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INTRODUCTION

EDDY GISONDA

The Samuel Griffith Society held its thirtieth conference on the weekend of 3 to 5 August 2018, in the city of Brisbane, Queensland.

For the third year in a row, it was the best attended conference in the history of the Society.

The conference included papers delivered by a former Prime Minister, a former Premier of Queensland, a Judge of the Supreme Court of Queensland, a former Judge of the Federal Court of Australia, a former Justice of Appeal of the Supreme Court of Victoria, a serving Commonwealth Minister, a Catholic Archbishop, and legal practitioners, leading academics, and commentators.

As well, the Tenth Sir Harry Gibbs Memorial Oration was delivered by the Chief Justice of the High Court of Australia. Five of the last six Chief Justices have now addressed the Society, with the last three doing so while holding office.

Before the conference was organised, members of the Society were asked to nominate topics that would be of most interest to them. The three most popular answers were federalism, freedom of religion, and the republic. The conference included sessions on each of these topics.

The conference also included a further important session on issues arising from the release of the records of the Parliamentary Commission of Inquiry into the Honourable Lionel Keith Murphy. The session, which was chaired by Ben Jellis in his usual professional manner, began with some

reflections from Nicholas Cowdery, AO, QC, who was junior counsel for the prosecution in the criminal trials of Murphy before later becoming the Director of Public Prosecutions for the State of New South Wales. He was followed in the session by counsel assisting the Parliamentary Commission in 1986, the Honourable Stephen Charles, AO, QC, a leading Queen's Counsel before his appointment to one of the nation's finest courts, the inaugural Victorian Court of Appeal. Thereafter a lively discussion occurred, which included debate involving the presenters, attendees, David Bennett, AC, QC (the former Commonwealth Solicitor-General who represented Murphy during the Commission of Inquiry), and the Honourable Ian Callinan, AC (who was lead counsel for the prosecution during the criminal trials and now serves as President of the Society). This remarkable debating session proved to be a suitably fitting coda to one of the more controversial events in the life of the High Court of Australia.

The conference concluded with an address from the Honourable Dr Christopher Jessup, QC. He has honoured our Society by elevating this volume into required reading for any person wanting to properly understand the history of the conciliation and arbitration power in Australia.

Unsurprisingly, the weekend's proceedings generated significant public interest, with coverage of the conference appearing in a number of newspapers and media outlets. There can be little doubt that the conference ranked as one of the most interesting and important to be held in this country in 2018.

Many people contributed to the success of the conference: the speakers, the chairs of the various sessions, John Roskam, the Honourable Nick Minchin, AO, Jeffrey Phillips, SC, Dr Ryan Haddrick, and Sharni Cutajar, among others. The Society is grateful to all of them.

The following Mannkal Foundation Scholars attended the Conference in 2018: Claudia Cardaci, John Gray, Julian Hasleby, Mitchell Hasleby, Cindy Liang, Emilie Ong, Nicholas Palmer, Alex Prindiville, Anis Rezae, Domenico Romeo, Carl Schelling, Benjamin Thomas, Emma Watson and Laura Watson. It is not possible now to imagine a Samuel Griffith Society Conference without Mannkal Scholars in attendance, and Ron Manners is held in the highest regard by everyone associated with the Society and its conferences.

The Mannkal Scholars were joined by the following Sir Samuel Griffith Scholars and Ian Callinan Scholars: Mitchell Ablett-Nelson, Alexandra Betheras, Matthew Carlei, Nicholas Comino, Susanna Connolly, Chris Drayton-Dekker, Wilson Gavin, Michael Gibson, Harrison Isbester, Christopher Kounelis, Charlotte Lang-Waring, Jessica Markabawi, Lachlan Myatt, Elliott Perkins, Nik Sachdev, Ashley Seah, John Slater and Alexander Vanstan. These young students each made thoughtful contributions to the conference over the course of the weekend.

The Sir Samuel Griffith essay competition in 2018 was won by Charlotte Choi, an arts student from Melbourne. The question this year was: 'Should Australia hold a plebiscite on the question of whether to become a republic?' As with previous years, the quality from entrants was high. The winning entries from the past three years are now published for the first time in Appendix 1 to this volume.

Finally, the conference would not have run as successfully as it did without the work of the secretary of the Society, Stuart Wood, AM, QC, and his executive assistant, Shannon Lyon, ably assisted by Georgia Davis and Marina Antonellis. Their commendable service to the Society is appreciated by us all.

The conference in 2019 will be held in Melbourne.

THE TENTH SIR HARRY GIBBS MEMORIAL ORATION

THE HIGH COURT JUSTICES AND THE WEIGHT OF WAR

THE HONOURABLE SUSAN KIEFEL, AC

My thanks to the Samuel Griffith Society for this opportunity to speak to you.

Sir Samuel Griffith was an advocate for a federal parliament having the power to legislate with respect to defence. At the Australasian Federation Conference in 1890 he said that the possibility of each of the States passing laws with respect to their defence was 'obviously incompatible with the existence of anything like a combined and well-disciplined army'[1] and that for the purpose of defence there must be a central government in Australia. He noted that Sir Henry Parkes had pointed out 'we may at any moment be in imminent danger of invasion, and we cannot under existing circumstances protect ourselves satisfactorily'.[2] The following year he was able to observe that '[w]e are all agreed that there must be one command'.[3]

The importance of considerations of defence as a catalyst for federation was noted by Quick and Garran. They explain that the military expenditure incurred by the Imperial Government in 1858 in its various colonies and dependencies amounted to

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1 *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, 10 February 1890, 10.

2 Ibid.

3 *Official Report of the National Australasian Convention Debates*, 4 March 1891, 31.

nearly £4 million sterling. Gradually imperial troops were withdrawn and the largely self-governing colonies began undertaking the responsibility of their own military defence. At the Colonial Conference held in London in 1887 the representatives of the colonies expressed a desire that the Imperial Government should appoint a military officer of high standing to advise the Australian governments as to the best method of organising the local forces in order to secure their joint cooperation in time of need. The report of Major General Edwards, in 1889, pointed to there being no provision for united action in time of emergency. His recommendation, of a federation of the naval and military forces, Quick and Garran say, was 'one of the strongest arguments ever submitted in favour of the political federation of the Australian colonies'.[4]

The First World War, which occurred soon after Federation, would involve enormous casualties to the newly formed Australian armed forces; it would engender feelings in the population, including its judges, that Australia was involved in a great struggle; it would test the Justices of the new High Court in the approach that they would take to the use of the defence power to legislate for emergency powers; and it would weigh heavily with many of them personally.

The reality of the war was to be brought home to the Justices of the Court very soon. Legislation enacted in Australia in the First World War, as in the United Kingdom, conferred extraordinarily wide-ranging powers on the Executive Government and created new offences.

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4 Sir John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 561–563.

One such statute, enacted in 1914, was the *Trading with the Enemy Act 1914* (Cth). *The King v Snow*[5] involved a prosecution under that Act, where it was alleged that Francis Snow had tried to arrange the sale to a German company of 6,000 tons of copper from South Australia. The trial drew much publicity. He was acquitted and the Crown appealed to the High Court which commenced its hearing in Adelaide in May 1915. By majority, the Court refused special leave to appeal. Justice Isaacs would have granted special leave. He is well known for his use of rhetoric and this was especially so in times of war. He said:

> For a British subject in the hour of his country's greatest need to attempt to get 6,000 tons of copper out of the control of the Empire is in itself, if proved, an unpardonable act; but when in addition, if the accusation is true, the attempt contemplates handing it over, in return for pecuniary reward, to our enemies to sow death and destruction in our ranks, and those of our Allies, words utterly fail to describe the atrocity of the crime. If the charge be true in fact, it was no sudden slip, but a deliberate and sustained and sordid disregard by the accused of the ties of allegiance to the Sovereign, and the most sacred bonds of honour and fidelity and natural sentiment towards his fellow subjects.[6]

The hearing of *The King v Snow* was marked by another event. A report in the Adelaide *Register* newspaper on 25 May 1915 describes the 'painful incident' that occurred at the start of the hearing the day before.[7] The Chief Justice, Sir Samuel Griffith, Mr Justice Isaacs and Mr Justice Rich entered the

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5 *The King v Snow* (1915) 20 CLR 315.

6 Ibid 330.

7 'Mr Justice Rich: Son Killed at the Front', *Register*, 25 May 1915, 8.

courtroom and took their seats on the bench. The latter was seen to pick up a message and immediately leave the courtroom. He had been informed that his son had been killed in Flanders.

Other members of the Court were to feel this pain as 1916 was a particularly bad year. Both the eldest and the youngest sons of Justice O'Connor were killed. Justice Gavan Duffy's son was killed in France and Justice Higgins' only son was killed in Egypt. Sir Samuel Griffith's own son did not serve overseas during World War I, but the Chief Justice is reported to have said that he found it hard to do 'ordinary work in such anxious times'.[8]

Later in the same year that his son had been killed, Justice Rich agreed to undertake a Royal Commission into the state of a military training camp. This was unusual, for the members of the Court had agreed that it was not appropriate for them to serve Royal Commissions, a view with which many judges today would agree. Nevertheless he appears to have thought the circumstances exceptional.[9] His report, which was scathing,[10] was not well received and he was criticised, perhaps confirming that it had been an unwise decision to undertake the Commission.

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8 Roger Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984) 347.

9 Fiona Wheeler, '"Anomalous Occurrences in Unusual Circumstances"? Towards a History of Extra-Judicial Activity by High Court Justices' (Lecture delivered at High Court of Australia, 30 November 2011) 8.

10 Ibid 7.

The Court was approached three times during World War I to undertake Royal Commissions or inquiries. The second request from Prime Minister Hughes was for a member of the Court to report on the recruitment levels that would be required to maintain the Australian Imperial Force following the second failed referendum on conscription. Sir Samuel undertook the task himself, approaching it 'like a mathematical problem' and reporting that about 5,400 new recruits per month were required.[11] The third request was declined by the Court. It was to inquire into the internment of members of the Irish Republican Brotherhood (which is to say Sinn Fein). The Chief Justice replied, in July 1918, that undertaking such an inquiry was 'liable … to injure the prestige of the Judiciary'.[12]

Tragic events such as the death of their, and their colleagues' sons could only have served to reinforce in the Justices a recognition that these were exceptional times. This awareness may well have coloured the view that they took of wartime legislation and regulatory measures. The strict approach of the common law to detention by the executive, and of judges to the ordinary processes of constitutional and statutory interpretation do not appear to have been fully maintained.

Robert Gordon Menzies was a law student in 1918 when he wrote an article which looked back over the previous war years. He observed that the validity of the delegation of sweeping powers appeared to have been 'tacitly accepted as intra vires in Australia'. He said that constitutionalists appeared to have been reconciled to a 'temporary disturbance of the traditional

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11 Ibid 9.

12 Joyce, above n 8, 355.

constitutional balance'.[13] To similar effect in 1915, in *Lloyd v Wallach*, Justice Higgins observed that:

> In all countries and in all ages, it has often been found necessary to suspend or modify temporarily constitutional practices, and to commit extraordinary powers to persons in authority, in the supreme ordeal and grave peril of national war.[14]

That case concerned section 4(1) of the *War Precautions Act 1914* (Cth) which permitted the Governor-General to make regulations for securing the safety of the public and the defence of the Commonwealth by reference to specific objectives. A regulation made under the Act[15] provided that any naturalised person could be detained in military custody, on the order of the Minister, if the Minister 'has reason to believe' that the person is 'disaffected or disloyal'.

The Minister asserted such a belief about Franz Wallach, a German-born naturalised British subject who had immigrated to Australia in 1893. The High Court rejected an argument that the regulations, which could be made, were limited to the specific purposes stated in the Act. The majority held that there could be no challenge to the basis upon which the Minister formed his belief. Justice Isaacs said that the Minister 'is the sole judge of what circumstances are material and sufficient to base his mental conclusion upon' and he is presumed not to act capriciously or arbitrarily.[16] Mr Wallach was not released until 1919.

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13 Robert Gordon Menzies 'War Powers in the Constitution of the Commonwealth of Australia' (1918) 18 (1) *Columbia Law Review* 9.

14 *Lloyd v Wallach* (1915) 20 CLR 299, 310 ('*Lloyd*').

15 *War Precautions Regulations 1915* (Cth) reg 55(1).

16 See *Lloyd* (1915) 20 CLR 299, 308–9.

The House of Lords adopted a similar approach in 1917 in *R (Zadig) v Halliday*[17] and in World War II in *Liversidge v Anderson*.[18] In *Liversidge* the majority did not construe the requirement that the Home Secretary have 'reasonable cause' to believe strictly and did not require the Home Secretary to give a basis in fact for his belief. Lord Atkin's dissent is well known, not the least for the statements he took from Alice in Wonderland in ridiculing the construction adopted by the majority of the regulation. It is not as if the majority in *Liversidge* could be said to be unconsciously mistaken in the approach they took. The speeches are peppered with wartime justifications and acknowledgements that the regulation might not be construed in the same way in peace time. It would of course not be until 1980, in the *Rossminster* case, that Lord Diplock would pronounce that Lord Atkin had been right and the majority had been 'expediently and, at that time, perhaps, excusably wrong'.[19] The same might be said of the approach in *Lloyd v Wallach*.

A most important decision during World War I was *Farey v Burvett*[20], when the scope of the defence power was first explained by the Court. The Court gave it a very broad reach, so much so that in 1929 the Royal Commission on the *Constitution* was able to state that '[i]n time of war the Commonwealth Parliament may pass any law, or may give the Executive authority to make any regulation, which it considers necessary

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17 *R (Zadig) v Halliday* [1917] AC 260.

18 *Liversidge v Anderson* [1942] AC 206.

19 *R v Inland Revenue Commissioners; Ex parte Rossminster Ltd* [1980] AC 952 at 1011.

20 *Farey v Burvett* (1916) 21 CLR 433 ('*Farey*').

for the safety of the country. The Commonwealth in time of war was, for practical purposes, a unified government'.[21]

Farey v Burvett concerned another provision of the *War Precautions Act* which provided for the making of regulations prescribing and regulating the conditions of the disposal or use of any property, goods or things as were thought desirable for the more effective prosecution of the war or the effective defence of the Commonwealth.[22] The regulation in question fixed the maximum price at which bread could be sold. Mr Farey, a baker, was convicted of breaching that regulation. Later, in 1939, Prime Minister Menzies was to comment that some lawyers might have been surprised that a regulation of this kind fell within the defence power.[23]

The test of whether the defence power was engaged was said by the Court to be whether the measure was 'capable' of aiding the defence of the Commonwealth;[24] or even that it 'may conceivably…even incidentally' aid the defence of the Commonwealth.[25] Justices Gavan Duffy and Rich, in dissent, considered that the defence power was limited to measures associated with the military and naval forces. Pre-empting the method employed by Lord Atkin, their Honours invoked one of Aesop's *Fables* in relation to the majority's broader

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21 *Report of the Royal Commission on the Constitution* (Government Printer, 1929) 120.

