Payments (SPPs), National Partnership Payments (NPPs) and general revenue assistance".[33] [Emphasis added]

The Senate Select Committee itself noted that the extent of VFI in Australia depends upon whether the GST is considered Commonwealth revenue, noting that ". . . Australia's VFI is significant and entrenched."[34]

Whatever its statutory basis for collection, there is broad agreement that the GST was meant to be State revenue and the Senate Committee, in the foregoing passage, appears to acknowledge this practical fact. Buttressing the contention that the GST should be considered in practice as State revenue is the fact that to achieve receipt of GST monies, the States agreed to give up a range of revenue sources to which they previously had access.[35] The significance of what was given up in terms of revenue to achieve the GST is indicated in an article by the Under-Treasurer of Western Australian, Tim Marney. He noted, "for the first three years of the GST funding arrangements GST grants were insufficient to cover the forgone revenues and additional expenditures in most states (including Western Australia), requiring top up 'budget balancing assistance' from the Commonwealth under the terms of the IGA."[36]

It can be seen that, originally, GST was meant to alleviate VFI by providing the States with a growth source of revenue untied by the Commonwealth. Certainly, had GST as a revenue source grown as anticipated for all States, its characterisation as a remedy to VFI may have found greater merit. For States such as Western Australia, however, the GST has not grown as was expected. Indeed, even in total terms, it was noted as early as 2006 that the revenue windfall said to have been achieved by the GST for the States was actually tiny in the general scheme of things, being $1.2bn in 2005-06 or 0.1 percent of GDP.[37]

In recent times the size of the overall benefit to the States from the GST has been further diminished by slower than expected growth in the GST pool owing to sluggish consumption and changing consumption patterns. But the original purpose of providing *all* the States with an untied growth source of significant revenue has been most substantially subverted because the extreme nature of HFE means that large amounts of revenue now being used to benefit financially weaker States are being sourced from what would otherwise constitute the revenue of other States.

The simple fact is that prior to the advent of the GST in 2001-02, the financial donation to financially weaker States that occurred under the banner of equalisation was achieved using revenue that was unequivocally Commonwealth revenue.

The serious and under-explored question that now arises is why, in the context of severe VFI in Australia, does the burden of improving the circumstances of those States

that may from time to time be financially weaker than their counterparts fall on the remaining States (rather than on the Commonwealth, which presently raises more money than it is required to spend).

The Senate Select Committee concluded that, "by comparison with all other federations, Australia has a high level of VFI. Over time, the VFI has severely undermined the capacity of the States and territories to raise the revenue necessary to undertake their assigned constitutional responsibilities."[38] The Committee further noted that, over many decades, an extensive range of mechanisms have been developed to address the problem. The obvious question arises that, if VFI has severely undermined the capacity of the States and territories to raise the revenue necessary to undertake their assigned constitutional responsibilities, why does it fall on already underfunded States to provide so much of the funds now used for the equalisation of capacity in financially weaker States?

The unreality of now characterising GST payments distributed according to a comprehensive HFE as alleviating VFI is perhaps clearest when considering the case of the Northern Territory.

Where Pincus noted that VFI means that almost half of the spending of the States and territories is funded by Commonwealth grants, he also noted that this figure was more than 80 percent in the Northern Territory.[39] Moreover, despite the Commonwealth's relative revenue wealth compared to the States, a very significant proportion of the money devoted to the Northern Territory derives from other States' GST monies.[40]

The situation is, now, that there is, first, a striking correlation between donors and recipients in 2012-13:

Western Australia will subsidise the Northern Territory;
Victoria will subsidise South Australia;
New South Wales will subsidise Tasmania; and
Queensland will subsidise the Australian Capital Territory.

Second, of a total donated amount of $4.016bn in 2012-13 more than *half of this amount, totalling $2.224bn, is received by the Northern Territory.* The other recipients are South Australia, $1.007bn; Tasmania, $629m; and the Australian Capital Territory, $156m.

There is no doubting the need of the Northern Territory, Tasmania and South Australia.

As was noted above, the CGC/HFE process uses measures of both revenue and need in terms of service delivery costs. The Northern Territory has very high relative costs of service delivery which correlates to its very high share of Australia's indigenous population, and that each of the present recipient States/territories of Northern Territory, Tasmania and South Australia show much higher than average low socio-economic communities.[41]

In practical political terms, the paucity of State revenue generally, and relative abundance of Commonwealth revenue, the needs for assistance manifest in the Northern Territory, Australian Capital Territory, Tasmania and South Australia are in large part being met by the remaining States.

Indeed, more than half of the divisiveness caused by the present system of GST distribution is caused by the fact that despite the severe nature of VFI in Australia, and despite the far stronger revenue base of the Commonwealth, the responsibility of

meeting the needs of the Northern Territory beyond its own capacity to raise revenue no longer falls on the Commonwealth (as it always did, prior to 2000). That responsibility now falls to the four largest States which, in the context of VFI, can least afford that responsibility.

Leaving aside arguments regarding the natural constitutional responsibility which the Commonwealth may maintain with respect to the Australian Capital Territory and the Northern Territory, there is a powerful proposition that emerges. Notably, that it is less than reasonable to expect the four largest States to bear such a substantial share of the burden of assisting the Northern Territory (and other jurisdictions requiring "equalisation") by the donation of what was meant to be a significant growth source of revenue for those States.

The strength of this proposition should be assessed in the context of both the severity of VFI in Australia and two other important contextual considerations.

These two other contextual factors are, first, that equalisation in the form of wealth subsidies from one State to another already occurs in Australia by a range of means other than through the formal mechanism of monies distributed by the CGC. And, second, it is a readily identifiable phenomenon that when the Commonwealth experiences periods of financial distress (often associated with the need to reduce Commonwealth Budget deficits), a key method employed to return to surplus is to decrease monies allocated to already underfunded States.

Western Australia provides a $15bn plus net fiscal contribution to the federation (all other States except New South Wales are subsidised).[42] This is driven by the high level of Commonwealth revenue derived from Western Australia (company tax, personal income tax and petroleum extraction revenue), together with the low draw on Commonwealth social security and health benefits by residents of Western Australia. Western Australia has been providing a net contribution to the federation since the mid-1980s, with the amount increasing substantially in subsequent years. Western Australia's growing economic strength, the Commonwealth's proposed mining tax and the State's falling share of GST revenues are likely to see its net contribution to the federation continue to grow substantially.[43]

On the second issue of declining grants to the States, the 2012-13 Commonwealth Budget is a case in point. To achieve the enormous fiscal consolidation promised by the Commonwealth Government, and to bring a budget in deep deficit back to a small projected surplus, major cuts in States' funding were made. The official letter to State premiers and treasurers regarding the 2012-13 Commonwealth Budget included a document entitled, *Supplementary Information to the States and Territories on the 2012-13 Budget – Fact Sheet 1*.[44] It showed that, despite the acute level of VFI in Australia, the total financial assistance to the States decreased in one year from $96.156bn in 2011-12 to $90.370bnin 2012-13. This represents a very substantial reduction of $5.786bn in one year. A huge $1.124bn of this loss will be borne by Western Australia.

The mischaracterisation of GST payments as a mechanism alleviating VFI presents some obvious clues to practical, immediate and achievable reform of the GST distribution.

The several potential solutions to VFI have had frequent discussion in proceedings of The Samuel Griffith Society. They include the future sharing of income tax revenue, a potential broadening of the base, and increasing the rate, of the GST, or the

provision to the States of some other revenue source such as a share of the Petroleum Resource Rent Tax.[45]

The proposal in this paper is more modest but has the advantage that it is immediately and quickly achievable if the Northern Territory and the Australian Capital Territory had been directly funded by the Commonwealth and the GST pool had then been distributed amongst the States only on a per capita basis.[46]

If this method had prevailed in 2011-12, all four large States would have received more GST monies: New South Wales $1.043bn more; Victoria $1.432bn more; Queensland $939m more; and Western Australia $1.552bn more. The States that would have received less under this method would have been: South Australia, with $851m less; and Tasmania with $614m less. However, that combined loss ($1.465bn) represents a significant mitigation because of the increased size of the pool that would have occurred had the Northern Territory and the Australian Capital Territory been nominally funded directly by the Commonwealth. Indeed, that loss of $1.465bn could be potentially mitigated by the four large States through special agreement and all four large States would still be better off than under current arrangements. It may also be conceivable that the remaining $1.465bn loss could be mitigated by the Commonwealth.

The central point is that in a scenario where the Commonwealth assumed responsibility for all payments to the Northern Territory and the Australian Capital Territory presently drawn from the GST pool, the recurrent cost to the Commonwealth Budget in 2012-13 would be $3.652bn. Such a responsibility would be truly consistent with constitutional lines of responsibility. It would allow also for a swift end to the present divisiveness of the GST system. Further, it would allow for a starting point of a per capita sharing of GST monies with scope for some agreement between the remaining States that would see the four largest States significantly better off and Tasmania and South Australia potentially no worse off than under the present system.

Indeed, were the Commonwealth to subsume responsibility for all subsidies beyond the per capita shares to States, this would be achieved at a cost to the Commonwealth Budget of $4.016bn in 2012-13. Whether this is a large or reasonable impost on a Commonwealth Budget should be considered in light of the fact that in 2012, grants to the States were cut by $5.786bn. Either scenario would greatly reduce the problem of VFI, end the divisiveness of the present GST distribution system and allow the large Australian State economies the flexibility they need to fund services and infrastructure. All this could be achieved without the introduction of any new taxes.

Conclusion

The Senate Select Committee recently concluded that:

> On the basis of the material presented to the committee, the committee sees merit in a comprehensive assessment of the IGA on Federal Financial Relations and taxation levels and structures, to determine if measures can be taken to provide the states certainty regarding their revenue raising and their capacity to meeting their responsibilities.[47]

There is little to disagree with in the above proposition. It omits, however, a further substantive benefit of reducing VFI. A modern and essential benefit of actually and substantively reducing VFI in Australia is that it would allow the four large State economies the flexibility to invest in infrastructure designed to develop their

economies and wealth and revenue for the entire nation. This has never been more important than in the present economic conditions in Australia, which represent a fundamental restructuring of the economy and where, to expand their economies, State governments increasingly need to react quickly to fluid economic opportunities. At present, the large growth States do not have sufficient revenue to invest in these opportunities.

Since the start of the Global Financial Crisis, Australia has added 92 000 jobs in mining and 62 500 in construction. But by November it had lost 127 000 jobs in manufacturing, almost as many as in the entire 1990-91 recession. Employment in manufacturing has fallen in Australia during the last decade but manufacturing itself has actually increased in the same period in Western Australia. Indeed, it is notable that in the December 2011 quarter alone, 7 000 jobs were created in manufacturing in Western Australia. In the year to December, Australian domestic demand (that is, spending) grew by 4.6 percent (faster than GDP growth): only because Western Australia and Queensland drove this figure up – demand grew by 13 percent in Western Australia and 8.2 percent in Queensland. In all other States, demand was basically flat, growing only between 0.1 and 1.7 percent. Western Australia is, at present, driving the national economy. With only 10 percent of the nation's population, WA will contribute:

20 percent company tax take;
60 percent (Mining Resource Rent Tax);
40 percent of Australia's total exports; and
45 percent of Australia's total merchandise trade.

In the year to April 2012, 70 percent of all new Australian jobs were created in Western Australia.

From time to time different States, in response to rapidly changing global economic conditions, will have the opportunity to increase revenue and employment for the entire nation. The great tragedy of modern VFI, however, is that they will be immediately constrained by a lack of real flexible revenue to take greatest advantage of those situations. That outcome is to the detriment of the national economy.

Endnotes

1. Senate Select Committee Report on Reform of the Australian Federation "Australian Federation: an agenda for reform" published 30 June 2011 see 4.2. Available online at: http://www.aph.gov.au/~/media/wopapub/senate/committee/reffed_ctte/reffed/report/report_pdf.ashx ("Senate Select Committee Report on Reform of the Australian Federation").

2. *Karpowicz I,* "Narrowing Vertical Fiscal Imbalances in Four European Countries", IMF Working Paper see page 1, available online at http://www.imf.org/external/pubs/ft/wp/2012/wp1291.pdf

3. For the use of this definition, see R. Bird, and A. Tarasov, "Closing the Gap: Fiscal

Imbalances and Intergovernmental Transfers in Developed Federations," *Government and Policy*, 2004, vol. 22, 77–102. And for the operative use of a similar working definition, being the share of sub-national own spending not financed through own revenues see Eyraud L., and Lusinyan L., "Decentralizing Spending More than Revenue: Does It Hurt Fiscal Performance?" 2011 IMF Working Paper 11/226 (Washington: International Monetary Fund).

4. The Federalist No. 32, Concerning Taxation (continued), *The Federalist Papers*, Penguin Books, 1987, 220.

5. See Eyraud, L., and L. Lusinyan, 2011, "Decentralizing Spending More than Revenue: Does It Hurt Fiscal Performance?" IMF Working Paper 11/226 (Washington: International Monetary Fund). And see Rodden J "The Dilemma of Fiscal Federalism: Grants and Fiscal Performance around the world need full reference. And see

6. Craig, J. (1997), "Australia", in T. Ter-Minassian, (ed.)(1997), *Fiscal Federalism in Theory and Practice*, Washington: International Monetary Fun d, 175-200.

7. Twomey, A. & Glenn Withers, *Australia's Federal Future. Delivering growth and prosperity*, Federalist Paper No 1, Report for the Council of the Australian Federation, April, 2007, 37–38.

8. Dollery B., "A Century of Vertical Fiscal Imbalance in Australian Federalism", *History of Economics Review*, 2002, 38. On this point Dollery illustrates the point using a table which shows the relative degree of vertical fiscal imbalance in Australia on the measure of 'vertical current balances' being the own source revenues for each level of government to own source current expenditures. At the time Australia had a ratio of 1.45 above Canada 1.05, Germany 1.03 and the USA 0.93.

9. Data sourced from Department of Treasury for Western Australia and it should be noted this data does include GST revenues as Commonwealth revenue. For further details, see Appendix 1: http://samuelgriffith.org.au/docs/vol24/vol24chap4-appendices.pdf

10. Pincus, J. J., "Revisiting Proposals for a State Income Tax" Paper presented at 22nd Samuel Griffith Society Conference Perth 2010, Chapter 6. Available online at http://samuelgriffith.org.au/docs/vol22/vol22chap6.pdf citing data from (ABS 5506.0 – Taxation Revenue, Australia, 2008-09).

11. *Op. cit.,* Pincus, 58.

12. Commonwealth Grants Commission, *Report on GST Revenue Sharing Relativities — 2011 Update.* https://cgc.gov.au/attachments/article/26/2011%20Update%20Report.pdf ("GST Revenue Sharing Relativities — 2011 Update").

13. *Op. cit.*, Pincus, 58.

14. *Op. cit.*, Dollery, 35.

15. *Op. cit.*, Dollery, 35 – 37.

16. Northern Territory and the ACT were brought into the arrangements in 1988 and 1993 respectively.

17. For a slightly fuller description see Porter C., "*The Grants Commission and the Future of the Australian Federation*" Public Policy 2001 Vol. 6 No. 1/2 at 55.

18. Source: Western Australia Department of Treasury. For further details, see Appendix 2: http://samuelgriffith.org.au/docs/vol24/vol24chap4-appendices.pdf

19. *Op. cit.*, GST Revenue Sharing Relativities – 2011 Update.

20. *Op. cit.*, Dollery, 27.

21. WA Submission to the Review of GST Distribution October 2011 at 6 where it is also noted that interstate free trade hampered the growth of secondary industry (in the less populous States) by facilitating 'dumping' by New South Wales and Victorian manufacturers; and the Commonwealth's *Navigation Act and Conciliation and Arbitration Act* resulted in artificially high freight rates and wage costs respectively, placing export oriented States at a competitive disadvantage. Available online at: http://www.gstdistributionreview.gov.au/content/submissions/downloads/issues_paper/wa_gov.pdf ("WA Submission to the Review of GST").

22. *Op. cit.*, Dollery, 33.

23. Commonwealth of Australia *Equality in Diversity – Fifty Years of the Commonwealth Grants Commission,* Australian Government Publishing Service, 1983, 9. Ultimately, this publication notes the very point that a central rationale for the establishment of the CGC was to put financial assistance for disadvantaged States on a more systematic basis; see 12 and 16.

24 For further details, see Appendix 3: http://samuelgriffith.org.au/docs/vol24/vol24chap4-appendices.pdf

25. *Op. cit.* Twomey & Withers noted that the pursuit of equalisation in Australia exceeds the pattern in all other comparable federations. As a consequence, it provides greater disincentives for sub-national governments to seek and provide efficient delivery of government services. At a minimum, more transparent and less complex equalisation processes with improved incentives for efficiency could be developed.

26. GST Distribution Review Interim Report March 2012 at 80 ("GST Distribution Review Interim Report").

27. See *op. cit.*, Porter C

28. *Op. cit.*, GST Distribution Review Interim Report, 101.

29. *Op. cit.*, See WA Submission to the Review of GST, 12 quoting (Commonwealth Treasury 2010, 17).

30. *Op. cit.*, Dollery, 27.

31. *Op. cit.*, Twomey & Withers, 37–38. The Senate Committee to which this paper was presented noted that "As the Commonwealth raises more revenue than the states and territories, these mechanisms [for equalisation] all involve the Commonwealth transferring funds to the states to assist them to meet their expenditure responsibilities " see Senate Select Committee Report on Reform of the Australian Federation, 5.

32. *Op. cit.*, Pincus, 58.

33. *Op. cit.*, Senate Select Committee Report on Reform of the Australian Federation, 57. See also Ahmad E., and Craig J., 1997, "Inter-governmental Transfers", in Ter-Minassian T. (ed), 1997, *Fiscal Federalism in Theory and Practice*, Washington: International Monetary Fund, 73-107 at 76 the authors characterise the Australian approach to the issue of VFI as being the third of three possible responses; whereby the vertical and horizontal imbalances are dealt with simultaneously through a system of grants, including equalisation payments and special purpose grants.

34. Senate Select Committee Report on Reform of the Australian Federation, 56.

35. At a Premiers' Conference on 9 April 2000 Premiers and Chief Ministers agreed to The *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*. This Agreement was annexed as Schedule 2 to the *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999*. Part 2 s.5(iv) of the Agreement stated that the taxes to be abolished were listed in Appendix A which also set the then required timeline for abolition.

36. Marney, T., "The GST agreement – setting the record straight", *Tax Policy Journal*, vol 3, 2007, 6.

37. *Op. cit.,* Marney at 6 citing Macquarie Bank research paper, Federalism Watch – 4 July 2006: Four facts missing from the debate on Federal / State relations".

38. Senate Select Committee Report on Reform of the Australian Federation, 69.

39. *Op. cit.*, Pincus, 58.

40. For further details, see Appendices 4 and 5: http://samuelgriffith.org.au/docs/vol24/vol24chap4-appendices.pdf
What is depicted in Appendix 4 is the donors and recipients under the GST system from the present 2012-13 financial year to the end of the forward estimates.
The graphs in Appendix 4 depict projected GST relativities from 2012-13 to 2015-16 using the data set contained in 2012-13 Western Australian State Budget but incorporating GST pool estimates from the 2012-13 Commonwealth Budget. The graphs in Appendix 5 have been included for completeness and depict projected GST relativities from 2012-13 to 2015-16, using the data set contained in 2012-13 Commonwealth Budget and GST pool estimates from the 2012-13 Commonwealth Budget. This analysis will focus on the data set produced by Western Australian Department of Treasury, which has a more sophisticated methodology for calculating forward estimates of royalty revenues than does the Commonwealth Treasury, and has consequently proved more accurate in predicting actual GST shares into the out-years.

41. Commonwealth Grants Commission, Presentation to the Panel reviewing the GST Distribution, 6 May 2011, Available at: https://cgc.gov.au/attachments/article/40/CGC_2011_presentation_to_GST_Review_panel.pdf

42. For further details, see Appendix 7: http://samuelgriffith.org.au/docs/vol24/vol24chap4-appendices.pdf
Appendix 7 demonstrates Western Australia's net contribution to the Australian federation, distinguishing the contribution through the GST system from all other contributions.

43. *Op. cit.*, WA Submission to the Review of GST, 9.

44. Supplementary Information to the States and Territories on the 2012-13 Budget – Fact Sheet 1 delivered in letter dated 8 May 2012 from Prime Minister Gillard to Premier Barnett and Treasurer Porter. For further details, see Appendix 8: http://samuelgriffith.org.au/docs/vol24/vol24chap4-appendices.pdf

45. At the 2010 conference Professor Jonathan Pincus argued in favour of income tax sharing and *op. cit.*, Twomey and Withers, *op. cit.*, 49, argued at the Senate Select Committee Report on Reform of the Australian Federation that*: [s]erious tax reform would recognise that Australia overtaxes incomes and undertaxes spending compared to other OECD economies. Our overall tax take is at the lower end of industrial economies as a share of GDP but is strongly biased toward income tax sourcing. Both personal income taxes and corporate income taxes represent higher shares of public revenue in Australia than in most comparable countries.*"

46. For further details, see Appendix 9: http://samuelgriffith.org.au/docs/vol24/vol24chap4-appendices.pdf
Appendix 9 shows distribution of the GST in 2011-12 for two scenarios:
    1. What actually happened in terms of distribution of the GST in 2011-12.
    2. What would have happened in terms of distribution if the Northern Territory and the Australian Capital Territory had been directly funded by the Commonwealth and the GST pool had been distributed amongst the States only on a per capita basis.

47. *Op. cit.*, Senate Select Committee Report on Reform of the Australian Federation.

Chapter Five

A Federalist Agenda for Coast to Coast Liberal (or Labor) Governments

The Honourable Richard Court

This is the first time in the history of The Samuel Griffith Society that two former treasurers of Western Australia have led critical discussion on our federation.

Some may be expecting a team act that presents a strong case for the secession of Western Australia from the federation – to the contrary, I see it as our responsibility as members of The Samuel Griffith Society to strengthen the federation with constructive, well-thought through arguments supporting the necessary changes required to reverse this constant trend of centralising more and more revenue streams and other critical powers into Canberra.

What is more, the reality is secession has already occurred. The central government in Canberra has seceded from the federation of States! Successive central governments of both major political persuasions have lost touch with the States and lost interest in understanding the challenges different States face in delivering the majority of this country's essential services without the revenue autonomy required.

It is demeaning for State leaders and State bureaucrats to be lectured by their federal counterparts on how to run schools, hospitals, power systems, environmental approvals, infrastructure priorities, etc, when they themselves have trouble putting two submarines to sea at the same time.

Canberra's transformation to the political equivalent of a schoolyard bully has happened because successive central governments – Liberal and Labor – have used their growing financial muscle and interpretations of our Constitution by the High Court to erode the position of the States.

In my youth it was the Whitlam Government who, I vividly remember, wanted to override the States on many fronts including their Soviet-style plans to take control of our gas at the well head. The transformation of Canberra from the capital of our federation to Australia's answer to the hermit kingdom has been sustained and relentless.

The Howard-Costello Government in its latter years was antagonistic towards the States, using the excuse that all the States were governed by Labor and why would you want to give them any more money – they are not competent. This blinkered and arrogant view has one serious flaw. The decision as to who elects the State governments is made by the people of each State. If they believe the government needs to be changed, they will change it. However, the Government in Canberra needs to work with all the States, whatever their political persuasion.

The Rudd-Gillard governments then tried the nuclear bomb approach – a resource super profits tax to try to override royalty revenue streams of the States. After a violent reaction across the political divide it morphed into the mining resource rent tax (MRRT) but still with a foot in the door to weaken further the States' ability to raise revenues.

The announcement of the RSPT achieved many things including:

Putting sovereign risk on the table for investors and customers.

Focusing Tony Abbott's attention on the financial plight of the States. In Western Australia he even vows to be a "born again federalist" which is a positive break from his natural tendency to follow in John Howard's footsteps.

Hopefully this empathy for the long-term financial decline of the States will rub off on to some of his "experienced" front bench who still delight in lecturing the States.