22 *War Precautions Act 1914* (Cth) s 4(1A)(b).

23 Australia, House of Representatives, *Parliamentary Debates* (Hansard) 7 September 1939, 164.

24 See *Farey* (1916) 21 CLR 433, 449 (Barton J); see also 441 (Griffith CJ); 460 (Higgins J).

25 See *Farey* (1916) 21 CLR 433, 455 (Isaacs J).

construction.[26] It was the construction adopted in *Farey v Burvett* which would mean that no wartime regulations were ever invalidated during World War I.[27]

As his health began to fail Sir Samuel Griffith did not sit on subsequent cases on the scope of the defence powers, such as *Pankhurst v Kiernan*[28], *Ferrando v Pearce*[29] and *Sickerdick v Ashton*[30]. He was however moved to make a statement in Court on 13 November 1918, following Armistice Day.[31] I shall refer to part only of it. He commenced by saying:

> I cannot let this day pass without a few words. We meet on an occasion without precedent in the recorded annals of the world. After being oppressed for more than four years by the most savage war, conducted with most unbridled outrage, we can look forward with confidence to a period comparatively free from anxiety. There have been many wars, but none in which the welfare of so large a portion of the human race was vitally at stake for so long a time, or from which such grave consequences were likely to follow.

Perhaps recalling the sons of his colleagues, he later added:

> Australia may look with pride upon the part taken by her sons, whose valour will never be forgotten.

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26 See *Farey* (1916) 21 CLR 433, 465.

27 K H Bailey, 'Fifty Years of the Australian Constitution (1951) 25 *Australian Law Journal* 314 at 319.

28 *Pankhurst v Kiernan* (1917) 24 CLR 120.

29 *Ferrando v Pearce* (1918) 25 CLR 241.

30 *Sickerdick v Ashton* (1918) 25 CLR 506.

31 (1918) 25 CLR v–vi.

He then spoke of a happier future, now that 'the chief danger appears to be past'. Of course a lasting peace was not to be. Personal loss was again to be felt in World War II by Chief Justice Latham, whose son was presumed dead after his plane failed to return from a flight over the Norwegian coast.[32] And it would not be long before the Justices would be faced with the challenge of how to construe wartime legislation.

In 1918 the Court had applied *Farey v Burvett* in *Sickerdick v Ashton* to uphold a regulation which prohibited the publication of statements likely to prejudice recruitment in the war. In 1941 freedom of speech was again in issue in *Wishart v Fraser*.[33] The Court appeared to maintain the position it had taken in the First World War. It dismissed a challenge to a provision, which mirrored s 4 of the *War Precautions Act*,[34] under which an offence of 'endeavouring to cause dissatisfaction' among persons engaged in the service of the King or Commonwealth was created. Mr Wishart, a solicitor and member of the Communist League of Australia, had co-authored a document which suggested that members of the Australian Imperial Force were unfairly treated and encouraged them to elect soldiers committees.

But World War II also saw some controversial decisions which were regarded by some, including the government of the day, as indicative of a change in the direction of the Court in its interpretation of the defence power.[35]

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32 Stuart Macintyre, 'Latham, Sir John Greig (1877–1964)' in *Australian Dictionary of Biography*, vol 10 (1986) 2–6.

33 *Wishart v Fraser* (1941) 64 CLR 470.

34 *National Security Act 1939* (Cth) s 5.

35 'Powers from States: Court Case Likely to be Cited', *Sydney Morning Herald*, 30 November 1942, 4; *Record of Proceedings of the*

The regulation in the *Victorian Public Service Case*[36] purported to control the holidays and remuneration of Victorian public servants who were not engaged in work associated with the prosecution of the war. The Court declined to recognise it as a defence measure. It required there to be a 'real connection'[37] between the regulation and the power. The Court said the regulation had nothing to do with public safety and the defence of the Commonwealth.[38]

The decision in *Adelaide Company of Jehovah's Witnesses v Commonwealth*,[39] which was decided in 1943, may be contrasted with *Lloyd v Wallach* and its acceptance of the opinions of the Executive. The regulations provided that the Governor-General could declare an association to be unlawful based upon his opinion that it was prejudicial to the efficient prosecution of the war. A declaration rendered property liable to forfeiture. Justices Williams and Rich said that the regulations 'exceed anything which could conceivably be required in order to aid, even incidentally, in the defence of the Commonwealth'.[40] Justice Starke described the regulations as

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Convention of Representatives of the Commonwealth and State Parliaments on Proposed Alteration of the Commonwealth Constitution (Commonwealth Government Printer, 1942) 136.

36 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488.

37 Ibid 507 (Latham CJ).

38 Ibid 515 (Starke J), 532–3 (Williams J).

39 *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116.

40 Ibid 166.

'arbitrary, capricious and oppressive'.[41] Once again political leaders expressed shock and dismay at the Court's decision.[42]

In *Stenhouse v Coleman*,[43] Justice Dixon expressed concern about the practice which might be maintained in peace time. He said[44] that measures, the 'necessity or justification' for which was conceded in time of emergency, may continue unrevoked when the emergency has passed. In 1949 the Court was to say that the effects of the war could continue for a long time.[45] If the defence power was able to justify at any time any legislation dealing with any matter that had been affected by the war, the Commonwealth Parliament would have a very general power.

These three decisions were decided some years into World War II, *Stenhouse v Coleman* in the latter part of the war. The Court, Justice Dixon in particular, may have had an eye to the post-war period which required changing conceptions of the defence power and of executive power. The decisions may also have presaged the decision in the *Communist Party Case*.[46]

This is not to say that the Justices necessarily considered that at times of emergency a broader view of these powers might not be countenanced. In *Stenhouse v Coleman*, Justice Dixon referred to the defence power as 'elastic'.[47] In the *Communist*

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41 Ibid 154.

42 'Subversive Regulations Invalid: High Court Judgment', *The Argus*, 15 June 1943, 9; 'Jehovah's Witnesses: High Court Rules Ban Was Invalid', *The Canberra Times*, 15 June 1943, 3.

43 *Stenhouse v Coleman* (1944) 69 CLR 457.

44 Ibid 472.

45 *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43, 83.

46 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

47 *Stenhouse v Coleman* (1944) 69 CLR 457, 472.

Party Case, Justice Kitto referred to it as 'expanding and contracting' in times of war and peace and said[48] that its 'waxing and waning' would have been evident in recent years. The judgments of Justices Dixon[49] and Fullagar[50] in the *Communist Party Case* suggest the possibility that the Court could revert to its former stance in times of heightened danger and emergency. Justice Dixon in particular does not appear to have excluded this possibility when he said,[51] by reference to *Lloyd v Wallach*, that in such times the power might sustain the detention of persons whom a minister 'believes to be disaffected or of hostile associations'. The point is, it might not do so in time of peace.

Judges of our time have not had to face difficult questions as to whether the existence of extreme danger or emergency may warrant a different approach to legislative and executive power. If such questions do arise it will likely be in a different context, involving different risks and the use of different kinds of powers.

Legislation may involve the courts more directly in relation to matters such as detention raising different issues for them. Nonetheless, the response of judges in earlier times, who have felt the weight of war, does not suggest that we should assume that a future response might be so much different. We cannot now know.

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48 *Communist Party Case* (1951) 83 CLR 1, 273.

49 Ibid 194–5.

50 Ibid 254–5.

51 Ibid 194–5.

NOT ALL THE SMART PEOPLE ARE IN CANBERRA

THE HONOURABLE CAMPBELL NEWMAN

The title of my address tonight is: *Not all the smart people are in Canberra*. My title is of course tongue in cheek, but it is an important point, and my more serious subtitle is: *A call for true competitive federalism*.

There is an undercurrent in our national debate that implies that all the smart people are in Canberra and that's where the solutions to all our problems lie. On the contrary, tonight I make the case for a refresh of our federation where we realise that right across this country, there are people in state, territory and local governments, and in the community as a whole, that can do a better job if we get the federal government out of the way and empower them.

These people are smart, they have great ideas, and if they were allowed to get on and deliver their own solutions to local challenges, we would be a better country.

I THE HISTORICAL POSITION

One hundred and thirty years ago a group of talented and far-sighted politicians kicked off a process that ultimately saw the federation of a group of British colonies as a new, united and democratic nation. Over years of discussion, negotiation, fights, public debate and huge doses of pragmatism, a constitution was hammered out and Australia was born. It was a political process. It was not a bureaucratic process. It was not led by the public service. Public servants supported the process, but it was the political leaders of the time that did the deal.

Their vision was one of a 'true' federation with dispersed power and it is evident in the words of the *Constitution*. Certain powers were vested in the Commonwealth – national defence, external affairs, and so on, and everything else belonged to the States.

I note the historic fact that the architects of the federation cast the net widely for a model of the federation that would suit Australia. They looked at Switzerland. They looked at Canada and discounted it because it was (ironically) too centralised. They borrowed heavily from the United States model because they were concerned to protect 'states' rights'. And, of course, our Senate was designed as a house of review and a place where the interests of even the smallest states would be protected.

For a period of time, this worked reasonably well until we came to our involvement in World War I and the pain of the great depression. The cataclysmic economic forces undoubtedly required the Commonwealth to intervene for the clear goal of national survival. However, as we know, when the crisis abated, the people from Canberra stayed 'to help us'!

II THE CURRENT POSITION

Move forward 120 years from federation, and where have we come to? Everyone in this room knows where we have got to – nevertheless for the purposes of the argument I will spell it out.

After 120 years of High Court decisions and interpretation of the *Constitution*, plus the exigencies of war, the federation is far removed from what the founding fathers intended. The centralists in Canberra are delighted but the results are not leading us to the promised land or a new Jerusalem. We have totally confused responsibilities, and duplication and overlap are the order of the day.

Prime Ministers and members of the federal cabinet pay absolute lip service to the *Constitution* and a degree of arrogance permeates like a miasma from Canberra across the continent. The media compound the problem clearly showing, on a daily basis, that despite being 'political reporters' most have limited knowledge about how things are really meant to work and absolutely no sense of history.

And finally, the public. The poor long-suffering members of the Australian public who wonder why stuff doesn't happen and are fed up with blame shifting and buck passing. One night they turn on the television and hear their state minister talking about education. The next night, or even the same night, it's the Commonwealth minister seemingly unfazed by his battle with Victorian Catholic Education making out that he is charge. (For the record, the Commonwealth Minister does not have any schools, but he does have a bucket load of federal public servants that don't run any schools.)

Why can't the overall policy settings be handled by a much smaller bureaucracy? Even more radically, why don't State education ministers step up and take responsibility – because it is their responsibility – for the education outcomes in our schools? Is it any wonder that the public are confused and disillusioned?

III THE MAIN PROBLEMS

What then are the main problems with the federation? The evolution of the federation has taken us to a place where State first ministers have been infantilised and they all act and sound like mendicants, because they are!

State ministers have been elected to be responsible for their respective state, and yet they endure a Prime Minister and federal cabinet who want to constantly weigh in on matters that at 1901 did not have anything to do with them.

At a most fundamental level, the problem is money or more precisely the vertical fiscal imbalance that sees Canberra collect almost all the loot and talk loudly about delivery, while the States (and let's not forget local government) are the bunnies who actually have to deliver services on limited revenue raising powers and with the grants that Canberra chooses to provide.

It's not Canberra's money by the way. As the Commonwealth Treasurer quite rightly says: it's the people of Australia's money. I agree, and I will add most emphatically that the Australian people deserve better.

The States must have direct access to their own source of income to pay for their responsibilities without relying on the political whims of Canberra. More bluntly, those that have the responsibility to fund the important services and infrastructure need to get that funding without interference or 'political engineering' via so-called 'National Partnerships' from the federal government.

Then there is that other great – or not so great – federation acronym: HFE (Horizontal Fiscal Equalisation). Essentially a socialist notion – straight from the good old Aussie concept of a 'fair go' – it means that States like New South Wales and Victoria have subsidised everyone else for 100 years. Then, at the very moment that Western Australia comes into some real money, it gets taken off them. In the meantime, States like South Australia and Tasmania can indulge themselves with particular administrations over the past twenty years who have been anti-development and anti-business.

What about Queensland? Queensland has done well, being subsidised by others and was on its way to financial independence, but that prospect is now diminishing as a mountain of debt and interest payments crush their ability to pay for the things that Queenslanders deserve.

My big thought on this is that HFE is a fig leaf for State governments that won't perform. Why be a low tax state when the formula assumes that you are taxing at a higher level? Why open up gas fields or mineral resources generating royalty revenue when that's politically painful and HFE will bail you out anyway? My point is that HFE squashes independence and innovation and provides no incentive for States to do the heavy lifting.

Before I leave the topic of what is wrong with the way that our federation is operating, I need to convey a few thoughts and then some examples on the perils of centralisation. I must say that I have always been nonplussed by my reputation in the media as being some sort of control freak. The truth is that I am a control freak and I have always been someone that believes in delegation of authority and responsibility to the lowest level.

In war, General Sir John Monash understood and went to great pains to ensure that his frontline soldiers needed to understand his plan and his junior leaders were empowered to react to changed circumstances on the battlefield and take action.

This is also the case in business enterprise. My view is that the best leaders tell people what is expected of them, give them clear guidelines, provide the necessary resources and then let people get on with the job. Micro management is detrimental to the human spirit, quells initiative and leads to poor performance. People who are given the freedom to act within clear guidelines, develop as individuals and achieve great results.

As it is on the battlefield and in the competitive world of business, so it is in politics and government. However, the paradigm that now prevails is that the smart people are all in Canberra and that the second eleven work in the States and Territories. Whether it is the politicians or the public servants, the main game is seen to be in Canberra and if you are any good that's where you should be. The back story seems to be that 'the Feds' are the only ones that can come in and sort out the mess that those idiots at state level have created.

De-centralisation of decision making is, I believe, a very important principle for any system of government. People on the spot are usually better placed to identify and analyse issues, develop responses and effectively implement solutions. Furthermore, the idea that in a country as vast as Australia, people sitting in Canberra can tailor policies that work for communities from Huonville in Tasmania to Thursday Island in Far North Queensland, from St Peters in Sydney to Narrogin in Western Australia, is laughable.

It's hard enough doing this at a state level and that's why when I was in government we took a number of steps to delegate authority to local government.

Some of the perils of centralisation are lack of local knowledge, lack of responsiveness, decision avoidance, and anti-democratic tyranny (people in suburban Melbourne railing against Adani and the promise of jobs in regional Queensland).

My firm view is that our system should be about empowering State leaders and then letting them solve their own problems.

The story of the National Heavy Vehicle Regulator – a Rudd Govt initiative but implemented by Prime Minister Abbott – is instructive. Established in 2013, the vision was of a seamless, harmonised system greasing the wheels of the nation's logistics and trucking operators.

Immediately upon implementation things fell in a heap. From their website they say that they are about minimising the compliance burden, reducing duplication of and inconsistencies in heavy vehicle regulation across state and territory borders, and providing leadership and driving sustainable improvement to safety, productivity and efficiency outcomes. However, they have a long way to go.

When I was the Premier of Queensland in 2013 and 2014, I was besieged by complaints from the trucking industry and farmers about a huge blowout in the times to process permits for the movement of heavy and oversize loads. Farmers with cane farms astride the Bruce Highway in North Queensland who merely wanted to move a piece of large machinery 500 metres down the road from one part of the farm to the other could not get permits. The trucking companies were screaming because permits were taking weeks for approval.

If you think that it has been solved now, then think again. I was approached in May this year by a trucking industry group that was concerned about a lack of responsiveness and the inability to receive permits in a timely fashion. In particular, mining equipment being relocated by heavy haulage from Pilbara to Weipa had to be barged across the Gulf of Carpentaria because, after 100 days, no permit had been issued in Queensland. Whereas permits in Western Australia and the Northern Territory were issued in two days (neither jurisdictions are signatories to the National Heavy Vehicle Law), in Queensland the permit applications had sat with local and state

government for over 100 days. My point is that we already had a perfectly good system that served us well, where local decisions were made in a timely and effective manner before this reform was introduced. The perverse irony is that the National Heavy Vehicle Regulator is located in Brisbane.

IV Benefits of Making the Federation Work Properly

But enough of the problems. What are the benefits to making the federation work properly? Firstly, we get a chance to reduce waste and duplication and better utilise the resources that we have as a nation. In short, we do a better job for Australians.

Secondly, we get to keep faith with the public and restore their faith in the system by reducing the blame game and looking like the political and media class actually have a clue.

Thirdly, we empower and motivate smart people in places other than Canberra to step up and truly lead. Premiers, ministers, mayors and councillors can do a better job if we let them.

Fourthly, we strip away the 'fig leaf' creating competitive federalism where States have a greater array of policy levers at their disposal and therefore must stand up and be counted.

Finally, Australians will have the opportunity to compare and – should they wish – choose to live in the jurisdictions that are delivering.

If you think this final one is a fantasy, then just remember that when Sir Joh Bjelke-Petersen ended death duties in Queensland, not only did the state see an influx of retirees, but this tax was eliminated nationally shortly thereafter.

So how do we do this? Let's get real: Canberra has absolutely no real interest in seeing the matter resolved even though going back to a proper federation, as the founders envisaged, may well be in the national interest.

Federation reform therefore needs to come from the state and territory first ministers. They may not agree on the specifics right now but surely they can agree that a broken system needs to be fixed and if they stand together and demand a process of reform that at least a start can be made. However, they don't seem to be interested in having to rock the boat either.

In summary, I don't see any push from anyone to do anything at the moment. So it has got to come from people like us and that's what conferences like this are about. We need to kick start a debate about federation. We need to try and talk to our fellow citizens on some of the things that I have mentioned tonight and get some sort of mood for change.

We need to point out that if there is a lack of performance by the States, it is actually a manifestation of the smothering 'fiscal love' that Canberra delivers.

I watch with amazement and shake my head at the perennial but brief outbreaks of discussion about tax reform. Even more laughable is the suggestion that true reform will be led by Canberra. Additionally, its implausible to think that we will have effective and meaningful taxation reform without reform of the federation itself.

To be more pointed, federation reform comes before taxation reform. If you get the roles and responsibilities sorted out then it will be easier – not easy – to sort out the tax issues and the whole HFE debacle.

It is time for a new compact between the Commonwealth and the States (and Territories) and it needs to be a deal between political equals that is appreciative of our history, respectful to our traditions, and acknowledges that we can make our country work better. This process cannot be led by the Department of Prime Minister and Cabinet. It must instead be led by the politicians themselves.

As I said when I started this address this evening, federation was led by politicians who crafted an audacious political bargain. That's what I am advocating now. If we are to get anywhere, the senior politicians need to tear themselves away from social media and the 24-hour news cycle and do some real work involving deep and considered thinking. We need them to lead the process and personally thrash out the key issues, and then provide the guidance to the public servants.

I'm not talking about constitutional amendments, although it would be nice if it could happen. Instead, I am advocating, as a minimum, a political deal that sees the respective roles and responsibilities being agreed, the responsibilities being defined and quantified, the true funding requirements being estimated, and then a taxation deal being done. This may mean that some States give up certain things but reclaim full responsibility for others.

For example, the National Disability Insurance Scheme could be a totally Commonwealth responsibility as part of the Social Security System. It may mean that the States get a share of Commonwealth income tax, collected by the Australian Taxation Office. On day one of the new system, the state income tax component of the overall Pay As You Go tax brackets would be the same everywhere. As time went on the various jurisdictions could ask the Commonwealth to vary their respective component. The postcode of your principal place of

residence would be a convenient coding flag to allow the automatic calculation of tax.

What would be the impact if Tasmania decided to be the lowest taxed state in Australia and became the preferred home of the wealthiest? It's not a bad place if you have central heating, there is the Museum of Old and New Art, and they make great wines and whiskey.

Finally, it may mean the States adopting an improved federal environmental law, dispensing with their own but then being solely responsible for implementation within their borders.

VI Conclusion

To conclude, we have a great country, but we seem to be currently becalmed on the ocean. There are other prescriptions, other things that may help with this, but the one that I passionately believe could make a huge difference is a concerted effort to redefine our federation and make it work.

I hope that you all share my passion for that dream. Thank you for having me this evening and have a great conference.

MORALITY POLICY AND FEDERALISM

ROBYN HOLLANDER

Duplication and overlap are high on the list when considering the limitations of a federal system. Economists despair at market inconsistencies, lawyers express frustration when confronted by legal anomalies, citizens rail at variations in everything from school starting ages to road rules to professional recognition. These largely practical concerns can be overshadowed by a more abstract, more principled concern – the capacity of duplication and overlap to undermine rights, particularly in areas of personal and social morality.

That is the starting point for my paper. I am asking the following question: is the duplication and overlap that characterises many federations, including our own, as dysfunctional and unprincipled as it seems? In particular, what does it mean for morality policy? To answer this question, I'm going to survey some of the arguments before examining a single policy area – that of same sex marriage and here I'm going to compare the experience in the United States of America ('USA') (which is characterised by duplication and overlap) with the Australian experience (which is not).

But first, a few definitions. As we all know, duplication and overlap characterise all contemporary federations. Duplication exists when multiple jurisdictions have the same roles and responsibilities. Overlap occurs when jurisdictions share roles and responsibilities and hence all have the capacity to affect the policy space in some way. This could be directly – through legislation or the courts – but also more indirectly using financial incentives or other powers or even in agenda setting.

What are we talking about when we talk about morality policy? Here it becomes clear that I am not a political philosopher because here I draw on the public policy literature which defines morality policy by simply drawing on observable criteria.

First, and most importantly, morality policy deals with issues of first principle, issues of right and wrong, good and bad. What's significant from a policy making perspective is that this means it resists the technical, incremental compromises that characterise policy making in other domains. We can negotiate around the appropriate level of corporate tax, for example, because we agree that corporations should be taxed. But the death penalty poses a far greater challenge because we are either for or against the death penalty. Thus, around this contested issue, there can be no substantive compromise.

Second, issues of morality have a high level of salience. They are easy to understand and because of this most, if not all, people will have a view. Everyone will have an answer to the question 'do you support euthanasia?' or 'are you in favour of legalising cannabis?'. Morality policy can therefore be said to be inclusive and this leads us to the third characteristic.

Morality policy generates higher than usual levels of citizen involvement. Because the debate revolves around basic value questions which are relatively simple to grasp, those usually unmoved by politics will be more willing to form an opinion, expound a view point or even act politically. We can take the high level of engagement in the same sex marriage vote as an example of this.

Now why does duplication and overlap matter to morality policy? To put it bluntly, to universalists, it's an abomination. For them, federalism is an institutional form that has allowed the

perpetuation of gross injustice. We just have to think of the recent marriage of an 11-year-old girl in the Malaysian state of Kelantan. The marriage itself was legal under state law (the man only fined because he was found guilty of polygamy.) Examples of state-based injustice have a long history in the USA where critics long contended that federalism has been indelibly stained by slavery, by Jim Crow, and by more subtle forms of racial discrimination all justified by a commitment to 'states' rights'. Here in Australia we can also point to examples where States have enacted policies in line with particular moral codes and imperatives that constrain individual rights: policies around prostitution, censorship, sex education, the right to life, euthanasia, the recognition of relationships, and the right to self-determination for Aboriginal Australians. The only way to avoid such outcomes, according to this line of argument, is to concentrate all responsibility in the hands of a central government which will be less easily swayed by minorities and therefore better able to legislate in areas of morality.

But such an absolutist formulation offers no guide to policy making in areas where moral principles collide: the right to life versus women's rights; physicians' obligations to preserve life versus individual desires for assisted suicide; religious freedom and same sex marriage. In such areas there is no clear path. It is here that federalism, and in particular a duplication of competencies, provides a way forward. This is because duplication allows individual communities to resolve such questions in ways that line up with their dominant value set. And here I'll be drawing on the work of Christopher Mooney, a political scientist from the USA.

Mooney argues federalism is well suited to the formulation of morality policy because, in a polity with heterogeneous values such as the USA, individual states – where we are more likely to find homogeneity – can design policy that largely conforms to the policy preferences of the citizens. This then explains the long periods of what he calls policy dormancy. Change will occur when community values shift and until then politicians will be content to 'let sleeping dogs lie', especially as even a vague whisper of change can open up space for policy entrepreneurs to try and shift the policy settings to more closely align with their preferred outcomes, and there disrupt the alignment between community preference and policy.

For Mooney, duplication is federalism's virtue: it allows every state, every province to resolve morality policy conflicts in its own way. But its twin – overlap – is its curse because it disrupts state-based resolution. Overlap paves the way to one of two outcomes: on-going conflict (and here he cites abortion in the USA where 'federal usurpation of state authority on morality policy [has led] to extended, acrimonious and irreconcilable policy activity') or state based resistance and a steady undermining of national determinations (his example here is the death penalty where the barrier imposed by the Supreme Court in 1972 met with state opposition and was rolled back by the Court and then, itself, rolled back four years later, thereby allowing a measure of congruence to be re-established).

But what happens when public sentiment moves ahead of our state or federal legislators and the courts? This is the question I want to turn to now and I'm going to argue that the combination of federal duplication and overlap provides a better framework for dealing with morality policy challenges than either state or federal exclusivity. And to do this, I'm going to

use the same sex marriage debate in Australia and the USA to demonstrate my argument.

In Australia, responsibility of marriage was characterised by an absence of duplication and overlap. I argue that this lack of duplication and overlap meant that we saw a significant gap develop between public values and political action. The misalignment was evident in the results of the 2017 same sex marriage postal survey. Nationally 62 per cent of respondents favoured same sex marriage and only 38 per cent voted against. While there was majority support in each State and Territory, there were some significant differences and I'll come to those a little later.

As we all know, primary responsibility rests with the Commonwealth as set down in section 51(xxi) (marriage) and (xxii) (divorce and parental rights), and the Commonwealth had steadfastly refused to recognised same sex marriage over a number of years. In fact in 2004 it passed the *Marriage Amendment Act 2004* (Cth) which defined marriage as a union between a man and a women. Amendments proposed in 2009, 2010 and 2012, which would have recognised same sex marriage, all failed.

At the same time, however, and this is important to my argument, some States were busy legislating in the area. While primary responsibility for regulating relationships lies with the Commonwealth, the States have some indirect engagement. Historically, prior to the establishment of the Family Court of Australia in 1975, State courts heard divorce cases. They dealt with child custody until the 1980s (and still do in Western Australia). The States also maintain the marriage registries.

Also, prior to 2009, the States were responsible for de facto relationships including partner rights and property and this aspect provided an avenue for many to involve themselves in the recognition of same sex relationships. Between 1999 and 2006, seven of the eight jurisdictions extended their existing de facto arrangement to cover same sex couples. The Commonwealth followed in 2008 when it removed all discrimination against same sex couples in relation to taxation, superannuation, social security, health, immigration, citizenship and family law.

But several of the subnational jurisdictions went further. Between 2003 and 2011, Tasmania, Victoria, Australian Capital Territory, New South Wales and Queensland all introduced legislation that provided for the formal recognition of same sex relationships. In some cases this amounted to simple registration but in others there were provisions for a ceremony, celebrant and certificate, as well as access to adoption and provisions for revocation. It was, for all intents and purposes, 'marriage lite'.

Three States tried to go even further. In Tasmania and New South Wales, same sex marriage bills were introduced into the Parliament. While it's doubtful if these bills had much chance of succeeding, the Australian Capital Territory was more ambitious. In 2013, it passed the *Marriage Equality (Same Sex) Act 2013* (ACT) under which 31 couples married before the Act was disallowed by the High Court. Unsurprisingly, the Australian Capital Territory recorded the highest level of support for same sex marriage in 2017, followed by Victoria and Tasmania.

In this case the evidence suggests that an absence of duplication and overlap meant there was a mismatch between community values and policy settings in some Australian jurisdictions at least.

Let's now turn to the USA which offers a contrasting story. In the USA, responsibility for marriage is characterised by duplication and overlap. The states over there have primary responsibility for the key elements of marriage including ceremonies, obligations and divorce. Federal involvement is indirect through child welfare and support, domestic violence, economic regulation, immigration and citizenship, and importantly civil rights.