I repeat the story that my father fondly recalls Sir Robert Menzies saying in the Cabinet ante-room after a fiery and contentious Premiers' Conference and Loan Council: "Six State premiers send me up the wall but I would not have it any other way because it is our insurance against dictatorship".

The Canberra money grab has to stop. Both the major political parties must reassess the imbalance between the revenues collected by the different arms of government and the areas of expenditure for which they have responsibility. Putting it bluntly, we are one of the few countries in the world where the central government actually has too much money and they resort to incredibly inefficient ways to spend that money – more of that a little later.

As I have said, this Sheriff of Nottingham mentality knows no political boundaries. We expect a drift to the centre from Labor governments but, in the past, both the major political parties have followed the same path. If the government changes at the 2013 federal election, does that mean the attitude towards the States will change? Bad habits are hard to fix but, if the former Howard-Costello Government ministers who were dismissive of the States are a part of an incoming ministry, and believe they can simply continue where they last left off, they will face a massive backlash within the State branches of the party.

Historically

As we look at attitudes and actions of the present, it is perhaps illuminating to consider the views and concerns expressed by the different State representatives who spent the best part of a decade negotiating the Constitution for our federation during the 1890s. What were their intentions?

In Western Australia's case, the lead player was our first Premier, John Forrest. Forrest wanted the States to have a fiscal freedom . . . financial independence and, as the eventual model emerged, he warned that the path chosen would lead to power being centralised in the new Federal Parliament, but even he could not imagine the speed with which the States' position was eroded. John Forrest said:

> All we desire to say is that three fourths of the Customs revenue shall be returned to the States. Unless the States have some security of this kind the people cannot be expected to accept the Constitutional bill . . . It is like beating the air to tell us that we are to give up our great revenue producer – the Customs – and that we are to have no guarantee whatever that any part of that money will be returned to us, although we shall each have to provide for the payment of interest on our public debts.

Well, within a decade the Commonwealth Parliament had abolished these obligations and it is no surprise that, 110 years later, a new beast called the Resource Super Profit Tax was unleashed as yet another attempt to grab a revenue stream quite rightly belonging to the States. As an aside, just to show how young our federation is,

my father, Sir Charles Court, who passed away a few years ago at the age of 96, was alive with all of the premiers of Western Australia, including the first, John Forrest, and the current premier, Colin Barnett.

Over the years we have seen countless interpretations of the Commonwealth Constitution by the High Court giving the Commonwealth Parliament legislative powers wider rather than narrower scope and meaning. Our constitutional history is littered with examples of a little give and a lot of take by Canberra. It is an attitude that has fuelled repeated talk of secession in the west and, in one case, direct action. In the secession referendum in Western Australia, held on 8 April 1933, there was a two-to-one majority vote in favour of Western Australia seceding from the Commonwealth. The response to the discontent was establishment of the Commonwealth Grants Commission to assist in a fairer distribution of revenues between the States.

During the Second World War we then saw the central government temporarily take over income taxing powers. When peace returned, the States income tax did not.

It is correct that the States can still constitutionally raise an income tax. But the political reality is that, unless the central government is prepared to lower its rates to allow the States to have a share, it will be difficult to achieve.

We saw a central government introduce a payroll tax which was then transferred to the States in 1971. We saw the High Court decision which ruled that the States could not raise license fees for wholesaler's licenses covering areas like tobacco and alcohol. The Federal Government needed to step in to collect these taxes on behalf of the States.

In many ways this was the catalyst in 1998 when the Howard Government introduced legislation for the goods and services tax (GST). To the credit of the Howard-Costello Government, this was a taxation proposal put fairly and squarely in front of the people before an election, giving it legitimacy when it was introduced.

Christian Porter has clearly outlined the issues surrounding the GST but I want to make this observation. When the GST was introduced, there were projections made as to what the collections and distributions would be between the States; at the same time there were projections for the Federal Government's collection of income tax and company tax.

Peter Costello as the Federal Treasurer had a standard speech that he would present to all the States, hammering them by saying, "we are giving you access to a growth tax, it has grown quicker than we projected, what are you doing with all the money?"

It was correct that the GST was providing a growth revenue source, but what he failed also to say is that income tax and company tax collections were also growing at record levels courtesy of the first wave of very strong commodity prices in the latter half of their term in government.

It is much easier being a treasurer in Australia when commodity prices are strong. For many years, the revenues flowed in well above Treasury predictions. To his credit Costello used these revenue streams to retire debt and address the central government's superannuation liabilities.

Wayne Swan, Treasurer in Labor governments, 2007 to 2013, has had even stronger commodity prices filling the Treasury coffers. In that environment there is no excuse for the central government not to be running substantial surpluses.

Yes, confidence needed to be enhanced during the Global Financial Crisis but our strong export performance hardly missed a beat. The central government has the

strong financial muscle due to the fact that it collects the company taxes and income taxes and we all know the old rule – whoever has the money tends to call the shots.

Today it is a different story: GST revenues are not growing as projected. Western Australia is heading towards a zero per cent share – that is what I call heavy lifting and enough to cause real unrest.

The irony of the workings of the Commonwealth Grants Commission is that it can reward inefficient States. If a State discourages mining, fishing or a timber industry, it can have wonderful green credentials and receive an even greater share of revenues generated by States like Queensland and Western Australia!

We just had one of the wise men from the east, Joe Hockey, the Shadow Treasurer, saying it was time for Western Australians now do some "heavy lifting" to help the other States that are struggling – no problems with that. We have been beneficiaries in the past.

Speaking of heavy lifting, when a State with 10 percent of Australia's population produces 40 percent of Australia's total export income, *that* is heavy lifting and it requires massive infrastructure expenditure and delivery of expensive health, education and other services in remote regions. If in doubt, visit or, better still, work inside these projects to experience the challenges.

He went on to give us some advice that we should introduce toll roads as a solution to the State's financial problems – that is, more tax. We already tax fuel. The more fuel you use, the more tax you pay. In our books, that is a fair user pays system.

Fuel taxes, or different variations of it, were introduced to fund roads. We are still collecting tax on fuel but they seemed to have been lost into general revenue.

Western Australia does not have toll roads for good reason. The people using those roads, cars, trucks, etc, already have user pay taxes to fund those roads. Toll roads are double dipping as if a fuel tax never existed.

Next we are going to be told to put poker machines in all the clubs and hotels to raise more money. I can assure you that no government of either political persuasion in Western Australia will ever go down that path.

When Joe Hockey made these comments he reminded me of my first meeting, as a new young State MP, with the CEO of the then Bank of New South Wales in Sydney in the early 1980s. He bluntly told me the States were a nuisance – there is only one worth keeping and that is New South Wales.

I was too intimidated to reply that Western Australia was the only State that had never been a part of New South Wales and, perhaps, we should revert to those boundaries for our country.

Then along comes the Resource Super Profit Tax which morphed into the MRRT. As I have said previously, another back door attempt by the central government to put a bigger tap into the resource sector revenue vein at the expense of the States and the companies who have played such a responsible role in ensuring the continuing strength of the Australian economy, particularly during a difficult global financial crisis.

Why do you need a new tax? If commodity prices are high, companies are making record profits, well, guess what, companies pay record tax – company tax.

The Government receives record levels of income tax because of the high employment generated. If you feel so strongly that the company tax being paid is not enough, why do you not have the guts to raise the level of company tax.

There was one small hurdle with this initial proposal and that was we have

sovereign States with the minerals in those States belonging to the Crown and it is the States' constitutional responsibility to manage those resources properly. It is up to the States whether or not they charge an *ad valorem* royalty or a profit-based royalty and, if the royalty levels happen to be low, the Federal Government collects more in tax, and vice versa.

The good news about the MRRT is that the Liberal Opposition has agreed to scrap it along with the carbon tax which is actually working to increase global carbon dioxide emissions by seeing energy intensive mineral processing being transferred from Australia to countries using predominantly coal fired power generation with higher emissions.

Whenever the question of access by the States to revenue streams is raised there are always plenty of suggestions to increase the level of certain taxes – for example, increase the rate of GST. My answer is simple. We are already collecting enough taxes in this country. It is not the overall amount that is the issue, it is the effectiveness of how it is distributed and spent.

The federation will fracture unless there is a change of heart by the major political parties. My message to all the State premiers and the State Leaders of the Opposition is that *Western_Australia is your friend.* We are fighting for *all* the States to have access to new growth revenue streams.

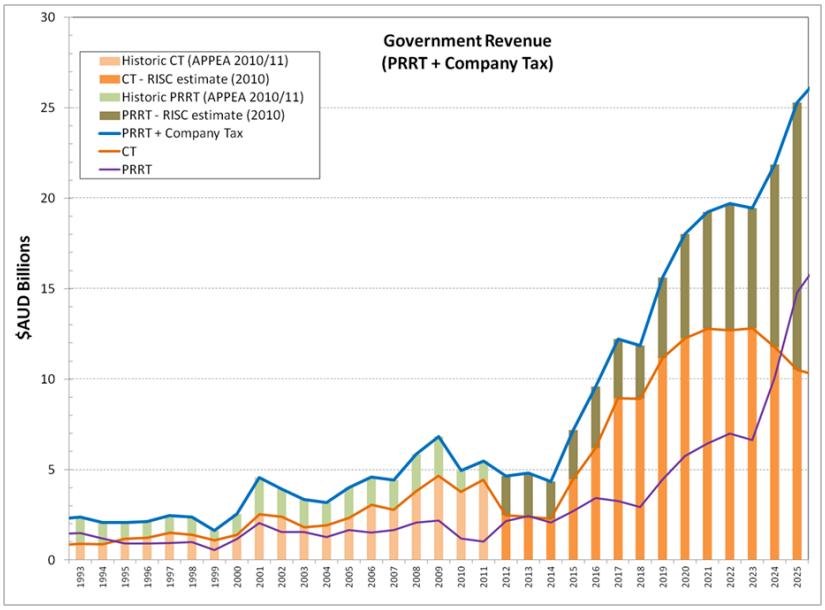
The split of GST revenues between the States is another important issue but the most critical one is regaining some financial autonomy.

I now put forward a constructive suggestion. Our central government is about to be swamped with a tidal wave of a massive growth revenue stream as a consequence of the current development of the next generation of offshore LNG projects, Gorgon, Ichthys, etc. What is not widely understood is that the North-West shelf LNG project, so far Australia's largest and most successful resource project, even though it is in "Commonwealth waters", has a royalty-sharing arrangement where approximately 70 per cent of the royalties flow to the government of Western Australia and 30 per cent to the central government.

It was an agreement negotiated between the State (by Sir Charles Court's Government) and the Commonwealth (Malcolm Fraser's Government). As a result of the workings of the Grants Commission, the majority of that 70 per cent flowing to Western Australia is then redistributed to all the other States and, as we are aware, Western Australia has been ending up with a smaller and smaller share as a result of that revenue redistribution.

But the bottom line is *all* the States benefit from this arrangement and that is why *all* the States should be very, very, very interested in the types of negotiations Western Australia is trying to do with our central government.

With the next generation of offshore LNG projects, for example, Gorgon, Ichthys, etc, not a single dollar of the royalty revenue stream will flow to the States, either to Western Australia or any other State. It will all go straight into the central coffers.



This graph shows that there are two beautiful hockey stick numbers coming through. The first is company tax about three years after a project like Gorgon goes into production. You see this massive kick in company tax and then, about ten years later, you see the second hockey stick occur. This is when the PRRT royalty stream starts flowing.

Once they have recovered all their expenditures related to those projects they then pay 40 percent to the government. My proposition is that the central government gives a commitment that it will share those new PRRT revenue streams from these offshore LNG projects 50/50 with the States and that 50 per cent be distributed simply on a per capita basis completely separately from the Grants Commission and with no strings attached as to how the States spend that money.

I repeat the North-West Shelf project is currently 70 per cent to the States and 30 per cent to the central government. I believe that a 50/50 split is fair, particularly considering that nearly immediately the Federal Government is going to have a massive kick in company tax collections.

If an incoming government made this commitment, it would be nearly 10 years into the future, but 10 years in the life of a nation goes very quickly and at least the States could be planning to have access to that new revenue stream as it eventuates.

Simple, Fair – I do not care which government does it. Just do it. The States should ignore pathetic brush offs that "we will allocate some of these revenues to infrastructure projects in your State". This is meaningless compared to the certainty of sharing this new growth revenue stream.

That is enough on money. I am going to move to infrastructure.

Infrastructure

This is a "doosey". The central government has bodies like Infrastructure Australia making recommendations on priorities for major projects. The States put in a wish list, recommendations go to the central government and the States are at their beck and

call as to what is going to be supported.

Why do we elect State governments? We elect them to make these types of decisions within their States because they are the closest and know the best infrastructure requirements for that State. If they mess it up, change that State government.

This current approach is terribly inefficient. A short list is agreed to. There will always be priority changes to projects but State governments will not dare take them off the list for fear of losing money that may have been earmarked.

You have to have had experience in a State government to know how demeaning it is when told what strings the Federal Governments want to put on expenditure programs. In the months before a Federal election you will always get a call from the Treasurer in Canberra, if he is from your party, saying, look, we want to spend a few million on a new highway, how about working with us and we will go 50/50 putting this highway through some marginal seat.

As if you can design and build a highway in a few months, but they think they win political points by saying we are announcing that you are going to do that particular highway. The fact that they have ignored your request for several years to build that or another road is just brushed aside in a telephone call.

Both the major political parties operate that way.

To divert attention on money issues at a Premiers' Conference, prime ministers use the old trick of throwing $100 million on the table for one of their pet projects and then sit back and watch the States fight for a share – it is a cheap trick.

The bottom line is that the States should already have autonomy with their revenue streams not to require the central government to fund all but nationally critical infrastructure projects. There will always be a need for some special projects to occur but it has now got down to often relatively small amounts of money.

So, on the infrastructure front, if the States have access to stronger revenue streams, you do not need to have as much involvement of the central government in trying to pick winners as to what is going to be built.

Industrial relations

What a debacle! The Howard Government did what the Whitlam Government could only have dreamed of – it used the corporations power to centralise industrial relations power in Canberra, along with the support of our business leaders at the time.

I was a strong supporter of the direction in which the Howard Government's industrial relations legislation was heading. It reflected what we had already successfully implemented in Western Australia following a series of industrial relations legislative changes commencing in 1993.

To use the corporations power, however, to override the State systems in relation to companies was a major mistake. I opposed this move even though, by then, I had left the political arena.

John Howard, when he was the Opposition's industrial relations spokesperson in 1992, made it clear to us in Western Australia before we went to the polls in 1993 that the federal party was going to go down that path and we argued strongly to the contrary. Why?

In the industrial relations world you need "relief valves". You need flexibility. There is an old saying: there are no winners in industrial relations – only survivors.

In 1993 we introduced the first of our industrial relations legislative changes supporting the deregulation of the labour markets allowing for individual workplace agreements and the like. By Christmas 1993, less than 12 months after being elected, Conzinc Rio Tinto was transferring their workforce to these new arrangements.

Within a few years the Pilbara was transformed with workers being paid more, having more flexibility in their work place, improved work conditions, very few disputes and the unions were closing their Pilbara offices. All this occurred while Paul Keating was a Labor prime minister and was carried out under a State industrial relations regime. You could move between State and federal jurisdictions.

Hawke and Keating themselves controlled unions during some difficult economic times with their personal authority within the union movement – that is not easy. They still, however, supported a highly centralised system.

We were able to achieve change in Western Australia by having a different system to that federally.

That avenue has now been removed and the business community is equally to blame. When I discussed this with business leaders at the time I was told, bluntly, get off your old "states' rights" horse – no future government would dare go back to the bad old days.

My response was they will do it within 20 seconds of being elected, and they have. But this time there is no relief valve. There are no options.

This legislation was challenged by the States but, being Labor States at the time, you can imagine how much heart and soul they put into this challenge. As one of the High Court judges noted, "the power of the Commonwealth with respect to industrial affairs is a power in relation to 'conciliation and arbitration' for the prevention and settlement of industrial disputes extending beyond the limits of any one state" and not otherwise (except for Commonwealth employment and other presently not relevant purposes). And adds: "the corporations power has nothing to say about industrial relations or their regulation by the Commonwealth".

Let us not get too cute about a legalistic interpretation – it was never the intention of those negotiating the Constitution for the States not to have this responsibility.

How do you address it with an incoming government? – that is not easy. That would require the government again to allow the option of corporations operating under a State system through a legislative change. Some States like Victoria handed over their powers regardless, but States should have the option – competition worked incredibly effectively in Western Australia.

It seems that the reality is there will be some tweaking of the existing legislation not to reignite the effective union campaign against "work choices" and I do not think that is something the coalition parties should be particularly proud of because there is a need to have a system where competition between the States promotes innovation and improved productivity in our labour markets.

We freed up the labour markets. It was successful. Now we are going back to one size fits all.

Time does not permit my views on education and health.

Conclusion

In summary, what I am saying is:

Reverse the drift of financial muscle to the centre, back to the States with a

50/50 PRRT sharing arrangement;
Bring about more flexibility and competition inside the industrial relations system;
Strip out the duplication which has arisen by the Federal Government wanting to be involved in areas that are State responsibility; and
We must realise that both the major political parties have been heading down the wrong path and we need to see an indication from at least one of them, but hopefully both, that they are prepared to reverse that trend.

Chapter Six

The Case for a State Income Tax

Keith Kendall

This paper lays out the case for reintroducing an income tax at the State level. This idea is not new, nor would its implementation be a first in Australia's post-federation history. What I do hope to achieve is to identify some of the problems that such a move would solve and present something of a feasible structure that could be implemented in practice.

The basic position presented here is that to be able to function properly as a political entity in a federal system, the relevant government needs to be primarily self-sufficient financially. That is, each government needs, more or less, to be able to raise sufficient revenue to fund its own expenditure programs. Right now, the States cannot claim that status. The best way of achieving this within our current system is through reintroducing an income tax at the State level.

This suggestion is not without potential problems and that is what I will address towards the end of this paper. First, this paper provides a survey of the problems with the current system and briefly analysing the revenue-raising options that may be used. After providing reasons why the income tax is the best way of doing this, the paper canvasses the problems that existed before the Second World War when the States did impose their own income taxes. In short, a desire not to return to the administrative nightmare that existed at that time, as well as an arguable lack of political will, represents the major obstacle to the States re-entering the income tax scene. The paper concludes by briefly outlining a system that addresses these problems within a reformed fiscal structure.

Vertical fiscal imbalance

The situation where one level of government is unable to raise sufficient revenue for its expenditures and is consequently financially dependent on another level of government is known as vertical fiscal imbalance.[1] This usually manifests itself where subnational governments are dependent on the national central government to make up for the shortfall. In Australia, this comes about as the States have responsibility for most public expenditure, whereas the most powerful revenue-raising tools are controlled by the Commonwealth Government.

While there is no single generally accepted method of calculating the extent of vertical fiscal imbalance, the level of vertical fiscal imbalance in Australia is generally regarded as one of the largest in any federation in the world.[2]

One measure is that used by the Henry Tax Review,[3] released in 2009, being the revenue transferred from the Commonwealth to the States, expressed as a proportion of the States' total revenue. While the precise percentage has fluctuated, it has tended to be in the order of around 45 to 50 per cent since 2000 (marking the advent of the GST).[4] This proportion varies from State to State, with the larger mainland States tending to be closer to 40 per cent and Tasmania closer to 60 per cent.[5]

This contrasts with the position in other federations; for example, central

government subsidisation in Canada in 2003 was around 17 percent; and in the United States, 22 percent.[6]

It was not ever thus. After the first 10 years of federation (in which special provisions were made to facilitate the transition involved with the States no longer being able to impose excise and customs duties),[7] Commonwealth transfers fell to a low of roughly 12 percent of State revenues on the eve of the Second World War.[8] It was at this point that the Commonwealth took over the field of income tax and large-scale vertical fiscal imbalance began to become part of the Australia federal landscape. I will return to this shortly.

Problems caused by vertical fiscal imbalance

One may be tempted to ask, so what? Why does it matter who raises the revenue, so long as sufficient revenue is raised to meet public expenditure requirements? Indeed, the structure of the goods and services tax (GST), in place since its introduction in 2000, might be identified as a case study in why centralised collection of the revenue is the way to go: the Commonwealth collects the revenue, achieving administrative economies of scale through its national bureaucratic network, and all revenue is distributed to the States to cover their expenditures. Further, the GST replaced a raft of economically inefficient State-level taxes that the States had hitherto had to resort to in order to raise a basic level of revenue for their expenditure requirements.[9]

The answer is that there is plenty wrong with this situation. And the GST provides a good example of just one such problem, as will be analyzed further below.

But the starting point for all problems is what Peter Walsh highlighted at this Society's conference in 1997: "A fundamental principle of responsible government in any system is that each government must raise the money that it spends".[10] Independent and decentralised decision-making, the essence of a federal system, is impossible unless governments are financially autonomous.[11] Political power follows the power of the purse. As much was recognised by Alfred Deakin in the immediate aftermath of federation. Drawing on the experience of history in which controlling the national purse strings eventually positioned the House of Commons as the dominant political institution in the United Kingdom, Deakin predicted that the Commonwealth Government would ultimately come to dominate the States. As he wrote in what has become a well-known passage:

> The rights of self-government of the States have been fondly supposed to be safeguarded by the Constitution. It left them legally free, but financially bound to the chariot wheels of the central Government . . . The Commonwealth will have acquired a general control over the States, while every extension of political power will be made by its means and go to increase its relative superiority.[12]

While complete subservience of the States has not eventuated, Deakin's assessment has proven to be remarkably prescient. The first of these specific problems is the spectre of Commonwealth interference in State policy matters. This is achieved through the Commonwealth's grants power under section 96 of the Constitution. In brief, this power allows the Commonwealth to attach whatever strings it likes to financial grants to the States, subject to the restriction that it cannot discriminate between the States. In fact, this was a key plank in the Commonwealth's ability to crowd the States out of the income tax field in the 1940s and 1950s.

This is one means by which the Commonwealth may circumvent the allocation of

legislative powers in the Constitution, set out mainly in section 51. For instance, the Commonwealth has no authority to make health policy as it applies in the States, yet there is nothing preventing the Commonwealth from formulating a uniform national health policy and making any financial grants to the States contingent on them adopting that policy in its entirety. This was what Deakin had in mind when he described the States being financially bound to the "chariot wheels" of the central government. After all, it is one thing to have the power to make policy and implement laws, but how can this be done without the means to finance those policies?

The second problem of vertical fiscal imbalance, related to the Commonwealth's ability to interfere in State policy, is the divorce of political cost and financial benefit in the fiscal sphere. It is here that the current example of the GST becomes useful. The GST is a Commonwealth tax; it is imposed through Commonwealth legislation and it is administered and collected at a Commonwealth level. Indeed, it is questionable whether the States can, under the Constitution, impose a GST. The States are, however, the beneficiaries of the revenue raised; under the agreement in which the GST was created, the Commonwealth must distribute all GST revenue to the States and territories.

This results in a situation in which GST reform is next to impossible. The rate is currently 10 per cent and is applied to most goods and services, with some notable exceptions, particularly fresh food, health and education. These exemptions were introduced as part of a political deal to secure the GST's passage through the Senate in the late 1990s; there is no coherent tax policy reason for excluding these goods and services from the GST's base.

Attention has recently turned to whether changes in the rate and/or the base can be implemented. Despite the strong economic arguments for doing so,[13] it is highly unlikely any such changes will eventuate under the current system. The reason for expecting all such efforts to fail is the split between political cost and fiscal benefit. As the recipients of all the revenue raised, the States (as a group) have a strong incentive to see the base broadened and the rate increased.

But any such changes must go through the Commonwealth Parliament. As a Commonwealth law, it will be recognised that any such increases are the Commonwealth's doing. Any political grief that is felt will be felt primarily by the Commonwealth. With no benefit, since all the additional revenue will go to the States, what incentive is there for the Commonwealth to take such action?

The only reason that such a state of affairs has been allowed to develop is due to the aforementioned vertical fiscal imbalance. As the States lack the means to raise their own (sufficient) revenue, they are dependent on the Commonwealth to undertake this task for them. As illustrated though, any serious reforms have a negligible chance of occurring while there is this divergence of political cost and fiscal benefit.