That has essentially meant that the states have been free to chart their own route through the same sex marriage debate beginning in 1991 when Hawaii allowed same sex marriage. This first foray was quickly overturned by legislation, and then more permanently blocked by constitutional amendment in 1998. In the 2000s we started to see same sex marriage occurring first in Massachusetts in 2004 and then Connecticut in 2008. Between 2008 and 2013, another 15 States plus Washington DC had followed. Each had proceeded along its own route, many via legislation and several as a result of judicial action. Interestingly, these changes were not necessarily organic. LGBTI activists – the policy entrepreneurs of the story – targeted States and cases where they had community support, as well as a strong chance of success.

In other States, perhaps as a reflection of prevailing community values, same sex marriage was decisively rejected, often through constitutional amendment. State based bans ranged from simply targeting same sex marriages to civil unions to 'any marriage-like contract'. In this case, federal duplication allowed states to chart their own individual paths.

But as we know, the story didn't end there. In a landmark ruling in 2015, the Supreme Court of the United States ruled that all States would be obliged to license marriage between two people of the same sex: *Obergefell v Hodges* 576 US ___ (2015). The court based its decision on *United States Constitution* amend XIV (the Equal Protection Clause). This is a clear result of overlap.

Mooney predicted that if this sort of overlap contravened community values we would see ongoing conflict or state-based resistance especially where there were significant differences between States. Survey data collected just prior to the *Obergefell* case showed wide variations in support ranging from 75 per cent in favour in New Hampshire to only 32 per cent in Mississippi and Alabama. Despite this, opposition has thus far been relatively muted. There have been a few cases involving the providers of marriage services – bakers, florists and the like – and discussion of using freedom of religion provisions, but we have yet to see a concerted backlash around the marriage provisions at least. Perhaps this is because there is increasing support for same sex marriage across the USA. In 2017, a Pew Research Centre survey found that 62 per cent of Americans supported same sex marriage, up from 35 per cent in 2001. Unfortunately, the figures were not broken down by state.

What can we conclude? I think we can all accept that there are areas of morality policy where values clash. I have argued that this is where the *bête noir* of federalism – duplication and overlap – can offer a way forward. This is because it allows for better alignment between community preferences and policy settings.

MCCAWLEY AND OTHER CASES IN THE LIGHT OF KIRK: ARE THERE UNRECOGNISED POSSIBLE LIMITS ON THE STATE'S POWERS OF CONSTITUTIONAL AMENDMENT DERIVED FROM THE *CONSTITUTION*?

THE HONOURABLE DAVID J S JACKSON

The title of this paper gives away the point of it. But I should begin by warning you not to expect too much. There is no ticking time bomb about to explode on current thinking about the limits of the State's powers of constitutional amendment, at least as far as I know.

With that disclaimer, may I dive into the topic by starting at the chronological end, namely the 2009 judgment of the High Court in *Kirk v Industrial Court of New South Wales*.[1] The relevant constitutional question arose in *Kirk* because of section 179 of the *Industrial Relations Act 1996* (NSW). The section provided that a decision of the Industrial Court was final and might not be appealed against, reviewed, quashed, or called into question by any court or tribunal. It expressly extended to proceedings for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction, declaration or otherwise.

Section 179 provided:

> (1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.

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1 (2010) 239 CLR 531.

(2) Proceedings of the Commission (however constituted) may not be prevented from being brought, prevented from being continued, terminated or called into question by any court or tribunal.

(3) …

(4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:

(a) the Full Bench of the Commission in Court Session, or

(b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision.

(5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.

(6) This section is subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law.

(7) In this section:

decision includes any award or order.

On the constitutional question, the court held that section 179 was invalid as beyond the legislative power of the State to alter the constitution or character of its Supreme Court, so that it would cease to meet the constitutional description of 'the Supreme Court of a State' that appears in section 73 of the *Australian Constitution*. Section 73 provides:

> The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:
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> (i) of any Justice or Justices exercising the original jurisdiction of the High Court;
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> (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State,
>
> (iii) of the Inter-State Commission, but as to questions of law only;
>
> and the judgment of the High Court in all such cases shall be final and conclusive.
>
> But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.
>
> Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

There were two steps in the reasoning process in *Kirk*. The first step was to identify the principle or limit upon state legislative power. The second was to characterise section 179 as infringing that principle.

As to the first step, the principle was succinctly stated in paragraph 96 of the reasons of the plurality. Their Honours said:

> In considering State legislation, it is necessary to take account of the requirement of Ch III of the

> Constitution that there be a body fitting the description 'the Supreme Court of a State', and the constitutional corollary that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description': *Forge* (2006) 228 CLR 45 at 76 [63].[2]

The second step was equally important. The gist of it is set out in paragraph 99 of the reasons of the plurality. The critical part, in my view, appears in the second half of that paragraph:

> To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of 'distorted positions'. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.[3] (footnote omitted)

Having said that, the plurality immediately went on to say, that does not mean no legislation can affect the availability of judicial review in a Supreme Court of a State. The distinction between what is within legislative power and what is outside it is the distinction between jurisdictional error and non-jurisdictional error, so that legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.[4]

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2 *Kirk* (2010) 239 CLR 531, 580 [96].

3 *Kirk* (2010) 239 CLR 531, 581 [99].

4 *Kirk* (2010) 239 CLR 531, 581 [100].

The *Kirk* principle is directly derived from the principles expounded in 1996 in *Kable v Director of Public Prosecutions (NSW).*[5] Other decisions stemming from *Kable* can be seen to turn on this notion of the constitutionally guaranteed institutional integrity of the Supreme Court. One example in Queensland is that legislation by which the Attorney-General would have been able to reverse a decision of the Supreme Court made under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was held to be invalid.[6] The point of interest for this paper is that the Court of Appeal rejected an argument that the *Kable* principle is limited to provisions that confer a power on a Court that is repugnant to the Court's institutional integrity.[7]

There is another relevant case that deals with the limit of the power of a State Parliament to make legislative changes to the Supreme Court. It is the 2006 decision of the High Court in *Forge v Australian Securities and Investment Commission*.[8]

The question in *Forge* was whether it was beyond the legislative power of the State of New South Wales to provide for the appointment of an acting Judge as a Judge of the Supreme Court. Specifically, the question was whether section 37 of the *Supreme Court Act 1970* (NSW) that permitted such an appointment was invalid. It provided, in part:

> (1) The Governor may, by commission under the public seal of the State, appoint any qualified person to act as a Judge, or as a Judge and a Judge of Appeal, for a time not exceeding 12 months to be specified in such commission.

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5 (1996) 189 CLR 51, 100–102, 117 and 137–143.

6 *Attorney-General (Qld) v Lawrence* [2014] 2 Qd R 504.

7 Ibid 530–531 [43].

8 (2006) 228 CLR 45.

(2) In subsection (1) ***qualified person*** means any of the following persons:

(a) a person qualified for appointment as a Judge of the Supreme Court of New South Wales,

(b) a person who is or has been a judge of the Federal Court of Australia,

(c) a person who is or has been a judge of the Supreme Court of another State or Territory.

(3) A person appointed under this section shall, for the time and subject to the conditions or limitations specified in the person's commission, have all the powers, authorities, privileges and immunities and fulfil all the duties of a Judge and (if appointed to act as such) a Judge of Appeal.

The High Court held that section 37 was valid. The High Court proceeded by the same two-step reasoning process followed in *Kirk*. The first step as to the principle was the same as in *Kirk*.

One important point about *Forge* is that it reframed the constitutional principle articulated in *Kable* in a way that more directly applies to assessing the limit of a State's constitutional power to affect its Supreme Court.

The way that was done appears in paragraph 63 of the reasons of the plurality:

> Because Ch III requires that there be a body fitting the description 'the Supreme Court of a State', it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description. One operation of that limitation on State legislative power was identified in *Kable*. The legislation under consideration in *Kable* was found to be repugnant to,

> or incompatible with, 'that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system'. The legislation in *Kable* was held to be repugnant to, or incompatible with, the institutional integrity of the Supreme Court of New South Wales because of the nature of the task the relevant legislation required the Court to perform. At the risk of undue abbreviation, and consequent inaccuracy, the task given to the Supreme Court was identified as a task where the Court acted as an instrument of the Executive. The consequence was that the Court, if required to perform the task, would not be an appropriate recipient of invested federal jurisdiction. But as is recognised in *Kable*, *Fardon v Attorney-General (Qld)* and *North Australian Aboriginal Legal Aid Service Inc v Bradley*, the relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.[9]

Thus, the principle has emerged that the question is whether the amendment would impermissibly interfere with the institutional integrity of the Supreme Court.

On the second step of the reasoning in *Forge*, there were a number of reasons for the conclusion that a power to appoint some acting Judges does not affect institutional integrity, and I

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9 Ibid 76 [63].

do not need to set them out. One obvious point was that even at the time of federation, there had already been numerous appointments of acting Judges of Supreme Courts. In fact, two of the first three Justices of the High Court had been acting Judges of a Supreme Court at some point, as were other later appointees.[10]

The other important point about *Forge* is what was said by the plurality in paragraph 73.[11] I will summarise the first two steps in the reasoning. First, the way that the *Supreme Court Act 1970* (NSW) distinguished between acting and permanent appointments would not permit the appointment of so many acting Judges that the Court was predominantly or chiefly composed of acting Judges. Second, that limit could be seen as following either from the words of the Act, or as reinforced or required by constitutional considerations. And it is a conclusion that proceeds from an unstated premise about what constitutes a court.

It is the next two sentences of paragraph 73 that are of most interest for present purposes:

> Thus, the conclusion may proceed from a premise that a court, or at least the Supreme Court, of a State must principally be constituted by permanent Judges (who have tenure of the kind for which the Act of Settlement provided: appointment during good behaviour for life, or, now, until a set retirement age with no diminution of remuneration during tenure). Or the conclusion may proceed from a premises that is stated at a higher level of extraction: that the courts,

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10 Ibid 63–64 [31].

11 Ibid 79 [73].

> and in particular the Supreme Court, of a State must be institutionally independent and impartial.

I would make two observations about that passage. First, this reasoning at the least suggests that the scope of the power of the State to alter the constitution of the Supreme Court by providing for the appointment of acting Judges for a limited term is not absolute. Second, the reference to 'permanent Judges' who have tenure to a set retirement age raises a relevant diversion. At the time of federation, the Judges of the Supreme Courts of the States were appointed for life, by words that appointed them 'during good behaviour'.[12]

The first Australian legislation that required a Judge to retire at age 70 years was passed in Queensland in 1921.[13] Some may think that a retirement age of 70 or similar years is a logical thing, to prevent those of waning powers from continuing, when they should retire. Perhaps, in part, that was a reason for the Queensland legislation.

But, in fact, the legislation in Queensland had a second purpose. As part of a long running antagonism between the government of the day and the Supreme Court, compulsory retirement was applied to the existing members of the Supreme Court, and brought about the immediate retirement of three of the five judges of the court. *McCawley's* case, itself, was an earlier part of this long running antagonism.[14] The Queensland legislation may be contrasted with other similar retirement legislation, such as the 1977 amendments to section 72 of the *Australian Constitution* that did not apply to existing judges.

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12 See, eg, *Constitution Act of 1867* (Qld), s 15.

13 *Judges' Retirement Act 1921* (Qld), s 3.

14 *McCawley v R* (1918) 26 CLR 9.

In 1915, TW McCawley was the Crown Solicitor. McCawley was an admitted barrister who had never practised. He was handpicked as the Under-Secretary for Justice by TJ Ryan, the then Premier and Attorney-General, who was a skilled practising barrister although not then a silk.[15] On 12 January 1917, aged 35 years, McCawley was appointed as a Judge and President of the new Court of Industrial Arbitration under the *Industrial Arbitration Act of 1916* (Qld). Sub-section 6(6) of that Act provided:

> Notwithstanding the provisions of any Act limiting the number of Judges of the Supreme Court the Governor in Council may appoint the President or any Judge of the Court to be a Judge of the Supreme Court.
>
> The President or any Judge of the Court, if so appointed as aforesaid, may exercise and sit in any jurisdiction of the Supreme Court, and shall have in all respects and to all intents and purposes the rights, privileges, powers, and jurisdiction of a Judge of the Supreme Court in addition to the rights, privileges, powers, and jurisdiction conferred by this Act, and shall hold office as a Judge of the said Supreme Court during good behaviour, and be paid such salary and allowances as the Governor in Council may direct, which shall not be diminished or increased during his term of office as a Judge of the Supreme Court or be less than the salary and allowances of a Puisne Judge of the Supreme Court; and upon such direction the said payments shall become a charge upon the Consolidated Revenue.

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[15] Ryan and McCawley had travelled together to the Privy Council in 1916 to argue a case for the government: *Fowles v Eastern and Australian Steamship Co Ltd* [1916] 2 AC 556.

> The President and each Judge of the Court of Industrial Arbitration shall hold office as President and Judge of the said Court for seven years from the date of their respective appointments, and shall be eligible to be reappointed by the Governor in Council as such President or Judge for a further period of seven years.

Under section 6(6), the appointment was for a period of seven years from the date of the commission. On 12 October 1917, also under section 6(6), McCawley was additionally appointed a Judge of the Supreme Court of Queensland. It was generally accepted that the additional appointment as a Supreme Court Judge should be construed as being for a term of seven years, being so long as he was appointed a Judge of the Court of Industrial Arbitration.[16]

On 6 December 1917, McCawley presented his commission to the Chief Justice but there was objection to its validity. The case for McCawley was argued personally by TJ Ryan. The ongoing antagonism between the government and the Supreme Court can be seen in some of the exchanges between Ryan and the court during argument.

The main argument for invalidity was that section 6(6) of the Act was *ultra vires* and contrary to the provisions of the Constitution of Queensland.[17] The relevant section of the *Constitution Act*, section 15, provided:

> The commissions of the present judges of the Supreme Court of the said colony and of all future judges thereof shall be, continue, and remain in full

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16 Higgins J dissented from this view in the High Court.

17 Whether the relevant provisions were confined to the *Constitution Act 1867* (Qld) or included the Imperial Order in Council of 6 June 1859 is irrelevant to this discussion.

> force during their good behaviour notwithstanding the demise of Her Majesty (whom may God long preserve) or of her heirs and successors any law usage or practice to the contrary thereof in anywise notwithstanding.

There were some procedural hiccups but, ultimately, on 25 April 1918, the Supreme Court made an order that McCawley was not entitled to take a seat as a member of the Supreme Court.

On 27 September 1918, the High Court dismissed an appeal, by a majority of 4:3. It decided that section 6(6) was invalid because it was inconsistent with section 15 of the Constitution of Queensland. The effect of section 15 was that the commission of a Judge of the Supreme Court shall be during good behaviour and impliedly for life, not for a fixed term. The provision had not been repealed. Because section 6(6) purported to authorise an appointment of a Judge of the Supreme Court for seven years, it was inconsistent and invalid.