Another manifestation of this problem is the "blame game" that is frequently played out between the States and the Commonwealth. The usual pattern observed is that the States are criticised for not doing enough in a particular area (health, education, public transport, environmental protection, etc), who then justify their lack of action on the basis that they have not been given sufficient funds from Canberra. The Commonwealth responds that the States have sufficient funding, but they are not efficient, or they have misplaced priorities, or something similar. And around we go.

Again, such a situation arises only because the States lack revenue-raising capability.

The GST also provides an excellent illustration of the Commonwealth's ability to interfere with the States' policy capacity. While all the GST revenue is distributed to the States, it is the Commonwealth that determines the allocations. While the allocation is meant to be based on horizontal equity, so that all States have access to a sufficient level of funding to provide the same level of public services,[14] there is a high degree of subjectivity to such a process. Consequently, the Commonwealth may use this as a tool by which it may influence State-level policy decisions.

Further, given the overriding objective of horizontal equity, this may be seen as actually a disincentive for the States to be efficient in their service delivery. This arises since any efficiencies obtained in service delivery will manifest as lower budgetary requirements for that same level of services. Assuming these efficiencies are not matched in other States, the more efficient State will see part of its previous allocation of GST revenue distributed to the other States. Controlling the purse strings undermines the notion of fiscal responsibility and contributes to the perpetual blame game.

How should the States raise revenue?

In terms of providing policy prescriptions for how the States should go about raising revenue, many including this author, will regard the notion of a good tax as something of an oxymoron. That being said, the idea behind a good in contrast to a bad tax is this notion of efficiency, which wears a couple of masks.

The primary form of efficiency is economic efficiency. Taxation has behavioural effects in that when something is taxed, people will on average be less inclined to undertake the taxed activity. A tax on goods will be expected to result in fewer sales. Taxing income will result in less paid work being performed. Economic efficiency refers to the extent to which such behavioural effects take place. A more efficient tax will have less of an effect on behaviour than an inefficient tax. Distortions in behaviour driven by the tax system represent an economic cost to the overall economy, reducing total welfare. A poor tax mix, therefore, can result in reduced living standards.

An analysis prepared in September 2011 in the lead-up to the Commonwealth's Tax Forum investigated the economic costs associated with different forms of taxation.[15] It found that taxes on land were the most efficient from an economic perspective, with an average "excess burden"[16] of six cents per dollar of revenue raised.[17] The next most efficient tax using this measure is the GST (average excess burden of 10 cents) followed by personal income tax (15 cents).[18] All other taxes had an average excess burden of at least 20 cents, with some duties having an average excess burden as high as 70 cents per dollar of revenue.[19]

As land taxes are already imposed at the State level, it may be assumed that even if there is scope for additional revenue raising, the States are not inclined to exploit that opportunity. As noted earlier, it is, at best, questionable whether the States could impose a GST due to restrictions under the Constitution.[20] In any event, consumption taxes at the State level have tended to be very difficult to administer and a workable version would need to be accompanied by reintroduction of State border checkpoints for the movement of goods to ensure the GST is applied appropriately, a feature which may itself be open to constitutional challenge.[21]

This leaves personal income tax as the next most efficient tax. Note that this does

not include company income tax, which has a higher average excess burden of 20 cents for every dollar of revenue raised. The scope with personal income tax is sufficient to cover the States' current fiscal reliance on the Commonwealth. As much can be seen by the Commonwealth's own figures, for example, in the 2012-13 Commonwealth Budget, actual net personal income tax receipts for 2010-11 were more than $132 billion.[22] This compares with the ABS statistics showing that Commonwealth transfers to the States in 2010-11 were just under $86 billion.[23] This shows the personal income tax to be a flexible revenue source that more than meets the States' current fiscal shortfall, with sufficient room (as seen by the $46 billion surplus these figures show) for the States to set their own revenue targets and allow the Commonwealth to retain a small personal income tax should the need arise for some cross-subsidisation between the States. This matter is further addressed below during an outline of how such a brave new tax world will look.

When the States did tax income

But, first, let us examine what happened when the States did tax income. After all, those who do not heed the lessons of history are doomed to repeat them. And this is probably a history we do not particularly want to repeat.

Put bluntly, the income tax scene in Australia was a mess. Except for Queensland and Western Australia, all States taxed income before federation and all States had an income tax by 1907, with the Commonwealth entering this area in 1915 as a measure to finance Australia's effort in the First World War.[24] By this stage, double taxation was starting to occur, where the same taxpayer was paying tax more than once on the same income. This may happen, for example, where a taxpayer resides in one State but derives income sourced in another State (such as rental income on an interstate investment property). This was alleviated to a certain degree through a system of rebates, although this did involve timing disadvantages (since the rebates tended to apply in the year after which the original income tax had to be paid) and added to the administrative complexity that already existed with trying to comply with multiple systems and filing multiple returns. Further, there was no uniformity as to the content of laws; each State and the Commonwealth had its own measure of income on which tax was to be levied.

In combating the Depression during the 1930s, some States began levying additional taxes on income. This practice peaked in 1935, with some taxpayers being subjected to up to 14 different income taxes and eligible to claim 12 rebates the following year.[25] This is in addition to the other taxes that were applicable at that time.[26] By 1942, the year of the *First Uniform Tax case*,[27] there were 26 separate Commonwealth and State income taxes.[28]

With the onset of the Second World War, the Commonwealth sought to reach an agreement with the States to take over income taxation for the duration of the war, but not to any avail.[29]

Once the Curtin Labor Government took office, the Commonwealth moved to force the States out of income tax. This was done through the passage of four bills: the first imposed the tax; the second provided financial grants to the States contingent on the States not imposing their own income tax for that particular year; the third made it an offence for a taxpayer to pay a State income tax liability before discharging Commonwealth income tax obligations; and the fourth provided for the

Commonwealth to acquire compulsorily the States' bureaucratic apparatus.

The States challenged this suite of legislation in the High Court. In a decision known as the *First Uniform Tax case*, the High Court upheld the validity of all statutes (albeit not unanimously). Of particular note was that the Court relied predominantly on the grants power under section 96 of the Constitution. With the benefit of hindsight, it may be seen as inevitable that the High Court would have allowed the Commonwealth to implement whatever policy it deemed necessary under the defence power in the Constitution. By basing its decision more heavily on the grants power, however, the prospect that the uniform tax system might well persist beyond the war was recognized.

When the Liberal-Country Party coalition won office in 1949, the Prime Minister, Mr R. G. (later Sir Robert) Menzies commissioned the Commonwealth and State Treasuries to prepare a report on the possibility of returning the income tax field to the States.[30] The report prepared in 1953 canvassed a number of technical difficulties that would need to be addressed before the States could resume taxing income. It is this report and the technical problems identified that I will address in the next section when outlining my proposed scheme.

Suffice to say, the States did not resume taxing incomes. The report just mentioned was considered at the 1953 Premiers Conference. While New South Wales, Victoria and South Australia indicated a willingness to reintroduce their own income taxes (subject to the Commonwealth reducing its involvement sufficiently), and Queensland gave support contingent upon receiving additional Commonwealth support, Western Australia and Tasmania opposed the scheme.[31] In the absence of unanimous agreement, the proposals did not go any further.

New South Wales and Victoria led a subsequent High Court challenge to the constitutionality of the Commonwealth's legislative scheme. The decision is generally referred to as the *Second Uniform Tax case*.[32] While elements of the scheme were invalidated, once again the Commonwealth prevailed overall on the basis of the grants power. The States continued to be crowded out of the income tax field.

On two subsequent occasions the Commonwealth Government has canvassed returning much of the fiscal power associated with income tax to the States. On both occasions political events overtook these intentions, leading to their eventual demise.

The first of these was in 1976 under the Liberal-National Party Government of Malcolm Fraser. In essence, the mechanics of this proposal would be effectively to remove the Commonwealth Government from the allocation process, making grants out of general revenue (as opposed to specific purpose grants that influence State policy), which would be determined by an independent body.[33] The need for fiscal restraint to reduce the Commonwealth budget deficit undermined this system, though, in short order, and Commonwealth payments to the States were slashed.[34]

The Labor Prime Minister, Bob Hawke, canvassed the prospect of reforming intergovernmental fiscal relations in 1990 and commissioned inquiries that were to report in November 1991 on, amongst other matters, vertical fiscal imbalance.[35] However, the leadership struggle that took place during this time detracted from the focus that was suggested would be put on this matter.[36] The Hawke inquiries were not pursued after the change of leadership, as his successor, Paul Keating, pursued a deliberate policy of a strong central government that was anathema to returning any power over income tax to the States.[37]

A proposed scheme

The 1953 Treasury report identified five substantive matters to which attention needs to be directed for a State income tax to be feasible. The brief consideration of a potential scheme provided here addresses these matters.

To give context, the State income tax largely replaces the present Commonwealth personal income tax. The Commonwealth would retain GST receipts collected and, perhaps, increase the rate if and as required. As the GST is a more efficient form of taxation than income tax, if there is no change in the revenue collected, then welfare overall should be improved.

One further broad matter is worth mentioning before addressing the Treasury issues. Under this scheme, it is important that taxation be used only as a revenue-raising tool. At present, the tax system is used to implement economic and social policy in addition to raising revenue. As a result, the tax system is littered with a plethora of concessions, rebates and other special provisions that would be unworkable in a genuine federal system. It would be unworkable since each government is likely to have differing economic and social policy priorities. The opportunity also for arbitrage and evasion under such a system would see a quick return to the undesirable situation that existed prior to the Second World War.

Division of the income tax field

The 1953 Report first identified the extent to which the Commonwealth would withdraw from the income tax field as a matter for consideration.[38] The Commonwealth would retain control over the company income tax. This reflects the reality that, as artificial entities, companies are more easily relocatable than individuals and, therefore, differences in company taxation at the State level are more likely to induce changes in behaviour. One design matter that this feature of the overall scheme would require consideration is the treatment of dividends and whether and how an imputation system could link taxation of company profits by the Commonwealth and the payment of dividends to individual shareholders who are taxed at the State level. But this aspect is too specific for this more general outline.

The extent of withdrawal from the personal income tax is something that would need to be decided once the revenue needs of the Commonwealth and the States are ascertained more accurately, but it is likely that the Commonwealth would retain a nominal presence rate-wise. As discussed below, the legislation itself would need to come from the Commonwealth; the issue here is whether the Commonwealth actually raises any revenue.

In this system, the States would set their own rates, independent of that done by the Commonwealth. Thus, alternative suggestions, where States impose a top up on a Commonwealth rate, or set their rates as a percentage of the Commonwealth rate, are rejected under this proposal. One of the primary justifications for the States reclaiming their income taxing capabilities is to shake off their fiscal binds to the chariot wheels of the Commonwealth. By being independent in this regard, not only of the Commonwealth but of each other, the States regain much of their political autonomy that is presently being compromised. Further, competitive federalism provides a restraint from unreasonable taxation in this area, allowing the States to experiment with their own combination of revenue raising and public expenditure programs. This

would also force the States to be fiscally responsible; high taxing States would be forced to justify the additional impost with, for example, better infrastructure, or better services, rather than, for example, subsidies to favoured groups or inflated budgets for special projects.

Relationship between Commonwealth and State rates

As already canvassed, State rates should be completely independent of Commonwealth rates. This allows for maximum policy flexibility and competitive federalism to restrain State extravagance.

As previously noted, the content of the law should come from the Commonwealth. One consequence of this is that a uniform taxing year is adopted throughout the country. This should not undermine the States' independence in any meaningful way and will reduce unnecessary complexity. For special cases, adjustments to the year of assessment can be allowed for, as is the case under the present Commonwealth system. However, remember that this proposal advocates that the States tax only personal incomes, and it is rare for individuals to require an alternative taxing year (this is usually done only for companies at present).

Degree of uniformity

While the States should have maximum flexibility over their rates, the content of the law should be enshrined in legislation from the Commonwealth, thereby ensuring a uniform personal income tax throughout the country. This would be the single largest initiative that would prevent a reoccurrence of the administrative nightmare that existed up to 1942.

So that the States are able to maintain autonomy over their non-tax policies, it is important that the personal income tax be a revenue-raising tool only. By allowing concessions to achieve economic or social goals, these policies would automatically be implemented throughout the country, undermining State autonomy. This should not be a barrier to implementing these goals at either the Commonwealth or State level; the relevant government merely needs to use a different legislative mechanism to achieve these objectives.

Precedent exists for this type of co-operative scheme. A relatively recent example is the field of corporations law prior to 2001. In the wake of the High Court's 1990 decision in the *Incorporation case*,[39] in which the Commonwealth's attempt to regulate the entire field of corporate law was struck down, the Commonwealth and the States entered into a co-operative scheme in which the Commonwealth enacted model legislation, which was then adopted by the various State parliaments.

Basis for taxing interstate income

There are two broad bases for taxing income that has connections to more than one jurisdiction: source and residence. In short, source refers to the jurisdiction where the income is generated (for example, the location of the investment property that generates rental income, or the location of where sales are made for business income). Residence refers to the jurisdiction in which the taxpayer is located. It was a divergence in approaches to this matter between the States that largely caused the problems leading up to the Commonwealth's takeover of the income tax field.

The prescription put forward here is to tax income based on residence. This

resolves almost all problems associated with identifying the source of income, especially as today, the specific location of the taxpayer does not dictate their income generating abilities for many different types of income. For example, bank interest is normally sourced where the relevant account is held, but there is nothing stopping an individual ordinarily resident in Tasmania from opening a bank account in Queensland, especially given the advent of controlling bank accounts over the internet.

One objection may be that the primary form of individual income is salary and wages and this system allows for a situation where the individual may work in a high taxing State but reside in a low taxing State. The practical implications of this in Australia are so minor that this should not be a barrier to this design decision. With only one or two exceptions (Albury-Wodonga being the one that immediately springs to mind), Australia's population centres tend to be located sufficiently far from State borders that this is unlikely to be a major problem. Some thought would need to be dedicated to how itinerant (or fly-in fly-out) workers should be treated, and this would normally be dealt with by residency rules. However, as a starting principle, this is much more workable than the alternative.

One advantage that such an approach has that did not exist in 1953 is that a substantial amount of analysis has taken place on this very issue in an international tax context. The system's design would draw on these lessons to develop a scheme that achieves the overall goals.

Arrangements for collecting income tax

This is not the same issue as it may have appeared in 1953. The States now have their own revenue collection agencies which could fulfil this role.

The preferable alternative, especially in light of the uniform legislation, is for the Commonwealth to collect the revenue and distribute to the States. This would need to be a strict agency arrangement, however; there can be no discretion at the Commonwealth level or even through an independent body allowing for a reallocation according to need or whatever other basis is decided to be flavour of the month. Otherwise, the current dysfunctionality seen with the GST arrangements will result in short order. The system proposed in this paper reflects that used in Canada, where the Federal Government collects the income tax revenue on behalf of the provinces (except for Quebec). This would undoubtedly require the States to make some contribution to the costs of the Commonwealth's administrative apparatus and each State would need to determine their most cost effective means of raising and collecting their own income tax revenues.

A perfectly predictable response to the model put forward in this paper is that, despite the substantive merits, there is no political will to make this proposal a reality. While that may be true at the present time, there is unlikely to be political will for such a fundamental change to the current system without a viable alternative being available. While the model presented in this paper is only a starting point, with significant detail to be refined, it may represent the necessary starting point for generating that political will.

Endnotes

The author would like to acknowledge the assistance of Michael Gilmour in compiling the statistical data used in this paper.

1. Miranda Stewart, "Australia" in Gianluigi Bizioli and Claudio Sacchetto (eds), *Tax Aspects of Fiscal Federalism: A Comparative Analysis*, IBFD, 2011, 168: "subnational governments have inadequate revenues to fund their expenditure responsibilities".

2. *Ibid.*

3. Commonwealth Treasury (Chair: K. Henry), *Australia's Future Tax System* ("Henry Review"), 2010.

4. Henry Review, *Architecture of Australia's Tax and Transfer System*, Commonwealth of Australia, 2008, 298.

5. *Ibid.*

6. Organisation for Economic Cooperation and Development (OECD), *Economic Survey of Australia 2006: Fiscal relations across levels of government*, http://www.oecd.org/australia/economicsurveyofaustralia2006fiscalrelationsacrosslevelsofgovernment.htm (accessed 9 September 2012).

7. Stewart, *op. cit.*, 168-169.

8. Henry Review, *op. cit.*, 301.

9. For a brief overview of these arrangements put in place with the introduction of the GST in Australia, see Stewart, *op. cit.*, 172-173.

10. Peter Walsh, "Labor and the Constitution: Forty Years On", *Upholding the Australian Constitution*, vol. 9, The Samuel Griffith Society, 1997, 160.

11. J.S.H. Hunter, *Federalism and Fiscal Balance*, Australian National University Press and Centre for Research on Federal Fiscal Relations, 1977, 39.

12. Alfred Deakin (ed. J.A. La Nauze), *Federated Australia*, Melbourne University Press, 1968, 97.

13. In brief, the exemptions (which go to the broadness of the base) for food, education and health represent efforts to alleviate the GST's negative effects on low income earners. The problems with a total exemption is that what should be

a targeted exemption is available to all. The measure is, therefore, more expensive (in terms of lost revenue), necessitating a higher general rate (alleviating measures should be achieved outside of the tax system to be properly targeted). Alternatively (or additionally), higher GST revenue may be used to fund a reduction in less efficient taxes while maintaining the same levels of revenue.

14. Henry Review, *op. cit.*, 299.

15. KPMG-Econtech, *Economic Analysis of the Impacts of GST to Reform Taxes* (September 2011).

16. "The average excess burden … is defined as the total loss in living standards from imposing a particular tax, per dollar of government revenue raised"; *ibid.*, 5.

17. *Ibid.*

18. *Ibid.*

19. *Ibid.*

20. See comments in Stewart, *op. cit.*, 163. It should be emphasised that the position on this matter is far from clear on the current state of the law.

21. Section 92 of the Commonwealth Constitution states that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free",

22. Federal Budget 2012-13, Paper No 2, Statement 5, 5-19.

23. Australian Bureau of Statistics, Release 5512-0 Government Finance Statistics, Australia, 2010-11, Table 239.

24. W.T. Murphy, "Australian State Income Tax Schemes" in W. Prest and R.L. Mathews (eds), *The Development of Australian Fiscal Federalism: Selected Readings*, Australian National University Press, 1980, 276.

25. K.M. Laffer, "Taxation Reform in Australia" in W. Prest and R.L. Mathews (eds), *The Development of Australian Fiscal Federalism: Selected Readings*, Australian National University Press, 1980, 299.

26. *Ibid.*

27. *South Australia v Commonwealth* (1942) 65 CLR 373.

28. *Ibid.*, 300.

29. K.H. Bailey, "The Uniform Income Tax Plan (1942)" in W. Prest and R.L. Mathews (eds), *The Development of Australian Fiscal Federalism: Selected Readings*, Australian National University Press, 1980, 311.

30. Commonwealth and State Treasury Officers 1953, *Resumption of Income Tax by the States* in W. Prest and R.L. Mathews (eds), *The Development of Australian Fiscal Federalism: Selected Readings*, Australian National University Press, 1980, 347-359.

31. W. Prest and R.L. Mathews (eds), *The Development of Australian Fiscal Federalism: Selected Readings*, Australian National University Press, 1980, 272. See also Cheryl Saunders, "The Uniform Income Tax Cases" in H.P. Lee and George Winterton (eds), *Australian Constitutional Landmarks*, Cambridge University Press, 2003, 67-68.

32. *Victoria v Commonwealth* (1957) 99 CLR 575.

33. Russel Mathews and Bhajan Grewal, "Fiscal Federalism in Australia: From Whitlam to Keating", Centre for Strategic Economic Studies, Working Paper No 1, 1995, 14-16.

34. *Ibid*., 16-17.

35. *Ibid*., 31.

36. *Ibid*., 32.

37. *Ibid.*

38. *Resumption of Income Tax by the States*, *op. cit*., 348-351.

39. *New South Wales v Commonwealth* (1990) 169 CLR 482.

Chapter Seven

The Constitutionality of the *Environmental Protection and Biodiversity Conservation Act*

Josephine Kelly

In the *Tasmanian Dam case* in 1983, the then Chief Justice, Sir Harry Gibbs, said in his dissenting decision:

> The external affairs power differs from the other powers conferred by s. 51 in its capacity for almost unlimited expansion. As Dixon J. pointed out in *Stenhouse v. Coleman*[1]: 'In most of the paragraphs of s. 51 the subject of the power is described either by reference to a class of legal, commercial, economic or social transaction or activity (as trade and commerce, banking, marriage), or by specifying some class of public service (as postal installations, lighthouses), or undertaking or operation (as railway construction with the consent of a State), or by naming a recognized category of legislation (as taxation, bankruptcy).' The boundaries of those categories of power may be wide, but at least they are capable of definition. However, there is almost no aspect of life which under modern conditions may not be the subject of an international agreement, and therefore the possible subject of Commonwealth legislative power. Whether Australia enters into any particular international agreement is entirely a matter for decision by the Executive. The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the Federal Government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity. This result could follow even though all the treaties were entered into in good faith, that is, not solely as a device for the purpose of attracting legislative power. Section 51(xxix) should be given a construction that will, so far as possible, avoid the consequence that the federal balance of the Constitution can be destroyed at the will of the Executive. To say this is of course not to suggest that by the Constitution any powers are reserved to the States. It is to say that the federal nature of the Constitution requires that 'no single power should be construed in such a way as to give the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament': *Bank of New South Wales v. The Commonwealth*,[2] which I cited in *Koowarta* at p.637.[3]

The majority of the High Court in the *Tasmanian Dam case* upheld the validity of legislation based on what were held to be obligations the Federal Government had assumed when it ratified the Convention for the Protection of the World Cultural and Natural Heritage (the World Heritage Convention) in 1974.

While it may not be possible to say that up until now the Federal Government's reliance on the majority decision in the *Tasmanian Dam case* to pass legislation has "rendered absurd the assignment of particular carefully defined powers to that

Parliament", I would argue that it has radically transformed the balance of constitutional power between the Commonwealth and the States and the potential of that change has been realised in relation to what is now called "the environment" and what, in the past, was called natural resources.

Two of the most contentious political issues in the country at the moment arise from legislation that relies, in part, on the *Tasmanian Dam case* principle for constitutional validity. They are the carbon tax and the Murray-Darling Basin. The legislation in relation to both matters relies on international environmental conventions ratified by the Federal Government. The carbon tax legislation enacted in 2012 by the Gillard Government relies on the United Nations Framework Convention on Climate Change (the Climate Change Convention). The *Water Act* 2007 sets out the regime for allocating water in the Murray-Darling Basin. It was enacted by the Howard Government in 2007, under the stewardship of Malcolm Turnbull, the Minister for the Environment and Heritage. That Act refers specifically to the Convention on Biological Diversity (the Biodiversity Convention), the Climate Change Convention and the Convention on Wetlands of International Importance especially as Waterfowl Habitat (the Ramsar Convention).

The carbon tax and the Basin legislation had been preceded in 1999 by the *Environment Protection and Biodiversity Conservation Act* (the EPBC Act), also enacted by the Howard Government. The following international conventions underpin the constitutional validity of the EPBC Act: the Biodiversity Convention, the World Heritage Convention, the Ramsar Convention, the Convention on Conservation of Nature in the South Pacific (the Apia Convention), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Bonn Convention on the Conservation of Migratory Species of Wild Animals, the Chinese/Australia Agreement on the protection of migratory birds and their environment (CAMBA) and the Japan/Australia Agreement for the protection of migratory birds and birds in danger of extinction and their environment (JAMBA).

Background

Before looking at the EPBC Act, I need to set out developments in environmentalism between 1983 and 1992 internationally, and, nationally, until 1999.

In 1987, the World Commission on Environment and Development published its report, *Our Common Future*, usually referred to as the Brundtland Report, after the chair of the Commission. The Commission called for sustainable development, "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[4]

The Commission also recommended a comprehensive global conference on environment and development.[5]

In 1989, the United Nations General Assembly resolved to hold the United Nations Conference on Environment and Development (UNCED). The mandate of the conference was "to devise integrated strategies that would halt and reverse the negative impact of human behaviour on the physical environment and promote environmentally sustainable economic development in all countries".[6]

As we all know, the conference was held in Rio de Janeiro in 1992 and is often referred to as the "Earth Summit".

In 1991, the International Union for the Conservation of Nature and Natural

Resources, the United Nations Environment Programme and the World Wide Fund for Nature prepared and published *Caring for the Earth: A Strategy for Sustainable Living* which was intended to update an earlier document, the *World Conservation Strategy*.[7] One recommendation was that the national legal system implement the principles of ecologically sustainable development (ESD).[8]

In summary, the principles of ESD are:

> the precautionary principle;
> intergenerational equity;
> conservation of biological diversity; and
> ecological integrity, and improved valuation, pricing and incentive mechanisms (the polluter pays principle).

They were novel concepts formulated by environmental ideologues with specific *political* objectives.

Meanwhile, in Australia, there was work to move from the *National Conservation Strategy for Australia* to a *National Strategy for Ecologically Sustainable Development*.[9] In mid-1990, a discussion paper, "Ecologically Sustainable Development", was released. Nine working groups on ESD were established to investigate the possibility of introducing sustainable development policies for each major economic sector. The working groups reported their findings at the end of 1991.

In mid-1992, the *Draft National Strategy for Ecologically Sustainable Development* was published and public submissions invited.

In May 1992, the Commonwealth, all State and territory governments, and the Australian Local Government Association, met and agreed upon the *Intergovernmental Agreement on the Environment* (IGAE).[10]

Under the IGAE, the three levels of government agreed that development and implementation of environmental policy and programs by all levels of government should be guided by the considerations and principles that related to ESD.

Governments of 172 countries participated in the Rio Conference in June 1992. The international instruments signed at the conference included the Rio Declaration on Environment and Development, Agenda 21, and, more importantly for present purposes, the Biodiversity Convention and the Climate Change Convention. Australia signed and later ratified both conventions, which included the principles of ESD.

By December 1992, the National Strategy for ESD was launched in Australia and adopted by the Commonwealth, States and territories.[11]

Within a matter of about five years, environmental ideologues had succeeded in having principles of ESD incorporated into international conventions, and into the framework for the making of domestic law in Australia at the national, State, territory and local government levels, without any real scrutiny of what those principles meant and what their consequences would be.

The *Environmental Protection and Biodiversity Conservation Act* 1999 (*EPBC Act*)

Dr Sharman Stone, Parliamentary Secretary and Liberal member for Murray in the House of Representatives, read the second reading speech introducing the EPBC bill. On Tuesday 29 June 1999 she was representing Senator Robert Hill, the Minister for the Environment and Heritage. Dr Stone said:

The Environment Protection and Biodiversity Conservation Bill 1999 is perhaps the most significant legislation dealing with environmental issues that has ever been presented to the Commonwealth parliament. The bill represents the only comprehensive attempt in the history of our federation to define the environmental responsibilities of the Commonwealth. It proposes the most fundamental reform of Commonwealth environmental law since the first environment statutes were enacted by this parliament in the early 1970s.

. . . . . .

The bill will replace five existing Commonwealth acts . . .

The bill will establish a new legislative framework to overcome the deficiencies of the existing regime and to allow Australia to meet the environmental challenges of the 21st century with renewed confidence. The bill will promote, not impede, ecologically sustainable development and will conserve biodiversity. The bill will ensure the Commonwealth is equipped to deal with current and emerging environmental issues in accordance with contemporary approaches to environmental management.

. . . . . .

The bill introduces a new and more efficient assessment and approval process that applies to actions which are likely to have a significant impact on the Commonwealth marine area; world heritage properties; Ramsar wetlands of international importance; nationally threatened species and ecological communities; and internationally protected migratory species.

Some Provisions of the *EPBC Act*

The objects of the Act are set out in section 3. They are:

(a) To provide for the protection of the environment that are matters of national environmental significance;
(b) To promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;
(c) Promote the conservation of biodiversity;
(d) To assist in the co-operative implementation of Australia's international environmental responsibilities.

Section 3A of the Act defines the principles of ESD:

The principles of ecologically sustainable development are:

(a) Decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations
(b) If there are threats of serous or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation (the precautionary principle)
(c) The principle of inter-generational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations (inter-generational equity)
(d) The conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making
(e) Improved valuation, pricing and incentive mechanisms should be promoted

(the polluter pays principle).

Section 391 provides that the Minister must consider the precautionary principle in making a wide range of decisions under the Act. Section 136 requires that the principles of ecologically sustainable development must be taken into account when considering environmental assessments and approvals.

Section 528 sets out a general list of definitions. Biodiversity is defined to mean the variability among living organisms from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and includes diversity within species and between species; and diversity of ecosystems.

Environment includes ecosystems and their constituent parts, including people and communities; and natural and physical resources; and the qualities and characteristics of locations, places and areas; and the social, economic and cultural aspects of each of those things previously mentioned.

The scheme of the *EPBC Act*

Following is a brief outline of the scheme of the Act. It provides for the listing and managing of World Heritage properties and Ramsar wetlands. It sets out a regulatory scheme for approvals for actions that have a significant impact on the environment in various contexts including in declared World Heritage and Ramsar wetland areas, and on listed threatened species or endangered communities.

The Act deals comprehensively with the conservation of biodiversity, that is, listed threatened species, threatened ecological communities, threatening processes, and critical habitat, which is habitat critical to the survival of a species.

It establishes a threatened species scientific committee and a biological diversity advisory committee to advise the Minister.

The Act provides controls for access to biological resources, which include genetic resources, organisms, parts of organisms, populations and any other biotic component of an ecosystem with actual or potential use or value for humanity. It permits the provision of aid for conservation of species in foreign countries if the species is covered by international agreements to which Australia is a party.

There are provisions for establishing and managing biosphere reserves, which means an area designated for inclusion in the World Network of Biosphere Reserves by the International Co-ordinating Council of the Man and the Biosphere program of the United Nations Education, Scientific and Cultural Organisation.

The question of language

Building on an environmental movement that had evolved from the publication of Rachel Carson's book, *Silent Spring*, in 1962, environmentalists had succeeded in incorporating ESD principles into the Biodiversity and Climate Change Conventions at the Rio Conference and into the mechanisms for making Australian domestic law at all levels in 1992.

Within about ten years of that success, the environmental movement had succeeded in popularising the phrase, "ecologically sustainable development", or the abbreviated version, "sustainable development", so that it had become the only kind of development any "right thinking" individual would embrace. Everyone wanted to save "the environment", that is, the natural environment, excluding mankind. The extreme development of the popular embrace of environmentalism is the branding of those

who do not "believe" in anthropogenic climate change as "sceptics" or "denialists", who are either ignored or ridiculed if they manage to appear in the media.

The principles of ESD were novel and the terminology vague. They were developed at an international level. They are now what are often referred to as "international norms". Consequently, their interpretation in Australian courts has been, and is likely to be in the future, strongly influenced by the large body of international academic writing and international jurisprudence which is developing around them principally from those of an activist bent.

In *Telstra Corporation Ltd v Hornsby Shire Council* in 2006, Chief Justice Preston of the Land and Environment Court of New South Wales set out his interpretation of the precautionary principle.[12] Before doing so he comprehensively surveyed the extensive body of international academic writing and jurisprudence on the principles of ESD, the latter extending from the European Court of Justice to the Supreme Court of Pakistan.

In a speech in 2009, His Honour talked about his interpretation of the precautionary principle in that case.

Bear in mind that the precautionary principle in the legislation he considered was in terms similar to the definition in the EPBC Act, that is, if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. His Honour said:

> The precautionary principle has work to do. I endeavoured to explain how the precautionary principle works in my judgment in *Telstra Corporation Ltd v Hornsby Shire Council*. In essence, the principle operates to shift the evidentiary burden of proof as to whether there is a threat of serious or irreversible environmental damage. Where there is a reasonably certain threat of serious or irreversible damage, the precautionary principle is not needed and is not invoked. The principle of prevention, one of the ESD principles, would require the taking of preventative measures to control or regulate the relatively certain threat of serious or irreversible environmental damage. . . . But where the threat is uncertain, past practice had been to defer taking preventative measures because of that uncertainty. The precautionary principle operates, when activated, to create an assumption that the threat is not uncertain but rather certain. Hence, if there is a threat of serious or irreversible environmental damage and there is the requisite degree of scientific uncertainty, the precautionary principle will be activated. A decision-maker must assume that the threat of serious or environmental damage is no longer uncertain but is a reality. The burden of showing that this threat does not, in fact, exist or is negligible effectively reverts to the proponent of the project. If the burden is not discharged, the decision-maker proceeds on the basis that there is threat of serious or irreversible environmental damage and determines what preventative measures ought be taken. The decision-maker is in the same position as if there had been a relatively certain threat of serious or irreversible damage.

His Honour applied that formulation of the precautionary principle in *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited*.[13] The proposed development was a limestone quarry. His Honour found that there was uncertainty as to the presence of karst features, caves and cave dwelling fauna called stygofauna. His Honour found there was a relevant threat which had the

requisite degree of uncertainty. Therefore, he proceeded on the basis that the threat was certain and imposed conditions of consent addressing that threat.

His Honour's interpretation of the precautionary principle distorts the process of environmental assessment in favour of the environment over social and economic considerations. The application of the precautionary principle has provided the momentum to the International Panel on Climate Change (the IPCC) in the climate change debate. The formulation of the principle relied on by the IPCC is a less powerful formulation than that enunciated by Justice Preston. If His Honour's formulation of the principle is applied, it will be very powerful indeed.

The Murray-Darling Basin

The *Water Act* provides for allocation of water in the Murray-Darling Basin between the environment and human use. The *Water Act* makes the environment paramount. The first point is that Ramsar wetland listings are not confined to natural wetlands. This is very important in current debate about the Murray-Darling Basin. The Lower Lakes in South Australia, Lake Alexandrina and Lake Albert, are Ramsar listed. They are fundamental to the demand of environmentalists and the SA Government for 4 000 megalitres to flow to the end of the river system. The Lower Lakes are an artificial, manmade, freshwater wetland, resulting from construction in the 1930s of seven kilometres of barrages or sea dykes. There is no longer a Murray River estuary. The Southern Ocean no longer flows in. The European carp, a pest, has thrived. Anyone who seeks to question the rationale for maintaining that artificial freshwater environment is beyond the pale – either ignored or demeaned.

No threat of a constitutional challenge by any of the States has been foreshadowed. South Australia is threatening High Court proceedings. If it proceeds, the challenge will be because the Murray-Darling Basin Plan does not comply with the *Water Act*. Issues that may arise include whether the precautionary principle and the obligations under the Climate Change Convention have been properly taken into account.

Conclusion

I am critical of the majority decision in the *Tasmanian Dam case* for the following reasons.

- it has increased the Federal Government's power to legislate in matters previously the domain of the States, and has altered the balance of power between the Federal and State governments;
- the development of globalism means that it is difficult to imagine any subject matter that will remain "domestic", as Sir Harry Gibbs used that term in the *Tasmanian Dam case;*
- international environmental conventions such as the Biodiversity and Climate Change conventions were designed by environmental ideologues to further their political objectives; there has been little or no scrutiny of the concepts in the conventions or their consequences;
- the concepts in the conventions were novel and their interpretation in Australian courts has been and is likely to be influenced by the large body of mostly activist international academic writing and jurisprudence which is developing around them and which, as a consequence, diminishes Australia's sovereignty;

finally, the change in constitutional responsibilities has had significant budgetary consequences for the Commonwealth. I would suggest that if the carbon tax and other measures relating to climate change, including renewable energy targets and associated schemes, had not been enacted, the National Disability Insurance Scheme would have been affordable several times over.

Endnotes

1. [1944] HCA 36; (1944) 69 C.L.R. 457, at 471.

2. [1948] HCA 7; (1948), 76 C.L.R. 1, at 184-5.

3. *The Commonwealth of Australia v Tasmania* (1983) 158 CLR 1 at 100.

4. At 44.

5. *Ibid*., at 387.

6. *Earth Summit Agenda 21: The United Nations Programme of Action from Rio*, United Nations Department of Public Information, New York: 1992 at 3.

7. International Union for the Conservation of Nature and Natural Resources/ United Nations Environment Programme/World Wide Fund for Nature.

8. *Ibid*., at 68.

9. *National conservation strategy for Australia: living resource conservation for sustainable development: proceedings of the national seminar, Canberra, 30 November-3 December 1981.*

10. http://www.environment.gov.au/about/esd/publications/igae/index.html

11. http://www.environment.gov.au/about/esd/publications/strategy/index.html

12. (2006) 67 NSWLR 256; (2006) 146 LGERA 10.

13. [2010] NSWLEC 48 (31 March 2010).

Chapter Eight

Native Title 20 Years On: Beyond the Hyperbole

The Honourable Gary Johns

We give the indigenous people of Australia, at last, the standing they are owed as the original occupants of this continent …[1]

— Paul Keating, *Native Title Bill*, Second Reading Speech, 1993

Owning land can at times in fact become a liability … some properties in the Indigenous estate may never be viable.[2]

— Indigenous Land Corporation, 2010

Aboriginal groups have acquired land under . . . pastoral leases, statutory Aboriginal freehold and trustee arrangements. Much of this land is . . . subject to native title claim . . . [which] has a high potential to . . . rigidify the Indigenous system.[3]

— Northern Land Council, 2011

Contracting opportunities for Aborigines in the Pilbara far exceeds the benefits of the trust money [from land rights].[4]

— Robyn Sermon, Rio Tinto, 2012

Disclaimer

On the 20th anniversary of the Mabo decision, to which the *Native Title Act* gave effect, Paul Keating commented, "Oh, a lot of people in the Labor Party [were] very nervous. A lot of my colleagues didn't want a bar of it."[5] In this, he was accurate. In 1992, as Parliamentary Secretary to the Treasurer, John Dawkins, my unsolicited advice to Dawkins was not to legislate for native title but, instead, leave it to the courts. He was not impressed. If not he, then certainly Prime Minister Paul Keating could sense greatness in the offing. The *Native Title Bill* 1993 vote was greeted with a standing ovation in the House of Representatives and in the public gallery. Like the audience at a Stalin rally, I, too, stood.

Large costs and uncertain benefits

The High Court found that Australia had wronged Aborigines by denying them land. In Keating's phrase, what if we who "took the traditional lands and smashed the traditional way of life" cannot repair our wrong by restoring the land?[6] Can the Aborigines be restored, as justice would demand?[7] What if native title rights not only fall short of expectations, or their benefits are squandered? what if they are a liability?

Although land rights talk is imbued with the language of spiritual connection to country,[8] there is clear evidence emerging that being left undisturbed on one's country

on other Aboriginal titles is insufficient to satisfy this goal. Native title is being claimed over other types of Aboriginal title because it provides an enhanced opportunity to extract rent. For example, in 2011, at Ooratippra, situated 300 kms northwest of Alice Springs, native title was successfully lodged over a Community Living Area and a Perpetual Pastoral Lease, which the Indigenous Land Corporation had purchased in 1999 and transferred title to the Ooratippra Aboriginal Corporation.[9]

Land rights talk is also imbued with the language of economic development.[10] But there is ample evidence that the uses to which the rent is put are unproductive. Because so much has been squandered, 20 years after the original legislation, the Commonwealth has sought to ensure that monies are put to better use, for example, to be set aside for educational scholarships.[11]

The cost of the native title regime is no small matter. The cost to administer native title, along with the Northern Territory Aboriginal Benefits Fund and Indigenous Land Corporation funds is well in excess of $340m per year.[12] To this amount should be added the Northern Territory and other State regimes, and the supplementary programs that buttress land rights. Noel Pearson's Family Responsibility Commission, for example, cost more than $4.6 million in 2010-11 to administer.[13] It would be nice to have evidence that the native title regime generates benefits at least equal to these amounts but, more important, that it will, in time, make owners self-sufficient. After 20 years of operation, it is time to evaluate native title.

It is time for land rights advocates, and governments, to ask who wins and who loses from native title and land rights? It is time to ask, if dispossession was the wrong that land rights was meant to right, has repossession worked? It may seem impolite to enquire whether the owners would have been better to leave their land. Remaining for generations, without work and in considerable turmoil, is a cost that is never assigned to land rights, but since the late 1970s that has been the result for many. But governments have persisted, and other land users have lost millions of dollars in lost opportunities and in costs.

"Good" agreements

In 1963, Nabalco commenced mining bauxite at Gove against the wishes of the people at Yirrkala Methodist mission. In 1964, the Queensland Government removed Aboriginal residents of Mapoon Presbyterian mission for Comalco's bauxite mine. No one would countenance a return to such processes. But times have changed. The 2011 Rio Tinto Alcan Gove Traditional Owners Agreement grants traditional owners up to $18m per annum over 42 years. The land is collective inalienable freehold under the *Aboriginal Land Rights Act* 1976 (NT).[14] The 2001 Comalco Cape York Indigenous Land Use Agreement (ILUA) grants native title and other Aboriginal titleholders and 11 language groups across the region $2.5m and $1.5 per annum respectively from Comalco and the Queensland Government.[15]

Marcia Langton describes native title as a "scheme for validating settler titles … and native title sneaks into the interstices."[16] She acknowledges that native title creates a right to negotiate, especially over large resource projects, and nominates the Western Cape York Co-existence Agreement at Weipa as a good example. It is as well to ask, what is a good agreement? Three of the largest and most comprehensive agreements in native title, two of which have partial evaluations and include Western Cape York, may assist in answering the question.

Comalco-Western Cape Communities Trust 2001 – Cape York

The Comalco ILUA at Cape York is extensive. Rio Tinto (owners of Comalco) claim that 25 per cent of their workforce at Weipa is Aboriginal, but it is not known whether these are from Weipa only or the three communities in question.[17] Whether such employment achievements required land rights is moot. In addition to employment and training programs, a Cultural Awareness fund, and transfer of property, a Charitable Trust has been set up to manage funds that accumulate from the annual contributions by Comalco and the Queensland Government.[18] The Trust's investments are projected to be $150m in retained funds by 2022. Once the mining and Queensland Government income streams cease, distributions from these investments and any reinvestment until 2022 will continue to be allocated to the sub-regional trusts for distributions under Charitable Purposes.[19]

Traditional owners, Napranum, Mapoon, and Aurukun Aboriginal Shire Councils, sporting groups, churches, and schools are eligible to apply. Common to each trust are the following:

- Household appliances – refrigerators, washing machines, air conditioners
- Funeral assistance – $5 400 per grant, $1 000 and for feasting
- Community sporting clubs and sponsorships
- Cultural festivals, church fetes and Christmas activities
- Church activities and church equipment, religious study programs
- Educational bursaries – Primary, $500 per child per year; Secondary bursaries capped at $15000, $1200 for the purchase of a computer if 100 per cent attendance; University, $15 000; includes cost for trip home per year, applicants must work with Rio Tinto Alcan on holidays
- Outstation establishment – $500 000 for outstations.[20]

Employment opportunities as a result of the Comalco investment are by far the most powerful tool for the betterment of local Aborigines. The trust funds may either enhance or detract from the employment impact. For example, the list is a curious mixture of funds for personal needs, future investment, and escapism. Monies to buy household goods and funeral assistance seem to be charity and risk displacing personal effort. Community expenses are no doubt touted as investments but, in fact, also risk displacing personal effort. The education funds with conditions attached are a sensible investment, although much is already available through the State and Federal governments. The outstations are problematic as they are touted as an escape from town life, when towns are where employment and services are most likely available. The outstations, therefore, are a form of holiday home in the bush.

There is some data available to evaluate the impact, among other programs, of the agreement. For example, The Family Responsibilities Commission,[21] which began operation in July 2008, covers Aurukun, and all three communities are part of the alcohol management regime established following the 2001 Fitzgerald Report.[22] Part of the Fitzgerald plan was to monitor health-related violence and other matters, so that unique data are available for behaviour in these communities. The data indicate that, for communities within the Comalco Agreement area, Mapoon shows statistical evidence of decline in hospital admissions for assault-related conditions from 2002-03 to 2010-11, but Aurukun and Napranum show no statistical trend. Statistical evidence

from Arukun and Napranum shows evidence of decline in all reported offences against the person between 2002-03 and 2010-11. The evidence from Mapoon does not.[23] Trends in Semester 1 student attendance rates for the five years 2007 to 2011 show statistical evidence of an increasing trend in student attendance for students at Aurukun; Napranum shows decline in attendance; and Mapoon no change. Although there is claimed success at the Noel Pearson-inspired Cape York Aboriginal Australian Academy, which commenced in Aurukun in Term 1, 2010, it is too early to assess outcomes.[24]

The sheer size of the trust and the allied programs combined are surely the last chance for place-based solutions to Aboriginal disadvantage. What else could be done to make the place work? Progress appears minimal, but perhaps progress will be slow.

Gulf Communities Agreement 1997 – North Queensland

The Gulf Communities Agreement 1997 was negotiated between Pasminco Century Mine Limited (now Zinifex Century Limited), the Queensland Government and three native title groups: the Waanyi, Mingginda, and Gkuthaarn and Kukatj. Zinifex Century Mine is located 250 kms north-west of Mount Isa, while the Port and Dewatering Facility is located on the coast at Karumba. A 300km underground pipeline connects the two sites. The mine site is a Fly In/Fly Out operation with the workforce commuting from locations ranging from the Gulf communities of Doomadgee, Burketown, Normanton and Mornington Island, to Mount Isa and Townsville.

The Century Mine workforce employs a large proportion of Aborigines. And various pastoral leases have been transferred to owners. Gulf Aboriginal Development Corporation manages the direct compensation payment to the native title eligible bodies, which amounts to $10m over 20 years. Century Employment and Training Committee administers Century Mine's annual expenditure of $2.5m on local Aboriginal employment and training. Aboriginal Development Benefits Trust manages $20m over 20 years for local Gulf Aboriginal business development, contributed by Century Mine at a rate of approximately $1m per annum. The Trust's current strategy is to invest one-third of the contributed funds in long-term investments, with the remainder of the funds available for business development loans.[25]

A ten-year review into the GCA was conducted in 2008. The review called for "increased government effort" in relation to the GCA, stating "a renewed commitment to the GCA was required over the remaining life of the mine . . . to ensure that employment and enterprise development benefits to native title groups [were] maximized." The review recommended release of $5.7m by the Queensland Government for a social impact assessment, and initiatives in governance and leadership training for signatory native title groups. In other words, throw in more money. A paper written in 2008 on the implications of the completion of the Century Mine on Gulf communities due in 2017 found that while Century Mine had increased income and job opportunities in the region and transferred pastoral leases to Aborigines, it had low levels of conversion of mining income into savings or long-term assets and overcrowded, low-quality housing, relatively poor health and education outcomes.[26]

These two case studies leave open the conclusion that even the best agreements may not "restore" Aborigines to some better place. Perhaps the third large agreement will have better news.

Browse LNG Precinct Agreement 2011 – Kimberley

The Browse LNG Precinct Project Agreement of June 2011 between the State of Western Australia, the Goolarabooloo Jabirr Jabirr Peoples, Woodside Energy Limited (and others) is massive. The benefits package includes:

- $30m towards an economic development and housing funds
- $28m in payments, additional $5m for more than three LNG trains
- $4m in annual payments, additional $2m for more than three LNG trains
- $3m annual payments – business development, employment and training
- $5 million a year in contracts and job preferences
- $8m for Reading Recovery Program throughout the Kimberley
- $10m for the Goolarabooloo Jabirr Jabirr Rangers, and
- 2900 hectares of freehold land on country, and the LNG precinct to be handed back as freehold land at end of the life of the precinct.

In addition there are benefits to the wider Kimberley region including:

- $186m towards economic development, housing, education, cultural preservation funds and for social programs
- 300 construction jobs, 15 per cent of the project workforce, and
- 600 hectares of freehold land to Dampier Peninsula Traditional Owners and a commitment to reform land tenure on ALT land on the Peninsula.[27]

Native title was not necessarily central to this agreement, but, assuming that it is, the offer for Aborigines does not get any better than this. This is a lottery win; if this agreement at James Price Point does not succeed, then the dreams that land rights, not to mention native title offers, are not achievable. The reason for commencing with these large agreements is to point out that they are rare and are only possible because the mine resources are so vast.