You will get the flavour of how the case was dealt with by the majority from a passage from Chief Justice Griffith's reasons:

> These limitations, it will be observed, introduced as part of the Constitution granted to Queensland what has always been regarded as a great constitutional principle introduced by the Act of Settlement, namely, that the tenure of office of the Judges of the superior Courts should be for life during good behaviour. The law of 1867 is still part of the Statute law of Queensland. The Parliament of Queensland had not, therefore, in my opinion, any authority under the Order in Council as so amended, any more than before the amendment or before the Australian Constitution, to enact any law providing for the

> appointment of a judge of the Supreme Court with any other tenure of office…[18]

The point of the majority judgments was not that it was beyond the power of the State Parliament to alter the Supreme Court in a way that affected the institutional integrity of the Supreme Court. It was, that before Parliament could alter the tenure of the appointment of a Judge of the Supreme Court by some other Act, an amendment had to be made to the Constitution of Queensland first, so as to avoid inconsistency.

Before leaving the High Court in *McCawley* behind, one other point to note is that both Chief Justice Griffith CJ and Justice Barton J referred to section 106 of the *Australian Constitution* which provides:

> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

This, Sir Samuel said, gave the provisions of the Constitution of Queensland that reflected the *Act of Settlement* the force of an Imperial Statute.[19] Justice Barton also referred to section 106 as giving support to the character of the Constitution of Queensland as a constitution.[20]

On 8 March 1920, the Privy Council allowed McCawley's appeal from the High Court.[21] From what I have said so far, you might be expecting that when the case got to the Privy Council

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18 *McCawley v R* (1918) 26 CLR 9, 22.

19 Ibid.

20 Ibid 33.

21 *McCawley v The King* (1920) 28 CLR 106.

it would have focused on some of the questions I have mentioned about the detailed operation of the Constitution of Queensland and perhaps consideration of its context in the *Australian Constitution*. Not in the least bit.

The dispositive reasoning of the Privy Council begins at pages 114 and 115 with the distinction their Lordships drew between a 'controlled' constitution and an 'uncontrolled' constitution.[22] They continued with this passage:

> It is of the greatest importance to notice that where the Constitution is uncontrolled the consequences of its freedom admitted no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision. Thus when one of the learned judges in the Court below said that, according to the appellant, the Constitution could be ignored as if it were a Dog Act, he was in effect merely expressing his opinion that the Constitution was, in fact, controlled. If it were uncontrolled, it would be an elementary common place that in the eye of the law legislative document or documents which defined it occupied precisely the same position as a Dog Act or any other Act, however humble its subject matter.

I have always wondered whether the Privy Council would have used the example of amendment by the Dog Act if they had been talking of amendment of a fundamental British constitutional Act rather than the Constitution of Queensland.

One source I have read[23] says that McCawley's counsel were not called on in the oral argument of the appeal. The

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22 Ibid 114–115.

23 D J Murphy, *T. J. Ryan – A Political Biography* (University of Queensland Press, 1975) 477.

Attorney-General for England intervened in the appeal and his counsel made submissions about the extent to which the Imperial Parliament had intended to devolve constitutional power on colonial Parliaments when erecting those colonies. These points do not appear in the report in the Law Reports.[24]

Nowhere in the Privy Council's reasons is any reference made to the fact that the Constitution of Queensland was the Constitution of a State[25] and subject to the *Australian Constitution* under section 106.[26] So far as the Privy Council was concerned, the ability of the Australian colonies to amend their own *Constitutions* was entrenched by the *Colonial Laws Validity Act 1865* (Imp), section 5, that provided:

> Every Colonial Legislature shall have, and be deemed at all Times to have had, full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein; and every Representative Legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

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24 *McCawley v The King* [1920] AC 691.

25 Only one reference is made to Queensland being a State under the Commonwealth Constitution. That was in the course of describing the judgment of Griffith CJ at (1920) 28 CLR 106, 112.

26 And covering clause 5.

The result was that on 3 May 1920 McCawley took up office as a Judge of the Supreme Court. Within two years, as I have already mentioned, three of the judges who had sat on *McCawley's* case in the Supreme Court were removed from office, effective 31 March 1922, by an Act based on the holding in *McCawley's* case that an ordinary Act could repeal the constitutional provision for the life tenure of a Judge.

From what I have said so far, however, one might think that the only relevant question raised by the reasoning in *Kirk* and *Forge* concerns the constitution of the Supreme Court of any State. But although I acknowledge that the next step goes out on a limb, there might be a bit more to it.

Some may remember the appointment of Senator Albert Patrick Field during the turbulent period between 1973 and 1975. On 30 June 1975, Queensland Labor Senator Bert Milliner died. The Queensland Parliament comprised of the Legislative Assembly led by Premier Joh Bjelke-Petersen appointed Field, who was a public servant immediately before his appointment. A High Court challenge was mounted. In any event, famously or infamously, depending on one's view, on 11 November 1975 there was a double dissolution and Field was not elected at the 13 December 1975 election.

The underlying point of that history is that as at 1975, section 15 of the *Constitution* provided in part:

> If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as herein-after provided, whichever first happens. But if the Houses of

> Parliament of the State are not in session at the time when the vacancy is notified…

Note the reference to the 'Houses of Parliament of the State', plural. Of course, since 1922, there has been no Legislative Council of the Parliament of Queensland even though there was one, as provided for in the Constitution of Queensland, at the time of federation.

As you may know, in the 1977 constitutional amendments,[27] section 15 was replaced. It now provides for the contingency if there is only one House of the Parliament of the State for which the Senator is to be chosen. The relevant part of the current section provides:

> If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified…

But having regard to *Kirk* and *Forge*, what might have been the consequences of the statutory assumption in section 15, as originally enacted, that there would be Houses of Parliament, plural, of a State?

This part of the journey around the cases begins with *Taylor v Attorney-General*,[28] another Queensland case brought to the High Court in 1917. It was another case that arose during the long period of antagonism between the government of the day and the Supreme Court. Ryan, as Attorney-General and Premier,

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27 *Constitution Alteration (Senate Casual Vacancies) Act 1977* (Cth).

28 (1917) 23 CLR 457.

again argued the case for the government. The question was whether the *Parliamentary Bills Referendum Act 1908* (Qld), which I will call the *Referendum Act*, was valid to permit the passage of a Bill to amend the Constitution of Queensland, by abolishing the Legislative Council, without the Bill passing the Legislative Council.

Bear in mind that this case was decided only a year before *McCawley's* case. The leading judgment was that of Barton J. The key passage is:

> There is power to make laws "respecting the constitution" of the legislature, and this, if passed, is such a law. The means of making it a law are provided validly by the Referendum Act. It seems to me, therefore, that I cannot but hold that there is power to abolish the Legislative Council…[29]

He held that section 5 of the *Colonial Laws Validity Act 1865* (Imp) gave full power to make laws respecting the constitution of the legislature meaning, the composition, form or nature of the House of the legislature where there is only one House or of either House if the legislative body consists of two Houses. He held that power covered the provision in the Referendum Act that a Bill passed by the Legislative Assembly in two successive sessions, that has in the same two sessions been rejected by the Legislative Council may be submitted by referendum to the electors and, if affirmed by them, may be presented to the Governor for royal assent.

Ultimately the Legislative Council was got rid of in Queensland, but it was not by the mechanism of a referendum under the *Referendum Act*. There was such a referendum on 5 May 1917 but it was lost by the government. In 1921, after

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29 *Taylor v Attorney-General* (1917) 23 CLR 457 at 470.

McCawley's case, the government swamped the Legislative Council by appointing additional members, who voted in favour of a Bill to abolish the Legislative Council.[30] In that way, Queensland became a unicameral Parliament.

One point of interest, for present purposes, is that at that stage no one seems to have thought that the assumption in section 15 of the *Australian Constitution* that there would be two Houses of State Parliaments, might restrict the ability of a State Parliament to abolish its Legislative Council (or, for that matter, its Legislative Assembly).

Perhaps two other contextual points should be made. One is that although each of the Australian colonies that became a state was erected with a bicameral Parliament, some of the Canadian Provinces as at federation had only one House,[31] so the concept of a representative democracy with one House of Parliament was not unknown. The other is that *Taylor's* case and *McCawley's* case were decided before the *Engineers'* case.

There were later cases about the extent of the powers of a State Parliament to legislate for or against the abolition of the Legislative Council. In particular, in 1931 in *Attorney-General (NSW) v Trethowan*,[32] there was successful challenge in the High Court to the validity of legislation to abolish the NSW Legislative Council that did not comply with section 7A of *Constitution Act 1902* (NSW) which set up a requirement for a referendum before the Legislative Council could be abolished.[33]

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30 *Constitution Act Amendment Bill 1921* (Qld).

31 For example, British Columbia.

32 (1931) 44 CLR 394.

33 In 1932, that case went to the Privy Council: (1932) 47 CLR 97.

Section 7A provided:

> (1) The Legislative Council shall not be abolished nor, subject to the provisions of sub-section six of this section, shall its constitution or powers be altered except in the manner provided in this section.
>
> (2) A Bill for any purpose within sub-section one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section.
>
> (3) On a day not sooner than two months after the passage of the Bill through both Houses of the Legislature the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly. Such day shall be appointed by the Legislature.
>
> (4) When the Bill is submitted to the electors the vote shall be taken in such manner as the Legislature prescribes.
>
> (5) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty's assent.
>
> (6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section …

As can be seen, the section provided that the NSW Legislative Council could not be abolished unless the Bill first passed through both Houses, and then was approved by a majority of votes at a referendum.

However, in 1960 there was a more interesting case, for present purposes, in *Clayton v Heffron*.[34] The main question in *Clayton* was whether section 5B of the *Constitution Act 1902* (NSW) was invalid. Section 5B was introduced to deal with the contingency that the NSW Legislative Council might refuse to pass a Bill under section 7A, and provided a mechanism to by-pass that House and go directly to referendum, like the earlier *Queensland Referendum Act*.

In effect, the High Court held that both sections 7A and 5B were 'manner and form' provisions that would have to be complied with under section 5 of the *Colonial Laws Validity Act 1865* (Imp) and therefore operated outside the ability of the Parliament of the State to amend the Constitution of NSW by an ordinary Act.

But of interest here is that the validity of both section 5B and section 7A, as a method to abolish the Legislative Council, was challenged based on the reference in section 15 of the *Australian Constitution* to the 'Houses of Parliament'. The plurality described this as a 'somewhat curious point'. Their Honours said:

> It is obvious that the provision [s 15] supposes that there will be two Houses of Parliament in every State: it is argued that it necessarily implies that there shall continue to be two Houses of Parliament accordingly. The contention means that the Federal Constitution deprives the State legislature of the power to abolish one House. This argument seems clearly enough to be ill founded. The supposition that there will be two Houses implied no intention legislatively to provide that the Constitutional power of the State to change to

[34] (1960) 105 CLR 214.

> a unicameral system, if the power existed, should cease. One can understand the section being relied upon as evidence that it was not supposed that the power to make the change existed. But that is all. Even that is not a very cogent argument.[35]

Summarising, I started with an argument, now accepted as good constitutional law, that the reference to the Supreme Court of any State in Chapter III of the *Australian Constitution* assumes and requires that there shall be a Supreme Court of the State, with the consequence that that the power of a State Parliament to legislate with respect to the Supreme Court is constrained, to the extent that the institutional integrity of the Court is not diminished. That principle crystallised in 2005 and 2010 from beginnings in earlier cases, particularly *Kable*.

Yet that point was not an argument that was raised at the time of the great debate about the extent of the State's power to amend its constitution to interfere with the constitution of the Supreme Court by appointing judges for a limited term, in *McCawley's* case.

On the other hand, there was an analogous argument that the references in section 15 of the *Australian Constitution* as to the Houses of Parliament of a State assumed the continued existence of those houses, with the consequence that the State's power to legislate to abolish one of the Houses of Parliament is constrained, so that the institutional integrity of the Parliament is not diminished.

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35 Ibid 249.

That point, too, was not an argument raised in the great debates in the cases between 1916 and 1931 about the power of a State Parliament to legislate to abolish its Legislative Council. But unlike legislation affecting the Supreme Court of any State, when that argument was raised about legislation affecting the Houses of Parliament of a State, it was summarily rejected.

Perhaps this particular arguable inconsistency never needs to be resolved. In a practical sense, the 'Houses of Parliament', plural, argument disappeared in 1977 with the amendment of section 15 of the *Australian Constitution*.

But is this the end of similar arguments? Up to this point there has not been a great deal of exploration of the limitation of the legislative powers of the State Parliaments created by making the constitutions of the States subject to the *Australian Constitution*, under section 106 of the latter.

The question that remains is where will *Kirk* take us from here, if anywhere at all? The suggestions I would offer up are as follows.

First, it must at least now be arguable that in the light of *Kirk* and *Forge*, *McCawley's* case was wrongly decided, to the extent that it suggests that the Parliament of a State may generally appoint judges of the Supreme Court for a term, such as seven years. This may matter. For example, if some new reforming government desired to appoint judges of a Supreme Court for a limited term and to require them to face re-election for extensions, as has happened in a number of states in the United States of America, I am encouraged to think that *Kirk* and *Forge* may trump *McCawley's* case.

Second, there may still be scope for an argument, in some other context, that the interrelationship of the polities of the States and the Commonwealth under section 106 of the *Australian Constitution* creates other restrictions on the State's powers to amend their constitutions, and that older cases that may have turned on the characterisation of State constitutions as uncontrolled constitutions of the colonies, may have to be reconsidered.

THE PROSPECTS OF AUSTRALIAN FEDERALISM

NICHOLAS ARONEY

The frontiers of Australian federalism are potentially as numerous as the many ways in which federalism infuses Australian law and politics. There are frontiers about how we understand the very foundations of the federation, about what makes the *Australian Constitution* legally binding, and about how it can be altered in the future. There are frontiers in the practical working of our bicameral system of parliamentary representation – especially the Senate – and ongoing questions about its reform. There are also frontiers in the use by the Commonwealth of its legislative, executive and financial powers – a longstanding issue that has seen the scope and volume of federal legislation and administration grow in virtually every decade since federation. And there are frontiers in the relations between the federal, state and territory governments – a murky landscape, in which not all that happens is open to public view or democratic accountability.