The remainder of the paper will concentrate on more common cases where these three elements do not always apply.

Evaluating native title

Some native title and land rights supporters argue that native title parties do not gain full benefits from their title because they "are under pressure to agree with mining companies" and that a company can, after six months, approach the National Native Title Tribunal to gain access to land.[28] They may be unaware that Chris Sumner, Deputy President of the Tribunal and a former Labor Attorney-General for South Australia who, while at pains to assure all that "[t]his is not to incorporate a general right of veto over mining projects", nevertheless determined that Weld Range Metals' proposal for a chromium, iron and nickel mine near Meekatharra in Western Australia should be stopped at the wishes of the traditional owners. The proposed mine has a construction workforce of around 1 000 contractors and permanent employment for 225 people generating approximately $2 billion in taxes and royalties. Knowing that leases were first granted in 1997, and that the tribunal commenced to determine the matter in 2010, Sumner found that the Wajarri Yamatji were "prepared to negotiate about acceptable agreements with grantee parties."[29] Clearly, the six-month constraint did not apply.

Others argue that native title is too difficult to attain.[30] They need not worry. Since 1998 the system has been, in some senses, bypassed using ILUAs whether native title has been determined or even claimed.[31] As the Noongar Native Title Representative Body argues, "we are now not really trying to 'win native title', but trying to 'win out of native title'." We are trying to move from "remnant title to social justice."[32] In Victoria, where there was never much hope of proving enduring connection to land, the Labor Government passed the *Traditional Owner Settlement Act* 2010. It provides an out-of-court settlement regime,[33] the core of which is the hand back of parks and reserves of significance to the traditional owner group to be jointly managed with the State.

When governments observed that native title appeared to lack the hoped for boost to land rights, they tried to nurse it along with tax breaks. But favourable taxation of native title payments[34] only reinforces the fact that "native title does not have inherent economic value or benefits."[35] A recent survey of those involved in ILUA negotiations suggested that native title parties were not "adequately compensated for land use".[36] And yet, the expectation is that native title and other land rights will act as a base for livelihood. This begs the question, "what value is communal native title and how is value assessed?"[37]

Perhaps the simplest means of assessing the value of native title is to assume that those who hold or claim native title derive satisfaction sufficient to make the claim. In addition, however, they hope to derive income. All owners and claimants (or those fortunate to be named in an agreement) share at least one of four means of deriving income. The first is where employment is established through ownership of business, or employment directly related to the native title right. Alas, there are few examples of direct employment arising from native title; the Rio Tinto example cited below is one. Indeed, almost all income is derived either from employment programs used to boost employment on native title land, or through the proponent, not the native title holder, or from rent.

There are three forms of rent. First, one or many proponent users of the land want to "solve" the entanglement of multiple claims present and future, they may pay in cash and/or in kind to satisfy the claimants or owners through an all encompassing agreement such as at Comalco Cape York. Second, monies may be paid to owners for "Future Act Activity", which is for disturbances to native title rights.[38] As at April 2012, some 2663 Agreements had been lodged with the National Native Title Tribunal. The negotiating parties have made only 68 public.[39] Some have suggested a register of agreements so that comparisons may be made or benchmarks of best practice or best outcomes established, but there is caution in publication at what are mostly private negotiations between interested parties.[40]

The overwhelming number of future act agreements available is for access for mining, exploration, gas pipelines, and infrastructures as varied as an airport, shooting range, shire infrastructure, and an attempt to gain perpetual pastoral lease over native title claims. For example, in 2010-11 the Carpentaria Land Council Aboriginal Corporation received a total of 92 future act notifications. Most commonly, these were for exploration permits, works programs and fishing permits.[41]

The Northern Land Council reports mining future acts are the largest driver of NLC's native title work program.[42] Examples of payment for compensation for such acts are difficult to find but one is traditional owners for the proposed Wunara phosphate mine

who received $150 000 of exploration compensation money, which they used to renovate five houses at the Wunara outstation.[43] Another is for exploration access fees paid to the Dja Dja Wurrung People of central Victoria at $1 500 per year per drill hole, and cultural heritage payments for inspections at $300 per day.[44] The 2002 MaMu Canopy Walk Heads of Agreement,[45] for example, provides $1 to the MaMu people for each entry fee paid by visitors to Wooroonooran National Park, Innisfail. The magnificent view of the north Johnstone River from the canopy walk, which displays some references to early MaMu habits and customs, earns the MaMu about $150 000 a year.[46] The MaMu also have the right to participate in the management of the National Park.

The third means of making money is by way of extinguishment compensation claims. These are uncommon. In 1997 and 2010 the Dunghutti Elders Council in the Kempsey region was paid $738 000 and $6.1 million respectively by the New South Wales Government as compensation for extinguishment of Dunghutti native title at Crescent Head in New South Wales.[47]

Possibly the largest payment is the 2003 Burrup and Maitland Industrial Estates Agreement Implementation Deed,[48] where the State of Western Australia acquired land for construction of heavy industrial estates on the Burrup Peninsula and adjacent Maitland area, along with any native title rights and interests that the native title parties may have had. The Agreement provided that in exchange for permanent extinguishment of native title on the Burrup and Maitland Estates industrial land and residential/commercial land in Karratha, the native title parties receive freehold title of Burrup land, a cultural centre on the land worth $5.5m and infrastructure funding on the land worth $2.5m. Five per cent of developed lots of Karratha commercial/residential land were to be transferred to an Approved Body Corporate, including $5.8m in compensation payments. The State also implemented the $3.5m Roebourne Enhancement Scheme to improve housing, transport, agency co-ordination and asbestos removal.

The question of how compensation for loss of native title rights and interests will be calculated has not been settled. For example, Central Desert Native Title Services has lodged a compensation claim over the Gibson Desert Nature Reserve, a remote and rarely visited conservation area via Kalgoorlie. The traditional owners, with the Western Australian Government, are attempting to legislate recognition of title and the existence of the nature reserve. In the event that agreement cannot be reached, the claim will likely be regarded as a "test case."[49] The most likely outcome, however, is that no money will change hands and claimants will "assist" in management of the reserve.

It is becoming clear that the value of native title is determined by those who create wealth and not by some innate value attributed by Aboriginal people. The reasons are that those who have successfully claimed native title have derived monetary benefit only when another potential occupant has presented them with a bankable proposition – usually a mining company,[50] a neighbouring pastoralist,[51] or a government keen to preserve land in a national park.[52] While traditional owners may enjoy native title, it may not put bread on the table. It may also lock owners into long-term arrangements adverse to their best interests. For example, there is solid evidence that one reason many traditional owners in the Pilbara have "surged ahead"[53] in establishing business is because, unlike their contemporaries in Cape York and

elsewhere, they no longer live on their traditional land. The Rio Tinto experience has been that many owners live in regional centres and visit their traditional lands. Traditional owners fly to Rio Tinto's newer mine sites from places such a Geraldton, Carnarvon, Broome and Derby.[54]

Native title system

Registered determinations, registered claims, and registered indigenous land use agreements,[55] each of which allows the right to negotiate, cover perhaps 80 per cent of the Australian landmass.[56] In addition, 36 per cent of the Northern Territory is inalienable freehold under the *Aboriginal Land Rights Act* 1976 (NT) or other Aboriginal land,[57] and 21 percent of South Australia is inalienable freehold under the *Aboriginal Lands Trust of South Australia Act* 1966 (SA) and later legislation.[58] Measured by coverage, native title and previous land rights legislation is an extraordinary success. In 2006, 93 000 of Australia's estimated 517 000 Aboriginal and Torres Strait Islanders lived in a discrete indigenous community. The majority, 80 500, lived in remote or very remote area communities; the remaining 12 500 in non-remote discrete communities in communities such as Redfern in Sydney and Framlingham in western Victoria.

In 2006, 26 per cent of people in remote indigenous communities lived in one of the 14 communities with one thousand or more people such as Yuendumu in the Northern Territory and Hope Vale in Queensland. A further 41 per cent lived in communities with between 200 and one thousand residents and 20 per cent were in communities with between 50 and 199 residents. Nearly 13 per cent of people lived in the 838 communities with a population of less than 50 people.[59]

There have been 185 determinations of Native Title, 141 that it exists and 44 that it does not.[60] The number of findings that it does not exist has been increasing since about 2000. Of 443 current claimant applications, 25 per cent were lodged after 2006, but 47 per cent have been in the system for between 10 and 17 years.[61] The findings ratio and the large number unresolved after lengthy periods suggest that diminishing returns have set in. Perhaps these have spurred governments to undertake Indigenous Land Use Agreements, which have the advantage of applying to multiple interests and multiple aspects of land use and management, including future uses. Once registered, an ILUA is a contract legally binding on all native titleholders in the area covered by the agreement, whether or not they are signatories to the agreement. There are 649 registered ILUAs.

Once agreement is reached, the negotiating parties are required to lodge a copy of the agreement with the NNTT. In a majority of cases, however, parties will, for reasons of confidentiality, give very few details of the contents of that agreement or its subject matter. For example, payment details will rarely be included. There are also agreements, like the Gove agreement, outside of the native title regime.

Yarrabah, Cape York

Unfortunately, few details of the ILUAs are available from the register. A random sample of 24 (of 649) ILUAs suggests that the vast majority were for mineral, oil and gas exploration access.[62] Some required access for infrastructure for electricity utilities and others from shires for housing and other infrastructure. One was for the management of a national park.

An example is at Yarrabah, located 37 km south of Cairns, a 45-minute drive on good roads. It has up to 3 000 residents. The houses are in poor repair, there is one school, one church, one other public hall and some minor shops. There is very little employment in Yarrabah.[63] Local officials have written that "issues of concern are similar to those of other Aboriginal & Torres Strait Island Communities with unemployment, health, housing and education and no historical opportunities for economic development."[64]

Yarrabah was established by missionaries in 1892. There were three major clan groups – GuruBanna, GuruGulu and Yarraburra. The mission closed in the late 1960s and came under control of the Queensland Government. Yarrabah received its Deed of Grant in Trust in 1986 and the Yarrabah Aboriginal Shire Council became self-governing. Native title was granted in December 2011 and Gunggandji Prescribed Body Corporate has been established and an office opened. Local officials suggest that their "successful determination has created opportunities for our people for the future."[65] The PBC will manage ILUAs and is "looking for and resourcing economic opportunities – ecotourism … preserve Bush Fruit Trees, rehabilitate and clean up their land & sea areas, prevent wild or uncontrolled fires", and "work with appropriate agencies to secure funding for Traditional Owner rangers so we can manage our country."[66] The prospects for development at Yarrabah seem bleak. And yet, Cairns beckons, just as it has at least since 1986.

Native title industry

A pre-Mabo Department of Education and Employment report, *Rural Development Skills on Aboriginal Land: can we meet the challenge?*, found that the majority of pastoral operations on Aboriginal title were not being run in a commercially sustainable manner and required continuing government grants. The report concluded:

> Aboriginal know how has enabled the development of political and negotiating/manipulative skills as a significant modus operandi for survival within the non-aboriginal world (skill in gaining access to resources rather than skills in generating them through European-style productive activities).[67]

The conclusion was an acute and courageous observation. In the twenty years since, land councils continue to excel at sourcing grants and maintaining a strong presence. To these, however, have been added a host of other players – Native Title Representative Bodies, Prescribed Bodies Corporate and Trusts.[68] These bodies, in addition to grants received, hold the moneys from native title or programs to buttress native title.

The native title method of extracting and distributing "rent" differs from the *Aboriginal Land Rights (Northern Territory) Act* 1976 where, for example, mining royalties are, in effect, tipped into the Aboriginal Benefit Account and distributed to supplicants on application via Land Councils. Under the ALRA in the Northern Territory and in other land systems in the States, land councils have been dominant. Under native title, traditional owners negotiate a deal with proponents. Nevertheless, Native Title Representative Bodies (NTRBs), which are primarily responsible for servicing the needs of native title-holders in their area, have become central players.[69] In some cases land councils have taken on the native title role; in other cases, new bodies have been formed.

Table 1. Funds for Native Title Representative Bodies and Service Providers

Native Title Representative Bodies and Service Providers	Government funding: 2010-11
Torres Strait Regional Authority	$2.1m ($70m total income, 108 employees)
Cape York Land Council	$4.8m ($5.6m total income, 28 employees)
Carpentaria Land Council Aboriginal Corporation	$1.6m ($5.1m total income, 37 employees)
North Queensland Land Council Native Title Representative Body Aboriginal Corporation	$2.5m (last reported 2005-06)
Queensland South Native Title Services	$11.2m (same total income, 49 employees)
NTSCorp (New South Wales)	$4.5m (same total income, not reported)
Native Title Services Victoria	$4.7m (same total income, 28 employees)
South Australian Native Title Services	$6.3m (same total income, 29 employees)
Goldfields Land and Sea Council Aboriginal Corporation (Representative Body)	$5.4m (same total income, 27 employees)
Kimberley Land Council	$7.7m* ($29.3m total income, 113 employees)
Central Desert Native Title Services	$5m (same total income, 57 employees)
South West Aboriginal Land and Sea Council	$3.3m ($5.6m total income, 37 employees)
Yamatji Marlpa Aboriginal Corporation	$11.2m ($28m total income, 103 employees)
Central Land Council	$3.3m ($21m total income, 200 employees)
Northern Land Council	$3.4m ($38m, 205 staff)

Source: Annual Reports of NTRBs. * estimate

The NTRBs are mostly land councils in a new role, with some new bodies established for native title. Table 1 indicates the distribution of funds among councils, which they use to assist claimants and owners in native title matters. The land councils have taken on the extra role of NTRBs, adding these funds to others grants.

Table 2. Northern Land Council Income 2011

Source of income	Annual grant in dollars
Native title program	$3.4m
Aboriginal Benefits Account (NT ALRA)	$26m
Department of Sustainability	$4m
Indigenous Land Corporation	$2.7m
Northern Australia Indigenous Land and Sea Management Alliance	$0.7m (expenses for Rangers $3.5m)
Territory Natural Resource Management	$0.3m
Others	$2.3m
Total	$40m

Source: Northern Land Council, *Annual Report 2010-11*, pp 189 and 206.

Table 2 suggests that the Northern Land Council, like all other land councils, is still good at "gaining access to resources." Native title is a lesser element in the Northern Territory because of the presence of the ALRA and the grants system associated with it.

Native title-holders must establish a Prescribed Body Corporate (PBC) to represent them as a group and manage their native title rights and interests. There are, so far, 93

prescribed bodies corporate. Funding for PBC administrative costs comes from the NTRB for the area in which the PBC is located.[70] PBCs have sought a new pool of funds, separate from the NTRBs, with whom some PBCs are in conflict.[71] The PBCs are able to undertake negotiations directly with others over their claim or future uses of native title. The new arrangements may signal a dispersal of council power. One estimate is the PBCs represent 50 000 traditional owners,[72] although the count in Table 3 suggests far fewer.

In the latest corporate returns, 86 of 93 PBCs indicated their activities as land management or did not specify. This usually means being paid to watch miners drill a hole, or assist a national parks official. Only 27 PBCs reported an income. Of those, seven reported a loss in 2011, one being a major loss. The Dunghutti Elders Council in Kempsey, for example, was paid all up $6.8m by the NSW Government in 1997 and 2010 as compensation for extinguishment of native title at Crescent Head. The corporation reported $5m in its account in 2010 and a loss of more than $1m in 2011. The Registrar of Indigenous Corporations has taken action to place the council in administration.[73]

Table 3. Characteristics of Prescribed Bodies Corporate

Purpose	Employees	Members	Income
Land management 51	No employees 70	0-9 members 1	$0 46
Health 1	1-6 employees 5	10-49 members 37	$1-249,999 14
Housing and other 2	12–22 employees 5	50-99 members 18	$250 000- $1m 6
Employment and training 4		100+ members 29	$1m + 7
Did not specify 35	Did not specify 13	Did not specify 9	Did not specify 20

Source: various documents from the *Office of the Registrar of Indigenous Corporations* for 93 PBCs registered from 1997 to 2012.

Ngarluma Aboriginal Corporation has the largest income by far at $7.8m in 2011, which was the result of an ILUA with Robe River Mining Co Pty Ltd in 2011. The ILUA Area covers about 7 000 square kilometres in the vicinity of Karratha. Native Title was granted to the Ngarluma and Yindjibarndi people in May 2005 and the NAC was set up in June 2005 and is the PBC for Ngarluma. There is also a housing estate development commenced in 2010, the Yaburriji Estate in Roebourne. There is also hope for the Mt Welcome Pastoral Station. The Station hopes to employ all local people and to run a successful beef business. The NASH plan is to develop a new housing community on approximately 50 hectares of land next to Roebourne, for up to 400 housing lots and to provide land for educational, community and commercial facilities to enhance the opportunities for all Indigenous people in Roebourne. There has been $11m in State government funding.[74]

Trusts may be used where native title is not established or no body corporate is

available as a vehicle to receive monies. In 2006 there were two regional ILUAs written between the Dja Dja Wurrung People and the Minerals Council of Australia as well as the Wamba Wamba Barapa Barapa and Wadi Wadi People and the MCA to satisfy the future act provisions of the *Native Title Act*. A trust was established for each. Both agreements covered disturbance from low level exploration and specified work and pay rates associated with the exploration.[75]

Larger agreements, Comalco and Gove for example, establish a trust for monies. The 2001 Comalco ILUA established a Charitable Trust controlled by a majority of traditional owners to manage funds and annual contributions made by Comalco and the Queensland Government.[76] The Browse LNG Precinct Project Agreement of June 2011 between the State of Western Australia, the Goolarabooloo Jabirr Jabirr Peoples, Woodside Energy Limited established an administrative body, Administrative Body and Corporate Trustee, at a cost of $5m.[77]

Trusts are well recognised under the ALRA system. Monies, for example, received on behalf of the Associations of Aboriginal people are held in the Land Use Trust Account and disbursed in accordance with the terms of the trust.[78] The trusts administered by a land council, however, suggest not only an intimate relationship between land council and traditional owners, but one where land councils are in control.

> A land trust can only deal with the land in ways that the Land Council directs it to, but land councils can only direct land trusts to deal in land in ways that the traditional owners have determined.[79]

The native title system encourages direct dealing between traditional owners and other users. In practice, there are often competing claimants, which look to others to sort their differences. In addition, large developments with a long life usually require an enduring instrument for disbursements and other arrangements such as promises of employment, where a trust is most effective.

Where trust and ILUAs have not been used, the prospects for cooperation between competing claims is diminished. Body corporate politics can be most unpleasant. Joint ownership and control of properties and monies can lead to considerable disharmony. In circumstances where an individual owns property and is, as a result, part of the body corporate for the purposes of managing joint matters of maintenance and such, at least the option of selling exists. Aboriginal collective ownership does not allow for disposal of property, so body corporate politics is enduring and inescapable, at least not without giving up rights to land and proceeds.

These matters are intensified where native title is claimed over other Aboriginal lands and claimants are not the same as the owners of those properties. In 1997, for example native title was granted over an area almost the same size as the Hopevale Deed Of Grant In Trust. The determination recognised the existence of native title held by 13 separate clans in their respective clan estate areas.[80] The Hopevale ILUA is a body corporate ILUA. The parties to it are Hopevale Congress RNTBC, Dhubbiwarra Aboriginal Corporation RNTBC and three individual blockholders who have been offered residential leases.[81] The Hopevale DOGIT was transferred to Congress in 2011. Both before and since that date, there has been litigation before the courts on four occasions concerning the transfer. The native title-holders, the subject of this determination, do not all hold native title to the entire determination area. Each clan holds native title only within its own clan estate area. Other litigation concerns

breaches of trust, mainly contractual arrangements proposed for the disbursement of money in the form of an ex gratia payment to be obtained by Congress from the State and future royalties in relation to mining on Aboriginal land.

The system is bust – patch-ups do not work

Native title and land rights have two deep problems. First, the collective nature of the title disallows the capture of improved value.[82] Australian governments have invested extensively in the belief that the best prospect for Aborigines lies in collective access to tribal lands. This, notwithstanding that at the time of earlier land rights legislation, the *Aboriginal Land Rights (Northern Territory) Act* 1976, traditional owners took exception to their collectivisation and having their lands managed by land councils.

> Every group of traditional Aboriginal landowners in Central Australia to whom the Aboriginal Land Rights Bill (Northern Territory) 1976 was verbally translated was surprised and angered to find that it did not meet their expectations.[83]

Second, peer group pressure placed on individuals in those communities is so great as to stifle effort and reward, which encourages owners to receive passive rents.[84] Indeed, the latter, which creates such a strong culture of compliance in poor behaviour, may be the most powerful barrier to success.[85] Peer pressure, so often excused as "culture" in these communities, creates such low expectations and entrenches such bad behavior that few can escape its clutches. Programs that seek to normalize abnormal environments found in these communities almost always fail. The Community Development Employment Projects program (CDEP) has historically carried the burden of training Aborigines, but apart from some successes among Aboriginal groups that deliver CDEP and other employment programs,[86] after 40 years it has failed to produce a job-ready workforce.[87]

The Indigenous Land Corporation has long reported "ILC-operated businesses have experienced people refusing seasonal, casual and full-time employment and/or withdrawing from traineeships and employment and returning to CDEP or income support with immunity."[88]

The new generation job creation programs – Indigenous Pastoral Program, Land/Sea Management Program, Fire Management and Abatement, Parks and Reserves, National Water Commission and so on – hire employees because of their race rather than their value. As a consequence, results are often poor.

Uluru rent money project 2005 – Northern Territory

The ILC concern is illustrated well by Uluru rent money. The earnest desire to have Aborigines work on country creates perverse incentives. Traditional owners of Uluru-Kata Tjuta National Park allocate rent from the national park to community development projects. This is called the Uluru Rent Money project.[89] The Central Land Council, however, manages the whole operation. Activities include meetings of the Mutitjulu Working Group, and projects such as dialysis services, the construction and operation of a swimming pool and the renovation of the recreation hall and basketball court at Mutitjulu. "Independent" research undertaken in the community suggests that, "overall, community members . . . are positive about the things that had been achieved with the rent money." Unfortunately, "service providers, who are generally supportive of this service, point out that the hall has already experienced problems in terms of maintenance and appropriate equipment."[90] There are also outstation upgrades at New

Well outstation (SA) and Kulpitjara Outstation.[91] These communities are in disarray; the rent keeps them there.[92]

At the same time the ILC purchased Ayers Rock Resort in May 2011 "in collaboration with"[93] Wana Ungkunytja Pty Ltd representing the communities of Kaltukatjara (Docker River), Mutitjulu and Imanpa for $300m. The ILC has established the National Indigenous Training Academy at Yulara to take on 50 Indigenous trainees in 2011-12 and 100 in 2012-13. "Recruitment partners" have been engaged throughout Australia to recruit Aboriginal job seekers.[94] Meanwhile, the local inhabitants at Mutitjulu sit idle. The purchase covers failure. Conditions appear to have remained the same despite title, rent and land purchases and the explicit desire to train and employ Aborigines.

Ooratippra Aboriginal Corporation – Northern Territory

Other examples indicate not only conflict but also the sheer pointlessness of some ventures. Ooratippra pastoral lease is situated 300 kms northwest of Alice Springs and covers 4 292 square kms. In 1999, the Indigenous Land Corporation purchased Ooratippra Perpetual Pastoral Lease for $2.55m and transferred title to the Ooratippra Aboriginal Corporation. During 2000-02 the ILC spent $327, 592 on Ooratippra and there was an "inspection" of Ooratippra in 2010.[95] The Ooratippra Aboriginal Corporation has reported an income of $65 000 in 2006 for lease of the station to Mt Riddock Pastoral Company, a neighbouring landowner.[96] The only other reported income was $72 300 in 2009 and $19 000 in 2011.[97]

In 2001, the Central Land Council lodged the Ooratippra native title application on behalf of various estate groups of the Alyawarr language group. A native title consent determination for exclusive possession of Ooratippra pastoral lease was handed down in 2011. The application covered the whole of the station, which includes the Irretety Community Living Area held by the Irretety Aboriginal Corporation. As Ooratippra Perpetual Pastoral Lease and Irretety Communal Living Area are owned by native title holders, they were able to claim exclusive possession which includes the right to negotiate over any future acts like mining.

In 2003, the Irretety ILUA allowed a section of land on the Ooratippra pastoral lease to be purchased by the Northern Territory Government for the purpose of creating an Aboriginal community living area. Without the ILUA, the transaction in the land may have been subject to the future act and right to negotiate provisions of the *Native Title Act* 1993 (Cth). The parties also agree that any action taken under the agreement in order for the land transaction to occur will not extinguish any native title rights and interests that may exist in the area. The entire area is now exclusively native title.

A Prescribed Body Corporate has to be established to look after the interests of the native title holders. There are 37 members of the Ooratippra Aboriginal Corporation, three of whom are members of the Ampilatwatja Community (population 360) and the remainder of the Alpurrurulam Community (Lake Nash, population 740). These communities are 340 kms apart. The relationship between the Ooratippra Aboriginal Corporation, which owns the pastoral lease, and is a native title holder, and the Irretety Aboriginal Corporation (which is located 400 kms north of the other communities), which is also a native title holder, may be a difficult negotiation. The Central Land Council recently reported that it has "provided mediation assistance in an ongoing dispute between two groups of traditional owners affecting the development."[98]

The owner of Mt Riddock indicated that the leasing arrangement had ceased in 2009, and that the station "is in a hell of a mess now".[99] Fences are broken, bores broken down, few cattle on the property, no-one is working it. Houses, including a new house, are wrecked and abandoned. The interviewee rated the property as one of the top ten in the Alice Springs area. The payments for lease were from $60 000 up to $100 000 in the last year, although these amounts do not appear in the PBC record. The Land Council had wanted $250 000 a year rent, but was unable to achieve this.

The Alcoota property adjacent to Ooratippra is, by contrast, well managed, by a non-Aboriginal manager with the Aboriginal owners (ALRA title) working well. This suggests it is not the title but the attitude: native title encourages rent, not work.

Conclusion

Paul Keating's hopes for native title may have proved somewhat of a burden to the original occupants. As the Northern Land Council indicates, native title can gum up existing title and administration. The Indigenous Land Council concludes that land can be a liability. It has also disappointed those who have missed out on title, or on the spoils of title. The Rio Tinto experience suggests that a surer road to happiness has been to leave the burdens of collective title and gain employment in the wider market. Many claimants want "social justice" so claims go on long after native title has been granted.

Just as surely as welfare has been poison, land rights have been no guarantee of success for Aboriginal people. Although land rights created great expectations among Aboriginal leaders, claimants and policy-makers, the evidence suggests that land rights, and native title, have failed to deliver on these expectations. No matter the particular device to administer native title and other land rights, whether ILUA, trust, PBC or through a land council, the "success" or otherwise depends on the wealth generated by the land user, not the native title landlord. Even where there are prospects, the scope for poor outcomes and passive non-state welfare remains great.

The benefits are a lottery. They mostly accumulate to those who administer programs designed to make land rights work. Alas, they almost always fail. The reason they fail is that collectivisation is no basis for commerce, and it reinforces poor habits and bad behaviour. The land rights era was based on an assumption that Aboriginal people were so different from others that economic institutions and peer group behaviour would somehow not apply. Collective living and reinforcement of bad habits is a major problem.

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5. Liz Jackson, "Judgement day," *ABC Four Corners*, 10 May 2012.

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8. Lisa Strelein, "Land, Rights, Laws: issues of native title," *Australian Institute of Aboriginal and Torres Strait Islander Studies,* Issue Paper No. 23, 1998, 6.

9. Indigenous Land Corporation, *Annual Reports* 2001, 2002, 2010.

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11. The Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs, *Leading Practice Agreements: Maximising Outcomes from Native Title Benefit*, July 2010. The paper called for a possible package of reforms to promote "better practice" in native title agreements and the governance of native title payments. No new policy has been announced.

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Chapter Nine

Indigenous Recognition: Some Issues

Lorraine Finlay

On a number of occasions at The Samuel Griffith Society conferences in past years the Founding President, Sir Harry Gibbs, presented "Issues" papers on topical questions such as a republic and a preamble to the Constitution. These papers were designed to highlight some of the key issues that would arise in consideration of those questions and to generate discussion. This paper aims to continue in the same vein. Its purpose is to highlight some of the key issues that will arise when considering the constitutional recognition of Indigenous Australians, and to foster discussion on what is an important constitutional question that is likely to be put to the Australian people within the next 18 months.

The Expert Panel on Constitutional Recognition of Indigenous Australians

At the 2010 federal election both major political parties declared their support for a referendum to recognize Indigenous Australians in the Constitution. The Australian Labor Party's *Closing the Gap* policy promised to establish an Expert Panel on Indigenous Constitutional Recognition. It declared that constitutional recognition "would be an important step in strengthening the relationship between indigenous and non-indigenous people, and building trust."[1]

The Coalition's *Plan for Real Action for Indigenous Australians* also indicated that it would support a referendum to recognize Indigenous Australians in the Constitution. It declared that this was something that "makes sense, and is overdue".[2] Following the 2010 election, the Prime Minister, Julia Gillard, also made commitments to the Australian Greens, Rob Oakeshott, MP, and Andrew Wilkie, MP, that a referendum on the constitutional recognition of Indigenous Australians would be held either during the term of the 43rd Parliament or at the next election.[3]

To this end, on 8 November 2010, the Prime Minister announced establishment of an Expert Panel to consult and provide advice on the question of constitutional recognition of Indigenous Australians. The report of the Panel was submitted to the Government on 19 January 2012. There are a number of issues concerning the Constitution considered by the Expert Panel that will be raised in this paper. These are, specifically, the preamble, section 25, the race power, prohibition of racial discrimination, and the question of reserved seats in Parliament. Before, however, considering the recommendations of the Expert Panel, there are two preliminary issues that are important in framing discussion.

Preliminary Issues

Discussion of Indigenous Issues

The first preliminary issue is a general point regarding discussion of Indigenous issues within Australia. In accepting the Final Report the Prime Minister spoke about the task

that had been given to the Expert Panel which included, amongst other things, bringing forward a proposal "that could contribute to a more unified and reconciled nation" and "be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums".[4] The spirit of optimism and inclusiveness that characterized acceptance of the report was somewhat tarnished when, only a few days later, two members of the Expert Panel wrote that if the referendum was lost, this would "brand Australians to the world as racists, and self-consciously and deliberately so."[5] Unfortunately this seems to be a common pattern, with public discussions about Indigenous issues all too frequently constrained by political correctness and stifled by cries of racism that are aimed at anybody who does not uncritically accept whatever proposition is being put forward.

When we are discussing significant issues of constitutional reform, the potential consequences are too important to allow debate to be stifled in this way. Individuals with reservations about the proposed constitutional changes have an obligation to engage in public debate. It is incumbent upon all of us to ensure that we give the broader Australian community the opportunity to hear and engage in a frank and meaningful discussion about these important issues, undeterred by criticisms of those who would prefer that discussion was limited to a politically correct or "black armband" view of Indigenous issues.

What type of document is our Constitution?

Secondly, there is the question of what type of document the Constitution is. Much of the discussion surrounding possible constitutional recognition of Indigenous Australians has focused on the "symbolic" importance of constitutional reform.

To my mind, whenever we discuss constitutional reform it is important to reflect not only on what the possible consequences (intended or otherwise) may be, but also on whether the proposed reforms enhance or detract from the fundamental purpose of a constitution. The Australian Constitution is not a Bill of Rights. It does not (beyond very limited examples) attempt to define and protect individual human rights.

Unlike other constitutions that are born of revolution or emerge from particularly dark moments in a nation's history, the Constitution of Australia does not attempt to embody the hopes, values and aspirations of the people in soaring and symbolic prose. Rather, it is a measured, practical and workmanlike document that was produced after years of careful debate and compromise. This undoubtedly is part of the reason it is amongst the most enduring and successful examples of a national constitution.

As a constitutional conservative naturally wary of any proposals to amend the Constitution, I assess proposed amendments not by their symbolic value but by their practical implications for the workings of our constitutional structure. Judged by this criterion, although constitutional recognition of Indigenous Australians might contribute to a more "reconciled nation", the practical implications are such that I have serious reservations about uncritically proceeding down this path.

The Preamble

In discussion about constitutional recognition of Indigenous Australians, one of the first suggestions is usually that the preamble to the Constitution should be amended to acknowledge the special place that they hold as the original inhabitants of Australia. It

is important, when considering such a suggestion, to be precise about what exactly we mean, what it is we want to amend, and what the implications of this would be.

A preamble in the legal sense "is an introductory passage or statement that precedes the operative or enforceable parts of the document".[6] The proper function of a preamble, as explained by Quick and Garran, is to "explain and recite certain facts which are necessary to be explained and recited before the enactments contained in an Act of Parliament are to be understood".[7] In a constitutional setting, as observed by Mark McKenna, Amelia Simpson and George Williams, a preamble may have both symbolic and justiciable functions:

> First, in its symbolic aspect, a preamble can capture and chart, in a pithy and quotable form, the history and aspirations of a nation. Although a preamble does not create substantive rights or obligations, its symbolic aspect may assist in the interpretation of the constitution itself by providing normative guidance. Thus, in its second, justiciable aspect, a preamble can be used in constitutional interpretation and in the construction of statutes and the development of the common law as a legally useful statement of fundamental values.[8]

The Constitution of Australia itself, contained in clause 9 of the *Commonwealth of Australia Constitution Act* 1900 (Imp), does not contain a Preamble. What people are referring to when they raise this issue is usually the Preamble to the Imperial Act which provides as follows:

> Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:
>
> And where it is expedient to provide for the admission into the Commonwealth of other Australian Colonies and possessions of the Queen;
>
> Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: . . .

An important implication that follows is that the existing Preamble – being part of the Imperial Act and not actually part of the Constitution itself – will not be capable of amendment using the procedure outlined in section 128 of the Constitution of Australia. Further, as noted by Associate Professor Anne Twomey:

> The Preamble is an historic statement of what was intended at the time the Constitution was enacted. That intent cannot be retrospectively amended by a change to the Preamble . . . Turning the Preamble into a dog's breakfast of historic statements and modern sentiments would leave the High Court struggling with how it was to be interpreted and used in the future.[9]

These considerations were recognized by the Expert Panel, who then considered as a possible alternative the introduction of a new Preamble to sit within the Constitution itself. Again, Anne Twomey identified some of the difficulties with this proposal:

> What would the status of the two Preambles be and how would a court interpret them both, particularly if they clashed? Would a Preamble that is included in the

text of the Constitution, after the enacting clause, be truly preambular in nature, or would it be regarded as having a different status by virtue of its position in the text?[10]

A further difficulty is that the operative provisions of the existing Constitution and, for that matter, the proposed substantive amendments to the Constitution, do not refer to the matters that the various proposed preambles are intended to contain. A preamble is meant to enhance our understanding of the operative provisions that it precedes. In this case, however, there would be a substantial disconnect between the matters raised in the preamble and the operative provisions. There would also be a degree of uncertainty about the effect of a new Preamble that is inserted not to explain a related amendment to the constitutional text, but rather without any related substantive changes to the operative provisions of the Constitution. As noted earlier, the very role of a Preamble is to introduce and explain the operative provisions that follow. It is not clear if and how the new Preamble would be intended to affect the interpretation of the existing operative provisions.

Sir Harry Gibbs has previously raised a number of reasons, "besides those of form and style, why a preamble should not include a statement of values or beliefs not reflected in the existing words of the Constitution".[11] These include the use of the Preamble as an aid to interpretation, with it being permissible to refer to the Preamble to resolve ambiguity or uncertainty when interpreting existing words in the operative provisions of the Constitution; the use of the Preamble beyond simply as an aid to interpretation in that at "a reference in a preamble to a matter will make evidence of that matter admissible"[12] with recitals in a preamble being prima facie evidence to the facts recited; the potential for a Preamble to influence executive office-holders in the exercise of their discretionary powers; and the reliance that could be placed on the words of the Preamble by both domestic interest groups and international bodies (such as the United Nations) when pursuing their agenda for political change. For these reasons, he concluded that "if there is to be a Preamble, it should be narrowly and circumspectly drawn."[13]

Precisely what any new Preamble should include is itself a matter of some controversy. Should the new Preamble be limited to recognizing Indigenous Australian, or also include other groups who were not amongst the Founding Fathers at the time of the Constitutional Conventions, such as women? As a proud West Australian it would also be remiss of me not to mention Western Australia – such a reluctant participant in the Federation that we are not mentioned in the existing Preamble. Should we now be included? And should the Preamble be limited to recognizing the contribution made by particular groups, or also set out core beliefs, values and aspirations of the Australian people. If so, which ones? The "question of what matters should be included in a new preamble is controversial and inherently divisive".[14]

Sir Harry Gibbs identified the difficulty in this when he spoke on the topic of the Preamble at the 1999 Conference: if the Constitution is to be a unifying document for all Australians, then the Preamble must only include those beliefs, values and aspirations which would meet with the general approval of the Australian community, and given that it is to be an enduring document, "they should not only be generally acceptable today, but also should be likely to be generally acceptable during the whole life of the Constitution".[15]

There are examples within Australia of the insertion of constitutional preambles recognizing Indigenous Australians. Victoria, Queensland and New South Wales have all amended their State constitutions in recent years to recognize Indigenous people within an amended Preamble. Each of these amendments included a "no legal effect" clause that expressly provides that the preambles are not to be used as an interpretive tool and are not to give rise to any rights or causes of action.[16]

The Expert Panel ultimately recommended against the inclusion of a "no legal effect" clause, fearing that "if the Statement of Recognition had no substance or effect, it would also risk being regarded as tokenistic and failing at referendum simply because people could not see the point of it".[17] Proponents of a new Preamble tend, however, to emphasise its symbolic value and downplay any substantive effects. If it is the symbolism that is important, then a "no legal effect" clause would be entirely appropriate. The strong opposition to such a clause perhaps indicates that an amended Preamble is, indeed, intended to have a substantive effect and legal significance.

The Constitution, section 25

Probably the least controversial aspect of the Expert Panel's final report is the recommendation that section 25 of the Constitution should be removed. Section 25 is entitled *"Provision as to races disqualified from voting"* and provides:

> For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

This is not, as frequently charged, a racist provision. In fact, it was intended as an anti-discrimination clause, being designed to penalize any State that excluded people from voting on the basis of their race by reducing that State's representation in the House of Representatives.[18]

The provision is, however, clearly obsolete and no longer serves any effective purpose. It is unthinkable that any State would – now or in the future – attempt to exclude people from voting based on their race. The removal of section 25 is a proposal that appears to have broad support and is a reform that carries little or no risk in terms of possible unintended consequences.

Race Power

The Expert Panel also considered the race power under section 51(xxvi), which provides that Parliament has the power to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws". There is no denying the racist origins of this power. It was originally designed to enable the Commonwealth to pass laws concerning foreign workers, including "the Indian, Afghan and Syrian hawkers, the Chinese miners, laundrymen, market gardeners and furniture manufacturers; the Japanese settlers and Kanuka plantation labourers of Queensland, and the various coloured races employed in the pearl fisheries of Queensland and Western Australia".[19] Today, however, the race power sits somewhat uneasily within the Constitution and stands as an enduring reminder of policies that are well in the past.

I agree with Anne Twomey that, "ideally there should be no provisions in the

Constitution that permit laws to be enacted by reference to race. The simple repeal of s. 51(xxvi) would be acceptable to most people".[20]

The desirability of removing the concept of race as a legitimate constitutional basis for legislation was outlined by Noel Pearson:

> As long as the allowance of racial discrimination remains in our Constitution it continues, in both subtle and unsubtle ways, to affect our relationships with each other. Though it has historically hurt my people more than others, racial categorizations dehumanize us all. It dehumanizes us because we are each individuals, and we should be judged as individuals. We should be rewarded on our merits and assisted in our needs. Race should not matter.[21]

The Final Report of the Expert Panel supports the removal of the existing race power, but recommends the insertion of a new power specifically to allow the Commonwealth to legislate for Aboriginal and Torres Strait Islander peoples. It has been suggested that this new power would not be based on race but rather "on the special place of those peoples in the history of the nation".[22] To the extent that the laws we are talking about are laws recognizing and protecting Aboriginal history and culture the existing nationhood power would seem ideally placed to provide constitutional support without the need for a new constitutional head of power to be introduced. When we move beyond this, however, to consider laws designed to address present day disadvantage within Indigenous communities, what we are describing is a constitutional power to legislate based on race.

Which brings me back to the fundamental proposition that our Constitution should not discriminate against Australians on the basis of race – even if such discrimination is rooted in the genuine desire to benefit a race that has traditionally suffered significant disadvantage. Both "detrimental" and "beneficial" racial discrimination are rooted in the same habit of mind, and even a "beneficial" race power undermines the concept of equality by reinforcing the idea that distinguishing between individuals by reference to their race may be acceptable. A constitutional head of power that is expressly premised upon a targeted race being treated differently ultimately undermines racial equality and reconciliation, whatever the good intentions that inform it.

It should be acknowledged that there are practical consequences that follow from simply removing the race power. One difficulty is the effect this may have on existing federal legislation and funding that relies upon it. While the vast majority of existing legislation in this field would arguably find alternative grounds of constitutional support, notably from powers such as the external affairs power, territories power and nationhood power, if this is seen as an unacceptable constitutional risk, then retaining the existing power would be preferable to replacing it with an amended race power as recommended by the Expert Panel.

The Expert Panel recommended the introduction of a new "section 51A", with a Statement of Recognition embedded at the beginning of the section. Section 51A would grant the Commonwealth the power to make laws with respect to Aboriginal and Torres Strait Islander peoples. It is proposed that the Statement of Recognition would use the word "advancement" to ensure that the beneficial purpose of the power is apparent. That is, the intention is for the power to be confined by the Statement of Recognition to laws made "for the advancement of" Aboriginal and Torres Strait Islander peoples.

Putting to one side the question of whether the Statement of Recognition would be

capable of confining the interpretation of section 51A in the manner intended (with, for example, Anne Twomey suggesting this may not be entirely straightforward or certain),[23] a "beneficial" power such as the proposed section 51A raises a number of important practical questions. Who decides what is meant by "advancement"? What if the interests of all Aboriginal people are not identical and a legislative scheme benefits some while disadvantaging others? Does every section of an Act need to be beneficial, or is it sufficient that the overriding purpose is beneficial? Does the power allow us to introduce legislation that imposes short-term detriment in order to achieve longer-term benefits? What about legislation seen as detrimental to the individual, but that would produce benefits for the broader Aboriginal community? The difficulty with introducing a subjective and value-laden term like "advancement" into the Constitution, and asking it to play a central role in qualifying and controlling a substantive power, is that it creates uncertainty and risks unexpected outcomes.

Constitutional Prohibition of Racial Discrimination

The Expert Panel also proposed introducing a new constitutional prohibition on racial discrimination. The proposed section 116A would prohibit the Commonwealth and States from discriminating on the grounds of race, colour or ethnic or national origin, although it would also be expressly noted that this prohibition "does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group".[24] The insertion of this substantive constitutional protection was supported by groups such as the Law Council of Australia.[25]

There is already legislation prohibiting racial discrimination at both the Commonwealth and State level. The move from statutory to constitutional protection is significant. It should not be entered into without a clear understanding of the consequences. This proposal is a clear step towards introduction of a Bill of Rights into the Constitution of Australia and should be rejected for all the reasons that I believe a Bill of Rights should be rejected. The debates surrounding issues such as native title, the Northern Territory Intervention and racial vilification laws highlight how politically controversial policies dealing with Indigenous issues and racial issues more broadly can be.

It is also not clear how existing exemptions under anti-discrimination law would fit within this new constitutional regime. These types of issues, inherently political and requiring a wide range of competing interests and considerations to be balanced, should be debated and decided by a democratically elected parliament. They should not be removed from this forum to the exclusive oversight of the judiciary.

The Northern Territory Intervention provides a good example of the uncertainty that would surround operation of a new constitutional prohibition of racial discrimination. Although advocates claim the Intervention is designed to address long-term issues of Indigenous disadvantage, critics claim it is a discriminatory policy that violates the *Racial Discrimination Act* 1975 (Cth). Within Indigenous communities there is disagreement about whether the Intervention is beneficial or not. To ensure that the Intervention could be implemented immediately, the Federal Government exempted it from operation of the *Racial Discrimination Act*. This would not have been possible had the prohibition against racial discrimination been a constitutional prohibition, and a program that has made a measurable difference to the lives of many Aboriginal

women and children in particular may very well be rendered unconstitutional. In any event, the future of the Intervention would rely ultimately on the approval of the High Court, rather than the continuing support of elected representatives in Parliament.

Reserved Seats in Parliament

A number of submissions to the Expert Panel raised the idea of constitutional provision for reserved seats in the Parliament for Aboriginal and Torres Strait Islander peoples.[26] This is not a new idea. It can be traced back to 1933 when King Burraga called for guaranteed Aboriginal federal parliamentary representation. It is, however, an idea that should be resisted. Over and above the technical issues that would need to be resolved before such a provision could be inserted into the Constitution, including primarily the hurdle created by section 29, introduction of reserved Indigenous parliamentary seats should be opposed for the same reason that introduction of quotas for female parliamentary representatives should be opposed. The only criteria on which our parliamentarians should be selected is individual merit. Far from achieving its stated aim, a policy of quotas will actually, in the long-term, undermine equality and does not advance Aboriginal representation other than in a superficial way. It marginalizes Aboriginal parliamentary representatives by, firstly, implying that they are reliant on the quota system for their election and, secondly, limits them to being representatives of Aboriginal people in relation to Aboriginal issues.

When I was thinking about this question I re-read the maiden speech of the Member for Hasluck, Ken Wyatt, MP, the first Indigenous Australian to be elected to the House of Representatives. In this speech he began by noting that he stood as an Aboriginal man before the members of the House of Representatives as an equal. Whilst acknowledging the significance of being the first Aboriginal to be elected a member of the House of Representatives, he said that when researchers in the future analyse the decision made by the people of Hasluck in 2010, "what they are likely to find is that the personal and professional qualities of the candidate were the reasons for their decision".[27] Since his election he has also noted that "my election is a chance to show quality leadership, not just Indigenous, but within Australian society and that sends a strong message to Australia".[28] That message would be lost with the introduction of reserved Indigenous seats in Parliament.

Conclusion

The issues identified in this paper are by no means the only issues that have been raised during the discussion about possible recognition of Aboriginal peoples in the Constitution. For example, in its submission to the Expert Panel, the Law Council of Australia noted that, in the course of their consultations, a "significant number" raised issues including sovereignty, self-determination, recognition of customary law, and the constitutional entrenchment of the *United Nations Declaration on the Rights of Indigenous Peoples*.[29] What I hope to have done by touching on the key recommendations made by the Expert Panel is to demonstrate that these are important constitutional issues with potentially serious implications. Although advocates of constitutional recognition of Indigenous Australians focus on the symbolic benefits of such recognition and the importance of it to the process of reconciliation, it is incumbent upon constitutional conservatives to examine the proposed changes not for

their symbolic value, but rather their practical effect. In my view, doing so highlights some serious concerns about the recommendations made by the Expert Panel.

The recommendations of the Expert Panel may well be put to the Australian people, in some form, at the next election. These recommendations go beyond merely symbolic constitutional recognition of Indigenous Australians, and recommend substantive constitutional change. The public debate on these issues leading to a referendum will be important. Whilst addressing continuing Indigenous disadvantage and the removal of racial discrimination are both undoubtedly important topics, it is my belief that we do not make up for past discrimination, further reconciliation between Australians or address systemic disadvantage by entrenching discrimination in the Constitution.

Endnotes

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15. Gibbs, *op. cit*., 5.

16. See *Constitution Act* 1975 (Vic), s. 1A; *Constitution Act* 1902 (NSW), s. 2; *Constitution of Queensland* 2001 (Qld), Preamble and s. 3A.

17. Twomey, *op. cit*., 3.

18. *Ibid*., 3-4.