In each of these respects our federal system displays a kind of path dependency. By 'path dependency' I mean the phenomenon that the future decisions open to an individual, a group of people, an institution, or an entire society are often controlled by history – they are shaped and constrained (not inexorably, but effectively nonetheless) by patterns of behaviour and institutional decisions settled in the past.[1] These patterns of

[1] Paul Pierson, 'Path Dependence, Increasing Returns, and the Study of Politics' (2000) 94(2) *American Political Science Review* 251; Scott E Page, 'Path Dependence' (2006) 1 *Quarterly Journal of Political Science* 87.

behaviour and causal patterns have a tendency to lock-in particular institutional pathways that cannot easily be overcome.

Let me give some examples of path dependency in Australian federalism. I'll begin with processes of formal constitutional change.

I CONSTITUTIONAL CHANGE

The amendment clause in the *Constitution* (section 128) stipulates that it can only be amended pursuant to a law passed by the Parliament and approved by the people in a referendum at which a majority of Australian voters and a majority of voters in a majority of states approve of the change. This seems to be an even-handed process which is both democratic and federal in its underlying principles. However, in practice, it is a process that effectively limits formal constitutional change to proposals initiated or supported by the federal government. The States cannot initiate formal constitutional change, nor can the people.

It is true that amendment proposals have to be passed by the Parliament, and they can under section 128 be initiated by the Senate without the support of the House of Representatives.[2] However, no such proposal has ever been put to the people. When the Senate passed two bills to amend the *Constitution* in 1914, not only did the House of Representatives fail to pass the bills, but the Governor-General, acting on the advice of the federal government of the day, declined to submit the proposed amendment to the voters.[3]

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2 That is, pursuant to a deadlock-breaking procedure in s 128.

3 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 41–42.

In practice, proposals to amend the *Constitution* are inevitably initiatives of the federal government. This effective monopoly has meant that the preponderance of proposals that have gone to referendum have involved an increase in federal power in one way or another.[4] And this in turn has contributed to the unpopularity of such proposals. Lacking consensus support, the proposals have most often failed the first referendum hurdle – a majority of Australian voters – let alone the second hurdle of a majority of voters in a majority of states.

Even attempts to reform the amendment process itself in order to open it up to the initiative of the States have failed, precisely because the federal government has not been prepared to give up its monopoly. For example, the Constitutional Commission of 1988 recommended that half the States, representing a majority of Australia's population, be enabled to initiate a referendum.[5] But the Commonwealth chose not to implement the recommendation. Why, after all, would it see the need to give up its monopoly?

II FEDERAL LEGISLATION

A similar path dependency characterises the Commonwealth's exercise of its legislative powers and the High Court's approach to interpreting the constitutional division of power. The common law doctrine of precedent institutionalises a kind of path dependency: past cases constitute authoritative determinations which bind decisions in the future. Having adopted in the

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4 According to Williams and Hume, above n 3, 24 (out of 44) proposals would have increased the power of the Commonwealth. This is a conservative assessment.

5 Ibid 29.

Engineers' Case in 1920[6] an approach to the interpretation of the scope of Commonwealth legislative powers that does not concern itself with reserving any fixed set of powers to the States or with maintaining some kind of 'federal balance' between them,[7] the High Court has committed itself to interpreting each head of Commonwealth legislative power as widely as the words used can reasonably sustain.[8] All that the Court looks for in a federal law is a 'sufficient connection' to the subject matter of a head of power; it does not matter if the material substance of the law is concerned with some topic that lies outside the Commonwealth's stipulated powers.[9]

This method encourages Commonwealth lawmakers to press the frontiers of Commonwealth legislative power whenever it is politically expedient to do so. Take as an example the Rudd Government's *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ('*ACNC Act*').[10] This law introduced a Commonwealth-level regulatory framework for the not-for-profit sector, and established the Australian Charities and Not-for-profits Commission ('ACNC') as the new sector regulator. The ACNC is empowered under the Act to compel the

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

7 *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 73.

8 For more detail, see Nicholas Aroney, Peter Gerangelos, James Stellios and Sarah Murray, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 133-136, 179-181.

9 Ibid 136-143, 150-157.

10 For more detail, see Nicholas Aroney and Matthew Tumour, 'Charities Are the New Constitutional Law Frontier' (2017) 41(2) *Melbourne University Law Review* 446.

publication of information, to give directions to charities, and in some circumstances to remove and replace their leadership. In addition, the Regulations require registered charities to meet an array of 'governance standards',[11] several of which are vague and at times awkwardly expressed.

There is nothing in the *Constitution* to suggest that the regulation of not-for-profit entities such as charities was intended by the framers to fall within Commonwealth legislative power.[12] The closest provision is the corporations power, which extends to the regulation of 'trading corporations', 'financial corporations' and 'foreign corporations'.[13]

Conceived as 'types' or 'categories' of corporation, these invite comparison with other very different categories of corporations, such as those formed for 'municipal', 'religious' or 'charitable' purposes.[14] But that has not stopped the High Court, consistent with its received method of constitutional interpretation, from finding that the corporations power extends to the regulation of *any* corporation that engages in sufficiently significant 'trading activity', even if its main purposes and predominant activities are of a non-trading character – as is the case for most not-for-profit charities.[15] This approach has enabled the Commonwealth to use the *ACNC Act* to regulate charities that happen to be corporate in form and engage in

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11 *Australian Charities and Not-for-Profits Commission Regulation 2013* (Cth).

12 In fact, all the evidence suggests that the opposite was the case.

13 *Constitution*, s 5l (xx).

14 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 393-5 (Isaacs J).

15 *R v Judges of Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190.

sufficient trading activities. Indeed, in the *ACNC Act*, the Commonwealth has gone even further, regulating charities that are not organised as corporations by relying on a combination of several other heads of power, including the taxation, external affairs and broadcasting powers.

Let me focus on one aspect of the law to illustrate what I mean. Among other things, the *ACNC Act* establishes an electronic database of registered entities to be made available for public inspection on the internet. This register includes information about each charitable entity, such as its name, its Australian Business Number, its directors and trustees (as applicable), its financial reports and other statements containing information about the entity.[16] In the Revised Explanatory Memorandum that accompanied the Act, the Commonwealth argued that what it calls the federal 'communications' power supports the establishment of the database and the empowering of the ACNC to obtain the information and to undertake monitoring for the purpose of determining whether information provided by an entity is correct.[17]

Notably, the *Constitution* does not anywhere refer to a 'communications' power. What it does refer to is a power to legislate with respect to 'postal, telegraphic, telephonic, and other like services' (section 5l(v)). The High Court has held that these 'other like services' include radio and television broadcasting.[18] The Commonwealth also appears to have relied on this head of power to support regulation of aspects of the

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16 *ACNC Act*, s 40–5(4).

17 Revised Explanatory Memorandum [2.3]–[2.6].

18 This was itself a stretch. See *R v Brislan; Ex parte Williams* (1935) 54 CLR 262; *Jones v Commonwealth (No2)* (1965) 112 CLR 206.

internet.[19] The cases have held that the head of power enables the Commonwealth to control the provision of such services by establishing a broadcast licensing system which prescribes conditions for the holding of such licenses, which conditions can include controls on the content that is communicated using such services, provided there is a proportionate relationship between the purposes of the legislation that connect it to the head of power and the means adopted by the legislation to achieve those purposes.[20]

Such laws regulate the provision and use of broadcasting and telecommunication services. It is thus possible to characterise them as laws that regulate those particular types of technology considered as 'services' provided to the public. However, the relevant section of the *ACNC Act*,[21] interpreted in the context of the Act as a whole, is not a law that regulates the provision and use of such 'services'. Rather it prescribes that certain information is to be made available for public inspection, and it just happens to make use of the internet as an effective way in which the information can be disseminated. This use of the internet is the only connection between the law and the relevant head of federal legislative power.

It seems to me that there are real questions to be asked whether there is a sufficient connection between the law and the head of power in this instance.[22] And there is even less constitutional justification for the requirement in the Governance Standards established by the *ACNC Regulations*

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19 For example, see *Broadcasting Services Act 1992* (Cth), Schedule 5; *Interactive Gambling Act 2001* (Cth).

20 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

21 Section 40-5(4).

22 For more detail, see Aroney and Tumour, above n 10.

that compels charities to 'make information about [their] purposes available to the public, including members, donors, employees, volunteers and benefit recipients'.[23]

The *ACNC Act* is a recent example of the Commonwealth pressing its legislative powers to their extreme frontiers. But in the absence of a constitutional challenge to the legislation, it is only because there is currently a government-commissioned inquiry into the Act that some of these issues may possibly be addressed.

III INTERGOVERNMENTAL RELATIONS

Relations between the Commonwealth and the States display another kind of path dependency. The key to understanding this, I suggest, is to focus on the financial powers and capacities of the Commonwealth and the States.

At the time of federation, the major source of taxation revenue for governments was in the form of taxes on goods – in particular, customs duties imposed on the importation of goods. For various reasons associated with the establishment of free trade within Australia and the deferral of the question of free trade with other countries to political determination at a federal level, it was decided that the Commonwealth should have exclusive power to impose not only duties of customs, but also excise duties.[24] This meant that the States would lose a major source of their income, and so transitional provision was made for the temporary distribution of surplus Commonwealth

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23 *ACNC Regulation* reg 45–5(2)(b).

24 Cheryl Saunders, 'Fiscal Federalism-a General and Unholy Scramble' in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (Melbourne University Press, 1992) 101, 103-4.

revenue to the States (section 93) while a permanent provision of the *Constitution* (section 96) authorised the Commonwealth to make financial grants to the States on the terms and conditions that it thinks fit.[25] Alfred Deakin, one of the framers, saw the implication very early. He observed that it would be the 'power of the purse' that would ultimately establish the dominance of the Commonwealth over the States. He put it this way:

> As the power of the purse in Great Britain established by degrees the authority of the Commons, it will ultimately establish in Australia the authority of the Commonwealth. 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. Their need will be its opportunity. The less populous will first succumb; those smitten by drought or similar misfortune will follow; and finally even the greatest and most prosperous will, however reluctantly, be brought to heel. Our Constitution may remain unaltered, but a vital change will have taken place in the relations between the States and the Commonwealth. 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.[26]

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25 See also s 94 in relation to surplus distributions, entirely in the discretion of the Commonwealth.

26 Anonymous column written by Alfred Deakin in the *Morning Post* (London, 1902).

While Deakin did not foresee the rise of personal and corporate income tax as another key source of government revenue, his prediction has proven remarkably prescient. Without going into the detail, today it is the case that the States only raise about half of the money they spend for the provision of services (e.g. on health, education, transport, policing); the remainder comes to them in the form of Commonwealth grants, a further half of which are tied to conditions imposed by the Commonwealth.[27] This imbalance between the raising of revenue by the Commonwealth and the spending of the revenue by the States is called 'Vertical Fiscal Imbalance'. Moreover, the conditions imposed on many of the grants by the Commonwealth require the States to provide detailed reports which enable the Commonwealth to assess whether they have achieved certain benchmarks. This system of reporting and benchmarking is ostensibly agreed to between the Commonwealth and the states and is meant to improve the democratic accountability of governments to the people. But it seems to an outsider that in practice it is the Commonwealth that drives the process and holds the States to account.

These sorts of issues were frankly addressed in a series of Issues Papers prepared in association with former Prime Minister Tony Abbott's recent attempt to initiate a root and branch reform of the Australian federal system. With remarkable candour, *Issues Paper 1* observed that the financial relationship between the Commonwealth and the States had the effect of reducing State autonomy through the use of tied grants;

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27 *Reform of the Federation White Paper: A Federation for Our Future: Issues Paper 1* (Commonwealth of Australia, September 2014) 51-53 (Figures 68); *Reform of the Federation White Paper: Coag and Federal Financial Relations: Issues Paper 5* (Commonwealth of Australia, February 2015) 31 (Figure 3.4).

undermining State certainty over revenue allocations; reducing transparency and accountability to citizens; increased duplication and overlap; and weakened incentives for tax and microeconomic reform by the States.[28]

Issues Paper 5 observed that high Vertical Fiscal Imbalance between the Commonwealth and the States further encourages what it described as blame shifting, fiscal illusion and moral hazard.[29] Blame shifting occurs when each level of government denounces the other for inadequacies in service provision. The Commonwealth blames the States for incompetence and ineptitude. The States blame the Commonwealth for insufficient funding. Fiscal illusion arises when States engage in the over-provision of services without facing the political cost of raising additional revenue through taxes or borrowing. And a kind of moral hazard is evident when political pressure is placed on the Commonwealth to bail out a State that is facing fiscal problems, thereby rewarding fiscal irresponsibility.

The White Paper process initiated by the Abbott Government was merely the latest in a long line of attempts to reform the Australian federal system. Less than a decade earlier, the Rudd Government had initiated and secured a new Intergovernmental Agreement on Federal Financial Relations (2008) that was meant to end the 'blame game', improve the provision of government services and make governments more publicly accountable.

However, reviewing the situation just a few years later, the Abbott Government's *Issues Paper 1* observed that the principles of the Intergovernmental Agreement on Federal Financial Relations were 'not being honoured by either the

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28 *Issues Paper 1,* 32. See also *Issues Paper 5,* 32-34.

29 *Issues Paper 5,* 33.

Commonwealth or the States and Territories. Cooperative federalism was again shifting towards coercive federalism'.[30] The sorry process was described in this way:

> Using conditional grants under section 96 of the Constitution, the Commonwealth puts a sizeable and difficult-to-resist sum of money on the table as an inducement to States to shape their policies in ways that align with the Commonwealth's view of what the 'agreed' priorities should be in a particular area of activity. As States and Territories seek to secure [this] funding, they surrender a degree of autonomy to pursue their own preferences.[31]

Recognising the significant power disparities between the Commonwealth and the States, the Issues Papers flagged various ways in which the imbalances and dysfunctionalities could possibly be remedied. One of these involved deliberate reallocation of responsibilities between the Commonwealth and the States in a manner suitable to contemporary circumstances and expectations. However, the Issues Papers recognised the difficulties involved. They observed that:

> devolving responsibility to [a] lower level of government is not necessarily something that comes easily. In a situation where the Commonwealth is heavily involved in many areas of activity, and therefore is held politically accountable for outcomes and for the efficient expenditure of taxpayers' money, the temptation to trust less and control more can be very strong for ministers and public servants alike. [32]

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30 *Issues Paper 1,* 12.

31 *Issues Paper 1,* 19.

32 *Issues Paper 1,* 20.