19. Law Council of Australia, *Constitutional Recognition of Indigenous Australians: Discussion Paper*, 19 March 2011, 20.

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21. Expert Panel on Constitutional Recognition of Indigenous Australians, above no. 3, 139.

22. Robert French, "The Race Power: A Constitutional Chimera" in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks*, Cambridge University Press, 2003, 208.

23. Twomey, *op. cit*., 6-7.

24. Expert Panel on Constitutional Recognition of Indigenous Australians, *op. cit*., 173.

25. Law Council of Australia, *op. cit*., 15.

26. Expert Panel on Constitutional Recognition of Indigenous Australians, *op. cit*., 177.

27. Ken Wyatt, MP, Governor-General's Speech: Address-in-Reply Speech, *Hansard*

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28. *Ibid.*

29. Expert Panel on Constitutional Recognition of Indigenous Australians, *op. cit.*, xv-xvi.

Chapter Ten

Speaker of the House

J. B. Paul

The framers of the Constitution of Australia intended the House of Representatives to replicate the House of Commons of the United Kingdom as nearly as practicable. That this objective has been only partly fulfilled has been mainly due to the Federal Parliament's failure to adapt the office of Speaker to Westminster principles as they had attained their full flowering in the middle of the nineteenth century.

I can deal with the history of the office of Speaker of the House of Commons only perfunctorily. Some have dated its origin as early as 1258, although it has been recognizable in its present form from 1376. The Speaker gradually evolved from being exclusively an agent of the Crown to one involved more in duties to the House which then competed with those duties to the Crown which still remained. The stresses involved in this duality are still recalled not only in Westminster but also in parliaments derived from Westminster in the surviving custom for anyone nominated as Speaker to demonstrate an unwillingness to be seated and to be dragged almost protesting to the Chair.

With the development of Cabinet government during the reign of King William III it was not unusual for a Speaker also to be closely involved in government. Robert Harley, 1st Earl of Oxford (of the second creation), was Speaker from 1701 to 1705, combining that office with that of Secretary of State from 1704 to 1705. Arthur Onslow, who established the longest unbroken term as Speaker from 1728 to 1761, gradually reduced his ties with government. Nevertheless the office remained largely political. It was only during the middle of the nineteenth century that the Speakership evolved into its modern form in which the holder, after renouncing his party affiliation, strives to be impartial and apolitical.

Section 35 of the Constitution of the Commonwealth of Australia declares:

> The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker.

The House of Representatives determines all other matters affecting the Speaker including election by secret ballot conducted by the Clerk of the House.

The first Speaker, Sir Frederick Holder, a former Premier of South Australia, disavowed his party allegiance as a Free Trader and then sat as an Independent – a practice his successors have not adopted. Unlike the Speaker of the House of Commons, Holder's successors continued to attend party meetings and to contest general elections as party candidates. The House of Representatives has never observed the tradition of the House of Commons that the Speaker retires from that office by his own choice and, though there have been exceptions, is customarily unopposed in his seat. Neither has the rule applied, as in Westminster, for a Speaker

on retiring to resign from the House. Speakers at Westminster on resigning have moved to the Elysian Fields of the House of Lords and have by more recent custom subsequently made themselves unavailable for ministerial office. Exceptions include Sir Spencer Compton, 1st Earl of Wilmington, Dr Henry Addington, 1st Viscount Sidmouth, and George Grenville, 1st Baron Grenville. Each was later appointed Prime Minister: Wilmington by King George II and the other two by King George III. Lord Grenville's ministry, known as the Ministry of All the Talents, did not last long; nor did the earlier ministries of Wilmington and Sidmouth.

Holder successfully contested the seat of Wakefield as an Independent in elections held in 1903 and 1906 and after each election was re-elected unopposed as Speaker. He was not required to submit to re-election with every change of government – and five such changes occurred between April 1904 and June 1909 through changing party alliances where no one party commanded a majority in the House. Holder accordingly continued as Speaker until his sudden death on 23 July 1909 when the House was sitting in committee after a stormy all-night sitting. He confided to friends his distress at the profound bitterness between the parties and, after saying "Dreadful! Dreadful!", fell insensible to the floor of the House. He never regained consciousness and died later that afternoon from a cerebral haemorrhage. Sir John McLeay, a South Australian like Holder, broke his record as the longest serving Speaker. He retired in 1966 after a term of ten and a half years.

Holder was succeeded as Speaker by Charles Carty Salmon whose son, known as Carty, was a colleague of mine in the Central Office of the Department of Labour and National Service in Melbourne where I began ten unforgiving years as a Commonwealth public servant. Charles Carty Salmon had been a Protectionist like the prime minister, Alfred Deakin, whom he had consistently supported. Despite Deakin's backing, he was elected Speaker only after a lengthy and stormy debate which, apart from the dinner adjournment from 6.30 to 7.45 p.m., lasted from 2.31 to almost 10 p.m.

The controversy surrounding his candidacy was the continuation of that very inter-party bitterness which seemingly had hastened Sir Frederick Holder's death. Little more than seven weeks earlier, on 2 June 1909, the Protectionists and the Free Traders (known as the Anti-Socialists since the election in 1906), with the tariff issue settled, had buried their remaining differences and had organized a "fusion". This "fusion" amounted to a reversal of alliances which led to a great deal of inter-party acrimony. Andrew Fisher's first Labor ministry, a minority government, which had taken office on 13 November 1908, was defeated when most of those Protectionists who until then had supported it aligned themselves with the Anti-Socialists and with Sir John Forrest's corner party in voting it out of office. Fisher resigned after the Governor-General, Lord Dudley, refused his request for a dissolution. Alfred Deakin, who before the fusion had led the Protectionists, took office leading a government which thereafter styled itself as Liberal.

The debate in the House of Representatives on Carty Salmon's candidacy, for all its sound and fury, proved not particularly illuminating. The Labor Party system of caucus discipline had come under repeated attack from its political opponents but Labor claimed gleefully that the government party meeting which settled on Carty Salmon's nomination had been a "caucus". The Labor Party nominated as Speaker one of their own, Charles McDonald, who had been Chairman of Committees since 1906 when he had displaced Carty Salmon in that office. The fact that this reversal meant that Carty

Salmon had lost the confidence of some of his erstwhile supporters was exploited by Labor in the course of that parliamentary debate. The Labor Party branded Carty Salmon as a "partisan" and therefore unfit for the office of Speaker. It has to be said that in subsequent elections for Speaker Labor has not deemed partisanship as a disqualification in any of their nominees. Nor did Labor in subsequent elections for Speaker argue for greater involvement by the House in evaluating nominees for that office.

I consider that members of the Deakin Liberal Government were fully within their rights in nominating one of their own to fill the office of Speaker left vacant by Holder's death. The Attorney-General, Patrick McMahon Glynn, a native of Gort, Co. Galway, and formerly an Anti-Socialist, quoted Westminster precedents to good effect in justifying this. But the animosity from the Labor Party and from others remained unassuaged. The Labor Party members voted as a bloc against Carty Salmon's nomination and were joined by three government backbenchers and a former Protectionist who joined Labor after repudiating the "fusion". Three government members, including Carty Salmon, did not vote in the division which resulted in his election, 37 Ayes to 29 Noes. The animosity from all sides of the House continued unabated throughout Carty Salmon's Speakership until he relinquished the office with some relief when Deakin's Liberal Government was defeated at the 1910 election. The incoming Fisher Labor Government then organized Charles McDonald's election as Speaker.

Until this change the House of Representatives had followed the Westminster tradition that the Speaker should adopt traditional dress including the black silk lay-type gown similar to the gown of a Queen's Counsel, a wing collar and a lace jabot or bands (occasionally varied with a white bow tie with a lace jabot), bar jacket, and a full-bottomed wig. Another addition, confined to the most formal occasions, included court shoes and hose (black buckled shoes and black satin knee breeches and silk stockings). The Speaker of the House of Representatives has never to my knowledge followed his Westminster counterpart by adopting on ceremonial occasions the more elaborate gown of black damask silk with extensive adornments in thread of gold bullion. The Lord Chancellor, the Lord Justices of Appeal and many University Chancellors have adopted this formal dress.

Charles McDonald, a dogmatic and dour republican, pointedly abandoned the practice of his two predecessors and presided at all times wearing an ordinary business suit. All subsequent Labor Speakers have acted accordingly. McDonald, in a Cromwellian gesture, also had the mace removed from the table of the House. Oliver Cromwell, when he disbanded the Long Parliament in 1649, had ordered the removal of "that bauble", as he termed it. This change in McDonald's case proved to be more than symbolic. It is fair to say that all Speakers, irrespective of the party which sponsored them, have felt bound by this continuing party patronage in being only as impartial as they dared — but it has to be acknowledged that most Labor Speakers have not bothered to maintain even a pretence of impartiality.

With the defeat of the Fisher Government in July 1913 Sir Elliot Johnson was elected Speaker. When Andrew Fisher and the Labor Party regained office in the first double dissolution election in September 1914, Charles McDonald, who displaced Johnson, once again adopted his defiantly untraditional ways until Sir Elliot succeeded him in June 1917 on the nomination of the Nationalist Government led by W. M. ("Billy")

Hughes. Johnson reverted to traditional practices affecting dress which were observed by subsequent non-Labor Speakers until and including Sir Billy Snedden, Speaker from February 1976 to February 1983. I regret to record that from 1996 non-Labor Speakers have by degrees moderated their formal dress but only one, Ian Sinclair, Speaker from March to November 1998, followed Labor's example. Sinclair was the third Privy Councillor to be elected Speaker and his disregard of formality in that office was consistent with his republican views. As a declared republican in his later years he effectively repudiated his Privy Councillor's oath – an oath which, to quote Sir Robert Menzies to whom it was only too familiar, "is just about the most royalist expression in the world".

Sir Elliot Johnson was summarily removed from the Speakership in 1923 by the Bruce-Page Nationalist-Country Party Government and replaced by W. A. Watt, the second former State Premier and the first Privy Councillor to be Speaker. Watt had had a turbulent background in Victorian State politics. Sir Frederic Eggleston described him as having been "the dominant force in Victorian politics, a man who tackled the hard problems, a great parliamentarian, orator and debater". These gifts he brought to the Federal sphere after he resigned the premiership in 1914 and won the seat of Balaclava as a supporter of Joseph Cook's Liberal Ministry. With Labor re-elected in 1914, Watt was denied office until Hughes formed his Nationalist Ministry on 16 February 1917. Although disappointed at being given Works and Railways rather than the Treasury portfolio, Watt made a success of it until he was confirmed as Sir John Forrest's successor as Treasurer in March 1918.

Watt was acting Prime Minister for sixteen months while Hughes was abroad but his relationship with him was often stormy and he felt impelled in June 1920 to resign from Hughes's Ministry. He was not included in the Bruce-Page Nationalist-Country Party Ministry formed in 1923 but was offered the Speakership to lure him from any temptation to be too turbulent a presence on the government back-bench. Watt undertook to accept that office for one term and by common consent proved to be an excellent Speaker whose interventions were often redeemed by humour. On one occasion, when a member, while speaking, had repeated trouble with his dentures, another member asked Watt what language he was speaking. Watt replied, "gum Arabic". Watt had earlier declined a knighthood, not on principle in emulation of Alfred Deakin, but because he felt his private financial situation did not suffice to support him in such an estate. In contrast to Deakin's consistent refusal of a Privy Councillorship, Watt accepted that appointment in 1920.

Sir Littleton Groom was appointed Speaker in succession to Watt in January 1926. He had held many Cabinet offices in his career in Federal politics including Attorney-General from 1906 to 1908 and again from 1921 to 1925 when Stanley Melbourne Bruce required him to relinquish it to make way for J. G. (later Sir John) Latham, a future Chief Justice of the High Court. Groom had been appointed a King's Counsel in 1923 and a Knight Commander of the Order of St Michael and St George (KCMG) in 1924. Groom thus came to the Speakership already holding that very knighthood which was customarily given to non-Labor Speakers.

Groom's occupancy of that office is chiefly remembered for his refusal in 1929 to vote with the Government in the House's committee consideration of the controversial Maritime Industries Bill. This abstention sufficed to defeat the bill when combined with a number of rebel backbenchers who crossed the floor, including the former prime

minister, W. M. Hughes. Bruce was granted a dissolution and he lost his own seat in the subsequent election which saw the Coalition defeated in a landslide. Groom was defeated in his seat of Darling Downs where Bruce campaigned against him, being unmoved by Groom's claim that in declining to vote in committee he was merely following Westminster practice. In Bruce's eyes the House of Representatives was too small a chamber for the practice Groom claimed to be following to be applicable. Groom was returned in Darling Downs as an Independent in 1931, subsequently joined the United Australia Party and held the seat until his death in November 1936.

Norman Makin was nominated for the Speakership in 1929 by the Scullin Labor Government. Disappointed at not being elected to the ministry, he was able to perform more than adequately as a presiding officer. His one concession to formality, which might not have appealed to all his caucus colleagues, was in wearing a subfusc suit, a wing collar and a black bow tie. He was the first former Speaker to hold ministerial office. He served in the Curtin Government from 1941 to 1945 and was Ambassador to the United States from 1946 to 1951. He was re-elected to the House of Representatives in 1954. Interviewed shortly before retiring in 1963 he overlooked his disappointment at the time in recalling his term as Speaker as the high point of his public life.

The Lyons United Australia Party Government was elected in a landslide in 1931 after Scullin obtained a dissolution on the defeat of his Government in the House of Representatives when supporters of the NSW Premier, Jack Lang, voted with the Opposition. In February 1932 the Lyons Government nominated George Mackay as Speaker. Mackay had a background in Queensland politics and had been Federal member for Lilley since 1917. He surprisingly announced his retirement from the House at the 1934 election claiming that "one may remain in Parliament too long", a sentiment his predecessor Norman Makin by conspicuous example did not share.

Mackay was succeeded by Sir George Bell who entered the Federal Parliament as Member for Darwin (Tasmania) in 1919. Bell had a military background, having served in the South African War and been made a Companion of the Distinguished Service Order (DSO). He returned to active service in 1914 and was appointed a Companion of the Order of St Michael and St George (CMG) in April 1919. Bell relinquished the office of Speaker in November 1940, was appointed a KCMG in 1941 but did not contest his seat in 1943. He was succeeded as Speaker by a West Australian UAP member, Walter Maxwell Nairn. The Curtin Labor Government retained Nairn as Speaker in 1941 when it succeeded the Fadden non-Labor coalition on its defeat in the House; but this concession proved to be short-lived. Nairn resigned from the office of Speaker when writs were issued for the 1943 election and he was defeated in his seat of Perth when the Curtin Government was re-elected in a landslide.

John Solomon Rosevear was elected Speaker in 1943 and so remained until the defeat of the Chifley Government in 1949. Until 1945 he obstinately retained his position as controller of leather and footwear which he had held since 1942. He was also chairman from 1944 to 1945 of the Post-war Planning Committee of Leather and Foot Industries. Almost everything in Rosevear's nature and political background counted against him as Speaker. Elected Federal member for Dalley in 1931 as a member of Jack Lang's splinter group, he defeated his one-time ally, E. G. Theodore, Treasurer in the Scullin Government. Lang Labor under Jack Beasley's leadership joined with official Labor in 1936 but in 1940 Rosevear joined Beasley in splitting again

from official Labor and serving as his deputy. Unity was restored in 1941 but resentment at Rosevear's renewed alignment with Beasley counted against him in the caucus ballot to elect John Curtin's government later that year.

Frank Bongiorno's entry on Sol Rosevear in the *Australian Dictionary of Biography* assessed his performance as Speaker:

> A controversial Speaker, Rosevear brought to his office 'a new strength and a new power', including many of the tactics perfected in the hurly-burly of New South Wales Labor politics between the wars. Not all of them were well suited to his new role as presiding officer. Symbolically refusing both wig and gown, he was quick to make up his mind and gained a reputation for inflexibility in upholding his rulings. Opposition members and journalists regularly accused him of partisanship. On one occasion in 1946, he left the Speaker's chair to launch a ferocious tirade against his former ally Lang. In the following year, in his capacity as a private member, he made several attacks on judges of the High Court of Australia from the floor of the House. E. H. [Harold] Cox, a journalist in the Canberra press gallery, claimed that the Speaker was 'frequently quite drunk in the Chair', but had 'an amazing gift for concealing his condition'. Rosevear also allowed illegal gambling in the House, a pastime in which he was an enthusiastic participant.

Rosevear continued to represent the seat of Dalley until his death in 1953. Paul Hasluck recalled that when the Anglican cleric officiating at his funeral described him as "a great national leader and statesman", a "devout Christian", and a "highly moral character", Fred Daly, then the Opposition Whip, remarked audibly, "By God, we're burying the wrong man".

The Menzies-Fadden Coalition Government elected in 1949 nominated Archie Galbraith Cameron as Rosevear's successor for much the same reason as the Bruce-Page Government in 1923 offered the Speakership to W. A. Watt. Cameron, elected Country Party member for Barker (South Australia) in 1934, had been a minister in the Lyons Government and, from March 1940 in a war coalition led by Menzies, when he was also Deputy Prime Minister after being surprisingly elected to succeed Sir Earle Page as Country Party leader. S. M. Bruce, the former prime minister then serving as High Commissioner in London, writing sympathetically to Menzies at this time recalled a conversation with Cameron "when he disposed of Lyons, you, Earle Page and Casey as Prime Ministers and then, as an afterthought, cleaned me up in case I had any misguided leanings in that direction". While Acting Minister for Commerce in 1938, Cameron became the first minister to be named and suspended from Parliament. He called the member for Wimmera, Alex Wilson, a "clean-skin" (that is, unbranded), and refused to withdraw the remark when the Speaker called on him to do so. On 7 October 1941 Wilson, by joining A. W. Coles, member for Henty (Victoria), turned the tables on Cameron and his non-Labor colleagues when they both consigned them to the Opposition benches by putting John Curtin and the Labor Party into office.

Cameron's ministerial career, turbulent enough in itself, ended stormily when he lost the Country Party leadership in October 1940 and left the party and the ministry. He continued to sit as a backbencher, first with the UAP, and then with the Liberals. In the Parthian shot he directed at the party he had so contemptuously abandoned, he claimed, among other things:

> Everlasting intrigue and manoeuvring for personal advantage reached its zenith in ruptures of the seal of Cabinet secrecy which must ultimately make any Minister's position inside a party or a Cabinet untenable. No party can function if its internal state is a stew of simmering discontent, spiced by insatiable personal ambitions and incurable animosities. No leader can lead successfully if he must devote most of his time to outwitting rivals, or to be outbidding them for support, or to be watching every footfall lest he stumble on a mantrap or a mine.

Robert Menzies might have recalled this statement the following August as reflecting his own experience when he felt obliged to resign as prime minister in favour of Arthur Fadden, Cameron's successor as Country Party leader.

Frank Green, Clerk of the House of Representatives from 1937 to 1955, recorded the speculation on the Speakership after Menzies returned to office in 1949. He claimed he had been left in the dark ". . . until the Prime Minister walked into my room one afternoon and asked me what I thought of his choice. I asked whom he had chosen, and he replied 'Airtchie' which was his nickname for Archie Cameron. To the question what did I think of Cameron as Speaker, I replied that it was the worst possible choice, for I never knew any man who could be so consistently wrong with such complete conviction that he was right . . ."

No doubt it was for this reason among many others that Menzies was not prepared to countenance Cameron as a Cabinet colleague or to leave him in smouldering isolation on a government backbench. Green sourly concluded:

> Of course, I could see why he had been selected to sit in the Speaker's Chair; it would shut him up – he could no longer quarrel with his party or attack Ministers.

On his role as Speaker I am content to quote from his *ADB* entry by John Playford, a kinsman of Sir Thomas Playford, South Australia's record-breaking Premier and a close friend of Cameron since they both served in the First World War. Cameron persuaded Tom Playford to contest the seat of Murray, which he did successfully at the State election in 1933. Here is John Playford's assessment:

> … On his election [as Speaker] in 1950 he wore the traditional wig and robes of office discarded by his Labor predecessor . . . Cameron objected to using Bert Evatt's High Court of Australia wig, which had been presented to Parliament, but none other was available, and he contented himself with the statement: 'It will be the first time there has been any clear, straight thinking under this wig'. Cameron's relations with the Governor-General, the former Labor Premier of New South Wales, (Sir) William McKell, were strained due to personal comments made by McKell ten years earlier. Cameron informed the House in March that, while 'he would fully and courteously discharge all official duties' with McKell, in other matters he would have 'nothing whatever to do with him'.

A firm disciplinarian, Cameron caused an immediate stir by imposing a rigid ban on betting in Parliament House and by forbidding card-playing or any other game of chance. . . The print of a racehorse, Phar Lap, which graced the wall of the barber's salon, was ordered to be removed. Cameron also insisted that everyone should be properly dressed in the lobbies, but did not invariably apply his rules to himself: on a hot day he "frequently received visitors dressed only in shorts and a singlet", his bare feet upon his desk. The cleaning staff resented his weekend habit of walking around

the lobbies so attired, fearing that visitors might mistake him for a cleaner and "damage their prestige".

Cameron was a non-smoker and a strict teetotaller. His first act as Speaker was to order the removal of the elaborate cocktail cabinet Sol Rosevear had installed in the Speaker's suite. As far as I am aware, Cameron, however formal the occasion, never wore buckled shoes and the accompanying hose and breeches, his favoured footwear being elastic-sided boots. He had revealed his antipathy for McKell some years earlier. Along with other non-Labor members, which notably included Sir Earle Page, Percy Spender and Eric Harrison, Cameron boycotted McKell's swearing-in as Governor-General in March 1947 while Menzies and Fadden dutifully attended and cordially greeted McKell and his wife.

One of Cameron's more controversial decisions has been almost entirely forgotten. Menzies made no record of it in his memoirs nor did A. W. Martin in his comprehensive biography of Menzies, nor did John Playford in his entry on Cameron in the *ADB*. Menzies, after being re-elected in the double dissolution election of 1951, reconstructed the Government. As a delayed part of this reconstruction he designated four backbench members as parliamentary under-secretaries. Menzies was abroad when the Speaker declaimed his views on these appointments as recorded in the following edited *Hansard* extract dated 22 May 1952:

> Mr CALWELL. – I ask you, Mr Speaker, whether, in your opinion, Parliamentary Under-Secretaries are officers of this House or of the Crown? I should like to know also, whether you have given any decision about their status and functions. I also desire to know whether you have refused to recognize these offices in any way, and . . . I should like to know any reasons that you may desire to advance in regard to any decisions that you have given . . .
>
> Mr SPEAKER. – I have devoted some time to this matter because I have been requested to do so on more than one occasion. In my view the officers concerned are not officers of this Parliament; they are officers of the Crown. For that reason I have refused to recognize them in this House. I went so far, and I think that I was in error in doing so, as to provide certain accommodation for them in this building. As the House knows, I am a small farmer and not a lawyer, but I think that I can read English. My view of the situation is that the appointments are unconstitutional, that no Minister has the power to delegate his authority to anybody and that any administrative act made by or done by a Parliamentary Under-Secretary is unconstitutional and illegal. Furthermore, I hold the view that a member of this House who accepts a position as Under-Secretary, renders himself liable to the vacation of his seat under the Constitution, and also liable to the penalties entailed for wrongfully holding a seat in this House, having accepted an office of profit under the Crown.
>
> *Honourable members interjecting*
>
> Mr SPEAKER. – Order! Silence must be maintained while I am addressing the House. It is also my view, and I have stated it in the right quarters, that the position of the Under-Secretaries has not been altered by the failure of the Government to pay them salaries. The test is that the office has been accepted and not that the holder of the office has made a profit. I further hold, and I have said so, that the payment of expenses to these honourable members is completely unconstitutional and unlawful.

Calwell then thanked the Speaker "for that information". The extract continued:

> Dr EVATT. – Following your very important ruling on constitutional law and practice in relation to the office of Under-Secretary, Mr Speaker, I ask you whether you will indicate what steps should be taken, or whether you will initiate steps, to declare vacant the following seats in the House of Representatives:— Canning, Darling Downs, Calare, and . . . Franklin.
>
> Mr SPEAKER. – I have given no ruling on the interpretation of the Constitution. That is a matter for the High Court of Australia. I did not attempt to give a ruling. I was asked to state my reasons for views that I had expressed, and I did so. The method of declaring seats vacant is, as I am sure the right honourable gentleman fully understands, laid down in the Constitution.