Here the Issues Papers candidly acknowledged the path dependent situation in which the Australian federal system finds itself. But the problem was even more deeply rooted than this. For, without any sense of irony, the Issues Papers referred to these responsibilities as being 'devolved' to the 'lower' levels of government. This is not the language of federalism but of devolution. It is the language that one encounters in unitary states, like the United Kingdom, which have gone through the process of devolving formerly centralised powers on constitutionally 'lower' levels of government. But in an integrative federation such as Australia the responsibilities were originally those of the constituent states and it was the states that decided to transfer some of their powers to the federal government not vice versa. However, characterising the issue as a matter of devolution, the Issues Papers reflected and contributed to the very problem they were trying to solve! Despite all the good intentions, therefore, it came as no particular surprise that the Federal Government's noble attempt to reform the federal system ended in abysmal failure.

As I have tried to show in other work,[33] there are lessons to be learned from other federal countries, such as Germany, Austria and Switzerland, concerning the ways which federal systems can effectively be reformed. In the light of that overseas experience it seems to me that the path dependent problems Australia faces are related to two features of Australian politics.

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[33] For more detail, see Nicholas Aroney, 'Federalism and Subsidiarity: Principles and Processes in the Reform of the Australian Federation' (2016) 44(1) *Federal Law Review 1* and Nicholas Aroney, 'Reforming Australian Federalism: The White Paper Process in Comparative Perspective' in Mark Bruerton et al (eds), *A People's Federation* (Annandale, NSW: The Federation Press, 2017) 199.

The first of these is the cyclical nature of the Australian political system. As the instructive experience of Switzerland especially suggests, successfully reforming a federal system takes a long time to achieve. The reform process has to be sustained over the life of more than one electoral cycle. But the highly partisan nature of our politics means that reform efforts initiated by one government are not going to be promoted or maintained by their political opponents. If Australian federalism is to be reformed, some way of overcoming this problem will need to be found.

The second problem is the tendency of Australian politics to pragmatism. While the Issues Papers undertook a refreshingly candid assessment of the state of the federal system, and while they laid out a very laudable set of principles according to which the system should be reformed, there was also a characteristically Australian pragmatism on view. The Issues Papers very quickly moved from 'principle' to 'practice' in a manner that short-circuited any attempt to secure sufficient agreement on principles before moving to the practicalities of what reform would actually mean. But moving so quickly to the practicalities encourages the participants to revert to thinking about the issues in terms of their one-sided interests rather than the benefits to be secured through a reform of the system as a whole.

In these ways, the Abbott Government's White Paper process demonstrated, once again, the path dependent nature of Australian federalism. The ideals of the White Paper process were to increase democratic participation, but the 'governmentality' of Australian federalism ultimately prevailed: citizens were more often seen as 'clients' of government services than as 'participants' in their own self-government. The White Paper process was intended to set out a measured,

deliberative approach to reforming the system, but in the end, the process was not able to survive a change in political leadership within the same political party. When Prime Minister Malcolm Turnbull proposed that the federal government would reduce its income tax by an agreed percentage and allow state governments to levy an income tax equal to that amount, the States, especially the Labor States, declined the invitation.

Although the idea had been canvassed in the Discussion Papers, some, quite unfairly, denigrated it as a 'thought bubble'.[34] But even though the reactions to the Prime Minister's proposal were politically exaggerated, the whole affair illustrates the fundamental problem with executive-led reform efforts: they are too prone to politicisation.

IV CONCLUSIONS

The collapse of the White Paper process was, in the scheme of things, sadly predictable. This is because a kind of path dependency characterises Australian federalism.

As Jorg Broschek has observed of federal systems generally:

> Institutional legacies can profoundly shape the patterns of federal reforms. Path dependence situates reform proponents and opponents within an institutional environment that is rooted in earlier

[34] Australian Senate, Finance and Public Administration References Committee, *Outcomes of the 42nd meeting of the Council of Australian Governments held on 1 April 2016* (Canberra: Commonwealth of Australia, May 2016); Senator Penny Wong Twitter Account (26 April 2016).

> developments. Demands for change are filtered and translated into distinct reform patterns.[35]

This filtering and translating has meant that past attempts to the reform the Australian federal system have often ended up reinforcing the tendencies of the system in its characteristic centralism and governmentality.

Path dependency can have multiple causes. Institutional patterns can become entrenched because they are supported by an elite group of political actors whose interests they serve. However, they can also become entrenched because the very same patterns are believed to be morally just or legitimate, or because they are thought to play a necessary or unavoidable role within the political system as a whole.[36]

Unravelling the causes of Australia's path dependent federal system is therefore important, and care needs to be taken when trying to reform the system. For it can often be counter-productive to pursue changes directed to transforming a constitutional system into an ideal but ultimately impossible or highly improbable state of affairs, for a halfway house between present reality and the unattainable ideal may be worse than the status quo.[37]

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35 Jorg Broschek, 'Pathways of Federal Reform: Australia, Canada, Germany, and Switzerland' (2015) 45(1) *Publius: The Journal of Federalism* 51, 68.

36 James Mahoney, 'Path Dependence in Historical Sociology' (2000) 29(4) *Theory and Society* 507, 515-526.

37 Lawrence Solum, 'Constitutional Possibilities' (2008) 83(1) *Indiana Law Journal* 307, 327-8.

The experience of other federations suggests ways in which it may be possible to reboot the Australian system, but this would require a different attitude on the part of our governments, one which seeks to build long-term consensus instead of short-term partisan gain. For the moment, however, Australian federalism is trapped in a rut and there appears little that we in the present can do about it. At the least, it is important that we try to understand the path dependent patterns that have determined the development of our federal system. Without such an understanding our attempts to reform the system are unlikely to be successful and could easily prove to be counter-productive.

THE FREEDOM TO HOLD AND PROFESS A RELIGIOUS BELIEF

THE MOST REVEREND JULIAN PORTEOUS

The national debate around changing the definition of marriage saw the emergence of an ugly intolerance against anyone who expressed a position opposing change. Anyone who expressed a view defending the traditional definition of marriage was called a bigot, or hater.

The readiest example of this general trend was provided by the owner of a children's entertainment company in Canberra who fired one of her staff members for merely expressing her view opposing a change in the legal definition of marriage. The owner outlined her reasons for her actions on Facebook stating that: 'Today I fired a staff member who made it public knowledge that they feel "it's okay to vote No" … Advertising your desire to vote no for [same sex marriage] is, in my eyes, hate speech. Voting no is homophobic'.

She went even further to claim that anyone expressing opposition to the change in the legal definition was 'a risk to the wellbeing of the children we work with'.

In my opinion, those pushing radical social change are no longer willing to tolerate any view that would oppose their position. They want to silence all opposition by labelling such views as 'hateful'. We have reached a new low in public debate in Australia. With an increasing number of Australians no longer willing to engage in reasoned debate on social issues I have great fears for the future of our country.

What is even more worrying is that this campaign to demonise those opposing a radical new social agenda has had a silencing effect on those who would normally seek to defend a traditional position on social issues. They have become too fearful of being labelled a bigot or a hater and so, remain silent.

While anyone was attacked for opposing the change in the legal definition of marriage, for the most part it was those of Christian faith who received the most abuse as they were perhaps the most vocal in their opposition to the change. Increasingly it is only those of strong convictions, who are for the most part Christian, who dare to speak out in opposition.

Christianity has become the last great institution resisting this radical social agenda, and as a result is now under increasing attack. Attempts are being made to try to silence Christians in particular and modify the teachings of the Christian faith in order to realise the full implementation of their agenda.

We witnessed threats of violence against venues booked by groups wishing to present the view that marriage should remain in the law as being between a man and a woman. It was curious that those defending long-held societal views on marriage were denounced and any venue who allowed them to present their views was threatened.

The right in a democratic society for the free exchange of views on topics of vital importance to the future of the nation was being curtailed by groups of activists.

In my own case, I was accused under anti-discrimination legislation of causing ‘offence’ to those who were same-sex attracted. That I was presenting well known Catholic teaching on the nature of marriage to a Catholic cohort did not prevent the use of laws which sought to protect individuals from

discrimination. The material I distributed in fact acknowledged respect for those who experienced same-sex attraction.

My role as a bishop is to faithfully present Catholic teaching to members of the Church. In the case of a strong and at times quite emotive presentation of the alternative view, it was incumbent on me to explain not only what the Church teaches but why it holds the beliefs it has about sexuality and marriage.

However, there was a concerted effort to prevent genuine public debate on this important social issue.

While the case against me was eventually withdrawn it had a chilling effect on those seeking to express traditional social views, in particular those of faith in Tasmania. People were no longer sure that they could say what they believed, even in the most respectful of ways. The case was unresolved so people are not clear as to the reach of the legislation.

It became clear, as the debate about changing the definition of marriage went on, that those who held to the view that marriage was between a man and a woman no longer felt comfortable about expressing their views, even amongst family and friends.

It was pleasing to see the Turnbull Government recognise, in light of the marriage campaign, the need to review the protections of religious freedom through the Ruddock Enquiry. It is interesting to note that the Enquiry was flooded by submissions, mainly from individuals who were deeply concerned that their freedoms were in jeopardy. We await the outcome of this Enquiry.

What is the basis for the right of religious freedom? This raises a very important question about the sound basis for what we refer to as human rights.

While there continues to be disagreement over the worth of rights language and a recognition of problems created by a culture overly saturated by 'rights talk', the importance of the concept of human rights can be found in the principles they seek to advance. Specifically those basic goods required for the human person to flourish according to their nature such as life, liberty of speech, religion and association, food, water and shelter.

As the world recovered from the horror of the Second World War where there were many instances of the denial of what we now regard as basic human rights, leading world figures sought to craft a set of principles to defend the dignity of the human person. This effort resulted in the development of the Universal Declaration of Human Rights.

Article 18 of the Universal Declaration of Human Rights states:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The Universal Declaration of Human Rights is a milestone document in human history. It was drafted by representatives with different legal and cultural backgrounds from all regions of the world. It was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 and established a benchmark for authentic human society. Its thirty articles set out fundamental principles required for the respect and protection of human dignity.

An important contributor to the Declaration was the French philosopher Jacques Maritain. In his book, *Man and the State*,

Maritain makes the important point that the discussion of 'rights' only makes sense if there is a proper understanding of the nature of the human person and the purpose of human life, that is, a correct anthropology, one that contemplates what man is in his nature and what his destiny is.[1]

This does present a certain challenge for us today. Professor Mary Ann Glendon of the Harvard Law School has written that one of the greatest errors of modern culture, stemming from 18th-century Enlightenment philosophy, is its absolutising of 'rights'. She explains that rights can be viewed as an autonomous licensed form of freedom that rejects any form of responsibility or duty.[2]

Maritain believed that the philosophical anthropology which emerged since the time of the Enlightenment did not provide adequate foundations for the rights of the human person. He maintained that the Enlightenment 'led men to conceive of rights as divine in themselves, hence infinite, escaping every objective measure, denying every limitation imposed upon the claims of ego'.[3] The radical individualism that we experience today absolutises personal rights denying a sense of social responsibility.

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1 Jacques Maritain, *Man and the State* (University of Chicago Press, 1951) 96.

2 Mary Anne Glendon, *Right Talks: The Impoverishment of Political Discourse* (The Free Press, 1991).

3 Maritain, above n 1, 84.

Maritain recognised that a sound philosophy was needed which overcomes this tendency. The philosophical anthropology requires a recognition of the authentic ontological structure of human life. He explains that the human person is endowed with:

> intelligence and determines his own ends, it is up to him to put himself in tune with the ends necessarily demanded by his nature … this means that there is, by virtue of human nature, an order or a disposition which human reason can discover and according to which the human will must act in order to attune itself to the essential and necessary ends of the human being.[4]

We cannot ultimately have and defend universal standards of appropriate treatment of human beings, namely human rights, unless we recognise that there is an objective truth to human existence and way of knowing this truth. The existence of this objective order and the ability to know it is what the Catholic intellectual tradition refers to as the Natural Law. Specifically, Natural Law is the way that the human person can know the objective order of reality through the use of reason.

The acknowledgement of an objective truth about the human person is the necessary presupposition for the existence of natural moral obligations or rights.

The teaching of the Church on human rights, beginning with Pope Leo XIII at the turn of the last century, has been continuously expanded and developed by Popes over the past hundred years. One of the most important rights recognised by the Church in the important Vatican II document, *Dignitatis Humanae*, is the right to religious freedom.

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4 Ibid 86.

It is important to note that the Church does not understand these rights as absolute, as Enlightenment thinkers did. In speaking about the right to religious freedom it says that:

> its exercise is subject to certain regulatory norms. In the use of all freedoms the moral principle of personal and social responsibility is to be observed. In the exercise of their rights, individual men and social groups are bound by the moral law to have respect both for the rights of others and for their own duties toward others and for the common welfare of all. Men are to deal with their fellows in justice and civility.[5]

Ultimately, this right exists, because it is viewed as necessary for the flourishing of the human person, who has a particular objective nature, which can be known through the use of human reason.

Religious freedom is both a fundamental human right, but one that must exist in balance or harmony with other rights and important practical realities. It is not absolute. However, without an objective basis for this right, the ontological truth of human existence, there can be no fundamental guarantee of this freedom. The existence of such a right simply becomes one belief among many.

It is essential that the right to religious freedom be protected and guaranteed by all societies, constitutions, and religions because it is required for the human person to flourish and protect the essential dignity of the human person.

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5 *Dignitatis Humanae*, 7.

To reject religious freedom or to force another to believe something about the nature and purpose of human existence against his personal free choice is a grave violation of the person and their flourishing, not only does it harm the individual but also the common good of a society.

It is imperative that we work tirelessly for the defence of the right to religious freedom, and respect for religious beliefs. As indicated in the beginning of this talk, the Christian faith remains the last great obstacle to those seeking to achieve their radical social agenda. Powerful forces are working to silence the Christian voice.

If these forces were to succeed, at least in terms of removing legal protections for freedom of religion, this would be a tragedy not just for those who believe but would constitute a threat to the freedoms and way of life we have all come to enjoy.

Once the voice of truth has been silenced, anything becomes possible. Totalitarian movements know this. When they come to power they know the Christian faith poses the greatest threat to their rule, for it maintains that there is a truth beyond that of arbitrary human power, a truth that defends the dignity and freedom of the human person.

Christianity, despite how it is portrayed in the popular media, is the original and best defender of the dignity of the human person and their human freedom. Jesus Christ proclaimed the radical message, previously unheard in human history, that God so loved each and every human person that he sent his only Son into the world to die in order that each person might share in his Divine life. It has been the Christian teaching of the worth of the human person that has been at the basis of the western legal protections of the freedom of the human person.