On 27 August the Prime Minister made a long statement to the House, in speaking to the motion that his statement be printed and its contents endorsed, in which he disputed every contention the Speaker had made respecting parliamentary under-secretaries and claimed to the contrary that the appointments were not illegal nor unconstitutional. The statement and the ensuing debate lasted seventy-five minutes. Opposition members including the Leader (Dr H. V. Evatt) and Deputy Leader (Arthur Calwell), sensing the possibilities for making mischief, spoke against the motion which the House carried (54-46 on party lines). As far as I can judge, this merely led to a stand-off between the Speaker and the Government. It was suggested that the Speaker should resign in view of the vote upholding Menzies' statement. He did not; but he had in effect and by implication challenged the Government to file an action in the High Court naming him as respondent, an expedient which had been suggested by Mr Calwell. The Government backed off from this and the Speaker continued to enforce his challenged views on the subject. This incident was discussed by Professor L. F. Crisp in his *Australian National Government*, 5th Edition, 1983, at pp. 386-9. I should add that governments had in the past made appointments along the lines Cameron disputed and subsequent governments were to do likewise.

Despite Cameron's truculent conduct the Menzies Government nominated him as Speaker after the 1954 election; and, despite his failing health, nominated him again after its landslide victory in the 1955 election. He died on 9 August 1956. As a convert to Roman Catholicism and a close personal friend of Archbishop Matthew Beovich, Cameron was given a state funeral in St Francis Xavier's Cathedral, Adelaide. In taking leave of such a larger-than-life figure, I feel that assessing his successors will prove anti-climactic, but I shall persevere.

Sir John McLeay's record-breaking term as Speaker in succession to Cameron was made possible by the continuing decline in the political fortunes of the Labor Party in the 1950s and 1960s. He did not attract the same controversy as his predecessor and retired in 1966 with expressions of good will from all sides of the House.

The appointment of William Aston as his successor highlighted the risks in giving such an office to a member holding a marginal seat. Aston was elected member for Phillip in Sydney's eastern suburbs in 1955 and again in 1958 but lost the seat in the 1961 election which, in the wake of an unpopular credit squeeze, brought the Menzies Government close to defeat. He was re-elected for Phillip in 1963, in 1966 and very narrowly in 1969 but was defeated in 1972. More than most non-Labor Speakers, Aston could be said to have been influenced in his conduct by the demands of nursing his

swinging seat and by being especially reliant in this on the good will of his party, both at the electoral and at the parliamentary levels.

H. B. Turner had been mentioned as a possible successor to McLeay. I consider he would have been a good Speaker and, as the holder of the blue ribbon seat of Bradfield on Sydney's north shore, he would not have been subject to the same temptations as Aston. Harold Holt's dislike of Turner was decisive in his being passed over. With his vulnerability in Phillip preying on his mind Aston, though Speaker, actively promoted John Gorton's election as Liberal leader on Holt's death. A witness to the scene informed me that Turner was so scandalized by Aston's open involvement in Gorton's election that, after the ballot, he engaged in a shouting match with him on the flight back to Sydney which continued until the plane touched down.

Following the 1969 election the narrowly re-elected Gorton Government faced Parliament for the first time on 25 November at the start of a notorious two-day session. Gough Whitlam as Leader of the Opposition congratulated Aston on his re-election as Speaker and emphasized one of Aston's expedients in seeking to retain his seat so narrowly.

> You are, Sir, accustomed to having small majorities. I hope that you will spare me from being more generous in my remarks, for after my colleagues and I were benevolent and, in fact, generous on your behalf during the valedictory at the end of the last Parliament you were good enough to quote our remarks in your campaign literature. I do not propose to give hostage to fortune on this occasion. You will have noticed, Sir, that the Opposition is disposed to scrutinize the conduct of yourself and your party colleagues much more vigilantly than hitherto. I hope I do not have the unpleasant task, as I did in the last Parliament, of moving dissent from your rulings . . .

Whitlam and his colleagues did not have long to wait before undertaking that "unpleasant task". In 1970 the Opposition moved a motion of censure against the Leader of the House, Billy Snedden. The Government then moved an amendment which in effect deflected the censure against the Leader of the Opposition. Aston as Speaker accepted that the amendment was in order. At the end of an acrimonious debate which lasted from 3.23 pm on 9 April to shortly after midnight (barring the dinner adjournment of almost two hours) a motion of dissent from his ruling was defeated and the amended motion carried on party lines. As to the Speaker's conduct, I can remember Jonathan Gaul of the *Canberra Times* remarking to me that Erskine May "must be spinning in his grave". A. R. Browning, in the 2nd Edition of *House of Representatives Practice*, 1989, at p. 347, remarked, "On a number of occasions a motion of censure of the Leader of the Opposition, or an amendment expressing censure in the form of an alternative proposition, has been agreed to. These are considered to be bad precedents". His citation of *Votes and Proceedings* 1970-72/81-3 suggests that Aston was the first Speaker to offend in this fashion.

Jim Cope, the member for Sydney, was the Whitlam Government's nominee as Speaker. Cope was well-known and well-liked for his wise-cracking interjections but he was ill-equipped for his new role. Admittedly he had to deal with especially fractious non-Labor members who were new to the experience of Opposition after their parties had governed for twenty-three years. But no Speaker deserved the treatment Cope was given by the Government which had had him elected.

On 27 February 1975 – after exactly two years as Speaker – Jim Cope named Clyde Cameron, Minister for Labor and Immigration in the Whitlam Government, for disrespect to the Chair. Normally this would have resulted in the minister's suspension from the House. The Prime Minister, in refusing to move that Cameron be suspended, pointedly withdrew his support from the Speaker after storming up to the Chair and publicly berating him. The Speaker resigned immediately. What Whitlam said to the Speaker has never been revealed because Cope felt unable to repeat it however often he was encouraged to do so. To date this has been the only time when a Government failed to support a Speaker after a Member had been named. I doubt whether such conduct would even be possible at Westminster. It would have seemed inconceivable in Canberra until it occurred in 1975. On Cope's resignation, the Whitlam Government elected Gordon Scholes as his successor. Like Norman Makin, Scholes subsequently served as a Minister. He held portfolios in the Hawke Government until 1987.

The Fraser Government took office after the Whitlam Government's dismissal on 11 November 1975 and, after being confirmed in office at the election held on 13 December, nominated B. M. (later Sir Billy) Snedden as Scholes' successor on 17 February 1976. Snedden, the second Speaker to be a Privy Councillor, came to this office after having held numerous portfolios from 1964 to 1972 including the Treasurership and also the deputy leadership of the Parliamentary Liberal Party. He had been Liberal parliamentary leader and Leader of the Opposition from December 1972 to March 1975, these positions making him unique as an incoming Speaker. He was re-elected on 21 February 1978 and on 25 November 1980. He relinquished the office following defeat of the Fraser Government.

Snedden was the last Speaker to follow the example of his non-Labor predecessors by wearing the full formal dress with full-bottomed wig. It was his belief that in doing so he would restore the dignity of the office. He sought to enhance and assert the Speaker's role and independence by indicating his preference to be recognized as an impartial umpire like the Speaker of the House of Commons. In 1979 he published a paper outlining his proposals for adopting some of the Westminster conventions, among them that the Speaker should hold office for five to seven years whereupon he should resign and hold no further public office, that the Speaker be unopposed by the major political parties at general elections and that the Speaker should resign from his or her party on becoming Speaker. Unfortunately these proposals have not been adopted.

Snedden tried to strengthen Parliament's ability to withstand pressure from the Executive believing that it was contrary to Parliament's independence for the Executive to control the funds allocated to Parliament. He therefore authorized parliamentary officers to publish a paper in 1976 entitled *The Parliamentary Budget*. He claimed, "You could not have a situation where the Executive decided the level at which Members could operate efficiently". This led to the introduction of the *Appropriation (Parliamentary Departments) Bill* in 1982.

I have cribbed much of the foregoing detail on Snedden from Wikipedia, the free encyclopedia. The following is an extended quotation from that same source.

> One of his most memorable actions as Speaker occurred in February 1982 when a Labor frontbencher, Bob Hawke, referred to the Prime Minister Malcolm Fraser as a "liar" during Question Time. Mr Fraser was answering a question about two joint Royal Commissions being conducted in Victoria at the time. Fraser allegedly

> selectively quoted a statement by the Victorian Leader of the Opposition, John Cain, which provoked Hawke to call Fraser a liar. Sir Billy followed parliamentary procedure and asked Hawke to withdraw the remark. When Hawke refused, Sir Billy named him and a motion for his suspension was moved. Sir Billy later wrote that "It was his [Fraser's] instigation which was making the Parliament unworkable, not the Opposition's response, like the classroom situation where the smart little man hits the fellow next to him who retaliates and is seen by the teacher". Members of the Opposition had by that point taken up "liar" as a chant, which put Sir Billy in the position where he would have to name every Member, one by one. After realizing that the House would be unworkable for that sitting day, Sir Billy declined to put the motion for Hawke's suspension.
>
> Fraser was furious and attempted to intimidate Sir Billy to punish Hawke for not withdrawing or take his "punishment". Sir Billy refused and was convinced that he would no longer be Speaker, but once Fraser realized that he had no support in the Liberal Party to remove Sir Billy from office, he sent Sir Billy a conciliatory message.

In that way a repetition of Jim Cope's experience was avoided.

The Wikipedia entry continued:

> After the defeat of the Fraser Government in 1983 and the election of Dr Harry Jenkins as Speaker, Sir Billy resigned from Parliament on 21 April 1983. In doing so, he enacted part of his 1979 paper. He believed that if he stayed in Parliament, he might be called for advice on his successor's rulings and that could not happen as it would be undermining the Chair. Sir Billy said, "I am very conscious that, under the Westminster convention, when the Speaker leaves the Chair he leaves the House. I think this is right". He formally resigned from Parliament later that day.

In dealing with past Speakers I have occasionally given details of their life after vacating the Chair even until death. I hope you will excuse the outrageous pun I have employed in Snedden's case: to wit, that I shall draw a discreet veil of silence over the circumstances attending his departure from this vale of tears.

Dr Harry Jenkins was Speaker from 22 April 1983 to 11 February 1986. He was then very improperly appointed Ambassador to Spain, although he was by then an invalid. In accepting this posting he displaced a career diplomat whose designated term had not been completed. Jenkins remained in Madrid until 1988.

Jenkins was succeeded as Speaker by Joan Child, the first woman to be appointed to that position. She held that position from 11 February 1986 until 28 August 1989 and was handicapped in dealing with a rowdy House by increasing deafness. One truly deplorable decision she made concerned the Speaker's Chair which was a replica of its Westminster counterpart and a gift to the Australian Parliament from the British Parliament. She ruled that it should not be moved from the Old Parliament House to the new and permanent Parliament House. This constitutes a continuing slight to the Mother of Parliaments which made the gift. It is a spurious argument to claim that that Chair would be out of place in its changed surroundings. It would be no more jarring a presence there than it had been in the Old Parliament House; and members would grow accustomed to it.

Child was succeeded by Leo Boyce ("Leaping Leo") McLeay. He resigned on 8 February 1993 over accusations that he had made a false compensation claim – accusations subsequently found to be incorrect. All things considered, he was woefully inadequate as a presiding officer. His successor until 30 April 1996, Stephen Martin, had been a successful referee in Rugby League although it might be questioned whether his rulings as Speaker were as acceptable. He obtained degrees, including a PhD, in town planning.

Four Speakers held office during the Howard Government's term in office. The first, R. G. Halverson, stepped down on 3 March 1998 and was appointed Ambassador to Ireland. He partly restored the wearing of formal dress but declined to wear full-bottomed wig. I have already mentioned his successor, Ian Sinclair.

Sinclair was succeeded by Neil Andrew, the second Speaker to be the subject of a motion of censure, the first being "Leaping Leo" McLeay. In both cases the motion was defeated on party lines. Andrew was succeeded by David Hawker who, like his predecessor, wore a gown, albeit of a simpler academic style, over his lounge suit. I once courteously reproached Hawker for not restoring the full ceremonial dress and he pleaded unconvincingly that it would not go down well with the public.

This brings my survey of Speakers to Harry Jenkins Junior, the first Speaker to be able to claim his father as a predecessor, and Peter Slipper. Jenkins has been regarded as a good Speaker, given the limitations imposed on that office-holder to perform well, but the circumstances of his withdrawal from that office were regrettable. The Speakership should not be treated as a pawn in a Government's quest for a working majority. Even independently of this, Peter Slipper came to the office a deeply compromised candidate. While I am prepared to applaud his partial restoration of traditional dress, I must acknowledge with regret that his successors could be discouraged from following his example for other reasons such as the circumstances surrounding his accession to the Chair and the enduring controversy attaching to his person.

In completing my survey of Speakers to the present time, I will digress by recalling an incident at Westminster in March-April 1895 when Mr Speaker Peel unexpectedly resigned thereby giving rise to the first contested election for Speaker since 1839. In 1839 James Abercromby, later 1st Baron Dunfermline, resigned and was succeeded by Charles Shaw-Lefevre, later 1st Viscount Eversley. In 1895 Archibald Philip Primrose, 5th Earl of Rosebery, was the Liberal Prime Minister as the ill-starred successor to William Ewart Gladstone. As Leo McKinstry recalled in his excellent biography of Rosebery published in 2005, entitled *Rosebery: Statesman in Turmoil*, "The quest to fill the vacancy soon became another drain on the Cabinet's time and energy, as ministers were torn between the needs of the House and the demands of party loyalty".

This could be seen as something of a forerunner to the controversy in Australia surrounding Carty Salmon's nomination and election as Speaker of the House of Representatives. Against the opposition of many in his Cabinet and from the Opposition benches, Rosebery successfully pressed for the election of a Liberal backbencher, William Gully, QC. This also drew fire from the Queen for stated reasons which need not concern us here. As McKinstry recorded:

> By now heartily weary of the Queen's incessant sniping at the Liberals, Rosebery replied in spirited vein. 'All Speakers are highly successful, all Speakers are deeply regretted and are generally announced to be irreplaceable. But a Speaker

> is soon found and found, almost invariably, among the mediocrities of the House.' Yet Gully was 'no mediocrity', continued Rosebery; he was a 'polished and refined gentleman, a counsel who would have been a judge.'

It is safe to say that Rosebery's encomium on Gully's personal attributes could not be applied to any Speaker of the House of Representatives I can recall – in Joan Child's case, for obvious reasons. But I consider that his more general assessment of Speakers at Westminster could not be applied to their Australian counterparts. Nor, I regret to say, could they be applied to the present Speaker of the House of Commons and still less to his even more frightful predecessor!

I shall now broaden my survey to more general criticisms of the functioning of the office of Speaker and here I recall the commendable endeavours of Sir Billy Snedden which, alas, came to nothing. The authority I now cite is the late David Hamer who had a varied parliamentary experience. He represented the Victorian seat of Isaacs as a Liberal from 1969 to 1974 and was an *Age* correspondent until he regained the seat in 1975. In 1977 he successfully stood for the Senate and retired from politics in 1990. He contributed an article to the *Age* entitled "Flaws of the House" which was published on 19 August 1974. It was republished in Mayer & Nelson, *Australian Politics: a Fourth Reader*, in 1976, and it is still highly topical.

In discussing Question Time in the House of Representatives, he claimed that it was far less valuable than it should be. Ministers evade questions and are not forced to answer; a half-answered question on foreign policy is followed by one on the price of wheat.

Claiming that Question Time is "so much less effective than that in either Ottawa or Westminster", he gave his "main reason" as being "undoubtedly the status of the Speaker". After recalling details I have already covered, he continued:

> The effect of having a party Speaker is that he is tied down by a web of Standing Orders, and he is reluctant to use even the meagre discretionary powers that he has. In both Westminster and Ottawa, once a question is asked, the Speaker permits supplementary questions until *in his opinion* the subject is exhausted. This makes it difficult for Ministers to evade.
>
> In Canberra, on the other hand, although the Speaker has the authority to permit supplementary questions, he very rarely does. He merely follows Standing Orders and takes the next question from the other side of the House; all continuity of questioning is immediately lost . . .
>
> The House of Representatives does little better as a forum for national debate than it does at Question Time . . .
>
> The remedies, or at least partial remedies, again lie in the status of the Speaker. Great damage is done by the power of the Government to cut off debate if it is becoming inconvenient (by moving that the question be put).
>
> In Canberra the Speaker is obliged to put the question without further debate. In Ottawa and Westminster the Speaker can refuse to put the question if in his opinion useful debate is still going on; in neither of these Parliaments is it possible to truncate debate absurdly as all too often happens in Canberra . . .
>
> Even more disenchanting to the listener or viewer is the repetitious nature of so many speeches. At Westminster the Speaker decides which members he will call to speak. If the member is being boring or repetitious the Speaker makes his opinion quite clear.

> Woe betide the member who does not then rapidly wind up his speech, for the Speaker can inflict the ultimate penalty for a politician; he will not call him again until he has learned his lesson.
>
> In Canberra, the Speaker has no such discretion. He calls Members from alternate sides of the House from lists provided by the party Whips. The Member has a set time to speak – usually twenty minutes – and human nature being what it is, he uses it to the full; if he runs out of material he says the same thing again in different words; sometimes even the same thing in the same words!
>
> These two areas of increased authority for the Speaker – and they could be given only if the Speaker's integrity and impartiality were universally recognized – would do much to improve the quality of debate . . .

It would be comforting if in the event of a change of government in the near future some attempt would be made to act on Sir Billy Snedden's dormant proposals and even go further in attempting to follow more closely the practices at Westminster and Ottawa. On this I am less than sanguine.

Failing this, some attempt should be made to restore some dignity to the office by way of formal dress. The High Court set an appalling example in 1988 when they abandoned traditional judicial dress without declaring any formal justification from the Bench when the Court first appeared "dressed down". An utterly feeble statement to the media signally failed to justify such a fatuous gesture. An acquaintance employed by the outfitters in Melbourne engaged to provide the substitutes told me that she and her fellow workers were incredulous that outfits so unsightly should have been ordered. Whenever I see television footage of High Court judges filing to their places on the Bench, I cannot forbear from sneering, "Just look at you! A conga line of Judge Judys of both sexes!" A former High Court judge present here has likened that outfit to a body bag – a body bag, that is, for a headless body. And what self-respecting corpse would want it for a winding-sheet?

The Federal Court subsequently confounded my belief that the High Court's current dress could not be surpassed for sheer hideousness. The Federal Court's changed dress resembles the cheapest of black bath robes with what looks like a bar-code prominently displayed on the right shoulder. Other jurisdictions have abandoned traditional dress partly or wholly. West Australian Supreme Court judges have gone the whole hog and have adopted bags for headless bodies. All this has proved confusing to barristers required to adapt their own dress to the whims of judges who variously sit untraditionally attired. A member of Sydney's inner Bar recently confided to me that he repeatedly has to check precisely how he should robe for the particular jurisdiction in which he is about to appear. Counsel from an assortment of States appearing these days before the High Court in a major case do not present a uniform appearance as they once did. They appear garbed according the differing dress codes prescribed in the immediate lower court in their respective States or, as with some of them, in the Federal Court. Such confusion is not a state of affairs to inspire confidence. Nor should it be applauded!

Let us hope, then, that any future Speaker by his own example in the matter of dress will pointedly shame those aberrant members of the judiciary who have affected such slummocky habits!

Contributors

Senator the Honourable **George Brandis**, QC, has been Attorney-General and Deputy Leader of the Government in the Senate since 2013. Educated at the universities of Queensland and Oxford, he joined the Queensland Bar in 1985. He has represented Queensland in the Senate since 2000. Appointed Minister for the Arts and Sport in 2007, he became Shadow Attorney-General later that year. He is a joint author of *Liberals Face the Future* (1985) and *Australian Liberalism: the Continuing Vision* (1987).

The Honourable **Ian Callinan**, AC, QC, was a justice of the High Court of Australia from 1998 until 2007. He was admitted to the Queensland Bar in 1965 after studying Law at the University of Queensland. His many activities have included membership of the board of the Australian Broadcasting Corporation (1997) and of the Council of the National Gallery of Australia since 2007. In addition to plays and short stories, he has written several novels including *The Lawyer and the Libertine* (1997), *The Coroner's Conscience* (1999) and *A Hero's Funeral* (2009).

The Honourable **Richard Court**, AC, educated at the University of Western Australia, was elected to the Legislative Assembly of Western Australia in 1982. He remained a member until 2001. He became leader of the Liberal Party in 1990 and was Premier and Treasurer of Western Australia from 1993 until 2001. Since 2001 he has been chairman of Resource Investment Strategy Consultants.

Lorraine Finlay joined the School of Law at Murdoch University in 2010. Prior to that, she had been a State Prosecutor in the Office of the Director of Public Prosecutions, Western Australia. A graduate of the University of Western Australia, the National University of Singapore and New York University, she spent some years at the High Court and was an Associate to Mr Justice Heydon.

The Honourable Justice **Dyson Heydon**, AC, was appointed to the High Court of Australia in 2003 and served for a decade. He had previously been a member of the Court of Appeal in New South Wales, to which he had been appointed in 2000. Educated at the University of Sydney and at Oxford, he was a Fellow and Tutor at Keble College, Oxford (1967-73), prior to appointment as a Professor of Law at Sydney in 1973, a post he held until 1981; he was Dean and head of the department, 1978-79. Editor of NSW Law Reports, 1981-2000, and Australian Law Reports, 1980-2000, he has been General Editor of Halsbury's Laws of Australia since 1990.

The Honourable **Gary Johns** was member for Petrie in the House of Representatives from 1987 until 1996. He was Parliamentary Secretary to the Treasurer in 1993; between 1993 and 1996 he was Minister Assisting the Prime Minister for Public Service Matters; and Special Minister of State and Vice-President of the Executive Council, 1994-96. Educated at Monash University, he subsequently took a doctorate at the University of Queensland. His many activities have included President, the Bennelong Society. His books include *The Missionaries were Right* (Connor Court, 2011) and, as editor, *Right Social Justice – Better Ways to Help the Poor* (2012).

Josephine Kelly is a Sydney barrister who has been a member of several tribunals including the Administrative Appeals Tribunal. She was educated at the Australian National University and the New South Wales Institute of Technology. From 1981 until

1986, she was Associate to Mr Justice Jerrold S. Cripps, a judge and later Chief Judge of the New South Wales Land and Environment Court. She has practised in criminal, property and conveyancing law as well as construction and environment. She edited *Environmental Law News* from 1989 until 2004.

Dr **Keith Kendall** joined the Melbourne Bar in 2011. Educated at the University of Sydney, the University of Chicago Law School, Latrobe and Monash universities, he has been practising in taxation law for well over a decade. He established the Taxation Program at the Latrobe University Law School where he is a senior lecturer. He is co-author of *International Securities Regulation* (Westlaw) and co-editor of the *Journal of Australian Taxation.*

J. B. Paul lectured in political science at the University of New South Wales for many years. He worked for a decade in the Australian public service, including in the Department of Labour and National Service, the Treasury and the Department of Education and Science, after graduating from the University of Melbourne.

The Honourable **Christian Porter** was elected to the Western Australian Parliament in 2008. He subsequently held several ministerial offices in the Barnett Liberal Government, notably Attorney-General, 2008 until 2012, and Treasurer, 2010 until 2012. He was elected to the House of Representatives to represent the seat of Pearce in 2013. Educated at the University of Western Australia and the London School of Economics and Political Science, he was a Senior State Prosecutor from 2002 to 2008.

Michael Sexton, SC, has been Solicitor-General of New South Wales since 1998. After graduating in Law from the University of Melbourne he was Associate to Sir Edward McTiernan of the High Court, 1971-72. 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 including *Illusions of Power: the Fate of a Reform Government* (1979; reissued 2005 as *The Great Crash*); *War for the Asking: Australia's Vietnam Secrets* (1981;2002); and, as joint author, *The Legal Mystique: The Role of Lawyers in Australian Society* (1982).