Ultimately, the principles enshrined in the universal declaration of human rights can only be defended if we recognise that there is an objective truth about human nature. While one does not have to be a Christian to acknowledge this, the Christian faith remains the best defender of this reality.

THE MEDIA AND RELIGION IN AUSTRALIA

GERARD HENDERSON

First up, a word of appreciation – and a declaration.

As you know, the late Ray Evans was a founder of the Samuel Griffith Society. I first met Ray at Melbourne University half a century ago. He was in the process of completing an engineering degree and I was studying arts and law. Ray was in the anti-communist and social democratic Australian Labor Party Club – the rival Labor Club had its roots in the Communist Party. And I was in the anti-communist and social democratic Democratic Labor Party Club. Ray was a Christian who grew up in the Methodist tradition. I was a Christian who grew up in the Catholic tradition. We shared an opposition to what was then termed the pro-communist left and what today has morphed into the Green/Left. And we did not like sneering secularists, even though we did acknowledge the case for agnosticism.

Ray was a man with strong beliefs who was able to communicate across the hard sciences and the social sciences. He never committed to the mainstream two-party political system. However, he made a significant contribution to the Australian political debate by advocacy from the political edges – in such areas as industrial relations, the environment debate and law. Ray Evans did not really set up what were called 'political fronts' – because there was no political machine behind his creations. Rather, he achieved what he did primarily through individual advocacy in encouraging people to get on his make of what Paul Keating once called 'the cart'.

The young academic Dominic Kelly opposed most of Ray Evans' ideas. But he understood his important role in Australian society – especially with respect to the establishment of the HR Nicholls Society (which advocated industrial relations reform) and the Lavoisier Group (which opposed the environmental catastrophists in our midst). In an obituary published in Fairfax Media in June 2014, Dr Kelly wrote that Ray 'was a textbook example of what American political scientists refer to as a "movement conservative": working hard behind the scenes to change the direction of public debate'.

It's great to be on Ray's Samuel Griffith Society cart – for the first occasion – this afternoon. And now for the declaration. I always admired Ray's courage and tenacity in the advocacy of his many causes. We broadly agreed over decades – but not always. I note tomorrow that you have two constitutional monarchists – Australia's twenty-eighth prime minister Tony Abbott and Professor David Flint – speaking on the topic 'An Australian Republic?'. So I should state that I voted 'Yes' in the 1999 constitutional referendum – along with 45.1 per cent of Australians. Ray, as you would be aware, voted 'No'.

Having said this, I am not expecting that Australia will become a republic any time soon. Especially while the Australian Republic Movement is led by one of the most divisive media personalities in Australia – your man Peter FitzSimons. I cannot see Australia embracing the cause led by a wealthy, leftist, middle-aged Fairfax Media columnist and occasional Australia Broadcasting Corporation (ABC) presenter who wears a red rag on his head and who holds in contempt social and political conservatives – including those who are believers. Especially Christians and, most of all, Catholics.

Which provides a suitable place to discuss 'The Media and Religion in Australia' – by way of citing examples from the current debate.

On Sunday 17 November 2012, I appeared on the ABC *Insiders* program. Barrie Cassidy was in the presenter's chair and my fellow panellists were Lenore Taylor (now editor of *The Guardian Australia*) and David Marr (now also with *The Guardian Australia*). The decision to establish what became the Royal Commission Into Institutional Responses to Child Sexual Abuse had just been announced by Prime Minister Julia Gillard. When discussion turned to this topic, I made the following comment:

> I'm not against it [the Royal Commission]. But it's going to be hugely expensive. No one knows where it will start and when it will stop. And what I'm concerned about is that it's not a distraction. If you look at the reports in *The Australian* this year, and on *Lateline* this year on the ABC, sexual abuse of children is rife among Indigenous communities in the APY Lands in South Australia, in parts of the Northern Territory, in parts of Western Australia and Queensland. As we understand it, there's widespread evidence for that. No one is focusing particularly on that, probably because no one quite knows how to handle it – including State and Territory police. But it's going on now. It's rife. And it probably went on last night….

Both Lenore Taylor and David Marr insisted that the matter had been handled by the Howard government's intervention in the Northern Territory in 2007. But, as I pointed out, this only covered the Northern Territory – and not the six States or the Australian Capital Territory. I continued:

> I'm not against a Royal Commission and I can see why both Julia Gillard and Tony Abbott supported it and I don't criticise that decision. But – I'm not exactly sure what it's going to achieve to resolve current problems. Although I can see how it can achieve … the resolution of past problems.

It was at this stage that David Marr turned the discussion to inferences about 'what's happening in Roman Catholic presbyteries' this very day. In return, I criticised my fellow panellist for old fashioned anti-Catholic sectarianism – since, even six years ago, it was evident that child sexual abuse by Catholic priests and brothers was essentially an historical crime.

As we all know the Royal Commission, following a time extension, ran from January 2013 to December 2017. In her book *My Story*, Julia Gillard said that she spoke to Cardinal George Pell before announcing her intention to establish the Royal Commission since she did not want it 'to be seen to be a witch-hunt into one Church, but rather to have the breadth it truly needed'. It is a matter of record that the Royal Commission did come to be seen as unduly focused on the Catholic Church.

The historian and former Catholic priest Paul Collins is not a conservative Catholic in the tradition of Pope Benedict XVI or the Catholic Archbishop of Hobart, Julian Porteous. Writing in the *Pearls and Irritations* blog on 12 December 2017 – at the conclusion of the Royal Commission – Paul Collins made the following point:

> I don't think the [Royal] Commission was an unequivocal blessing. I still feel that the Commission focused unduly on Catholicism and that it can't be entirely absolved of unconscious elements of anti-Catholicism that has been the default position of

> Anglo-Australian culture since the 19th century. There was also a lack of well-informed Catholics on the staff to the extent that sometimes a kind of caricature Catholicism emerged….

Now move forward to Tuesday 3 July 2018 – following the conviction in the Newcastle Local Court of Archbishop Philip Wilson of Adelaide who was found guilty by Magistrate Robert Stone of covering up child sexual abuse in the Maitland-Newcastle diocese in 1976, when he was a junior priest aged around 25. Due to the vagaries of section 316 of the *Crimes Act 1900* (NSW), the Archbishop's conviction turned on the failure to have a reasonable excuse for not reporting the matter to the NSW Police during the period April 2004 to January 2006. He is appealing the decision.

On the ABC's *The Drum* that evening, discussion turned to the Wilson case. Presenter Julia Baird noted towards the end of the discussion that 'there seems to be a consensus on the panel here'. There sure was as – variously – Dee Madigan, Karen Middleton, Megan Motto and Stephen O'Doherty piled into the Catholic Church in general and Archbishop Wilson in particular. No one saw fit to mention that, when he was Bishop of Wollongong and later Archbishop of Adelaide, Philip Wilson was a leader in the Catholic Church in facing up to clerical child sexual abuse.

And not one person on *The Drum* advised viewers that they had not read the decision, which has still not been released (even with redactions) and may never be released. This has led to a situation whereby what has been hailed as a decision of international significance is not readily available to be read in Australia or overseas. Fr Frank Brennan has written to the NSW Attorney-General seeking the immediate release of Magistrate

Stone's decision with redactions. Fr Brennan's letter was published in my *Media Watch Dog* blog on 3 August 2018.

Fairfax Media's Joanne McCarthy (who was present in Newcastle Local Court for the decision) also appeared on *The Drum* that night. As a reporter for the *Newcastle Herald*, she has been acknowledged – by Julia Gillard and others – as playing a central role in the establishment of the Royal Commission. Indeed, Ms McCarthy was personally thanked by Justice Peter McClellan when the Royal Commission held its final hearing in Newcastle. The occasion was photographed by Fairfax Media.

In her comment on *The Drum*, Ms McCarthy accused the Catholic Church of 'not responding to the Royal Commission' – this was an obvious reference to its findings with respect to the sacrament of confession. But she also made it clear that discussion on child sexual abuse should not focus on Philip Wilson and added:

> Well, I would hope that it [the Wilson conviction] sends a message to people on child sexual abuse in general – not just within institutions. And I have written this, after this decision today. We know that the majority of child sexual abuse occurs within families … And I think what this decision says is that if we are aware of child sexual abuse allegations in families in context today – and it's a ghastly thing to have to say, but there are children being sexually abused today – that if we are aware of allegations, if we are aware of concerns that we can't just look away….

In the close to six years since the Royal Commission commenced, media focus – particularly on the ABC and in Fairfax Media, *The Guardian Australia*, *The Saturday Paper*, Channel 10's *The Project*, Sky News' *Paul Murray Live*, *The*

New Daily and the *Crikey* newsletter – has focused on the Catholic Church and, to a lesser extent, the Anglican Church.

The Royal Commission's coverage of the Catholic Church was so substantial that it is not surprising that some Australians thought that it was an inquiry into the Catholic Church and the Catholic Church alone. Indeed Fairfax Media's Peter FitzSimons said as much when he wrote in the *Sun Herald* on 2 July 2017 that the Royal Commission was set up to inquire into child sexual abuse (it wasn't) and that it's achievement was to turn 'a much-needed spotlight into the horrors of rampant sexual abuse by the Catholic clergy over the decades'. FitzSimons implied that only Catholic clergy commit the crime of child sexual abuse.

This confusion was facilitated by the Royal Commission, particularly by the hostility exhibited at times to the Catholic Church and its members by Royal Commission chair Justice Peter McClellan and Senior Counsel Assisting the Roral Commission, Gail Furness, SC. This has continued beyond the life of the Royal Commission itself.

Robert Fitzgerald, formerly a member of the Royal Commission who has returned to the Productivity Commission, received front page lead story coverage in *The Sunday Age* on 11 March 2018 following his address, some weeks earlier, to the Catholic Social Services Victoria conference in Melbourne. Mr Fitzgerald used the occasion to suggest that the Catholic Church was the predominantly guilty party with respect to institutional child sexual abuse in Australia.

The *Sunday Age* highlighted Robert Fitzgerald's comment that 'nearly 62 per cent of all people who notified the Royal Commission of abuse in a religious setting were abused in a Catholic institution'. Now this is a truly shocking figure – if it is meaningful. But the claim only has meaning if it is comparable with non-Catholic institutions – whether of a religious, secular or government kind.

In the twentieth century, Catholics were about 25 per cent of the Australian population. However, since the Catholic Church ran its own systemic education system, Catholics would have accounted for around 80 per cent of children educated in a religious setting in Australia. Also, the Catholic Church operated a much higher percentage of orphanages and hospitals than like institutions that operated in a religious setting.

In response to my enquiry, Mr Fitzgerald acknowledged that 'regrettably there are no historical prevalence studies in Australia' in this area but added that the Royal Commission recommended that such research 'be undertaken in the future'. In other words, the 62 per cent figure is not meaningful, despite the *Sunday Age* beat-up.

The Royal Commission had a budget of about $350 million along with hundreds of staff. Yet, in spite of the fact that it devoted significantly more time to the Catholic Church than any other institution – religious, secular or government – it did not drill down into the statistics in its possession to analyse what they meant. Rather, it recommended that some other body should do this research sometime in the future.

Fr Frank Brennan – who is also not a Catholic in the Benedict XVI or Archbishop Porteous tradition and who voted 'Yes' in the same sex marriage postal survey – has written that the Royal Commission did not discover 'how much more likely

was it in the past that a child would be abused in a Catholic institution than in a non-Catholic institution'. He added that it 'would have been helpful to have the answers to these questions, but we don't'.

No – we don't. However, what evidence we have suggests that, in the period 1950 to 2010 covered by the Royal Commission, a child in a Catholic religious institution was probably safer than a child in a non-Catholic religious institution. It is not clear if the same can be said with respect to a child in a secular or government institution when assessed on a per-capita basis. But this could be the case. No one would get to know this from following the media's coverage of the Royal Commission.

Needless to say, the ABC misunderstood Mr Fitzgerald's speech and misinterpreted the Royal Commission's findings. For example, on 31 May 2018, *AM* presenter Sabra Lane declared that 'more than 60 per cent of sex abuse survivors who gave evidence to the Royal Commission reported the abuse happened in Catholic run institutions'. This statement is totally false. But, the ABC did not immediately correct Ms Lane's comment – despite the matter having been brought to its attention and despite having previously corrected a similar error made by Patricia Karvelas (*RN Drive*), Hamish Macdonald (*RN Breakfast*) and some others. Yet *AM* is perhaps the ABC's leading news and current affairs program. Even today Ms Lane's error has not been acknowledged on the program notes which accompany the online recording of the program which aired on 31 May 2018.

The ABC's focus on historic child sexual abuse in the Catholic Church stands in contrast to its failure to cover the public broadcaster's own history in this area. The ABC has not reported the fact that former ABC TV producer Jon Stephens

pleaded guilty in 2017 for sexually assaulting a 12-year-old boy while on official ABC duties in 1981 – except for a fleeting reference in one midday news bulletin to the fact that Stephens' minimum prison term was reduced on appeal due to his ill-health. Fairfax Media has ignored the story completely.

The ABC has also not covered the fact that in 1975 – just six years before Stephens' offending – the (then) ABC Radio program *Lateline* invited three pederasts into its Sydney studio to take part in a program called *Pederasty*.

The ABC did not report this matter to the NSW Police – then or since. Nor has it adopted a duty of care to the victims of pederasty who were involved in the program despite the fact that, if alive, they would be about the same age of some of the men who gave evidence to the Royal Commission. The most substantial coverage of the *Pederasty* program can be found in contemporary issues of the *Sydney Morning Herald* and its sister publication the *National Times* as well as in K S Inglis' 1983 book *This is the ABC*.

The 1975 *Pederasty* program was defended by (then) ABC chairman Richard Downing in a letter published in the *Sydney Morning Herald* on 19 July 1975. On the same day, the *Sydney Morning Herald* reported Professor Downing as saying that 'in general, men will sleep with young boys' – the implication being that the community in general should accept this fact of life. Richard Downing was 59 years of age in July 1975 and one of the most influential Australians. Philip Wilson was a 24 year old junior priest in the Hunter Valley.

In recent times, both former ABC chairman James Spigelman and his successor Justin Milne have advised me that the current ABC does not accept any responsibility for what the ABC did – or what Professor Downing said on behalf of the

ABC – in 1975. ABC journalists would not accept such a cop-out from an Anglican or Catholic bishop with respect to the statements made by a predecessor 40 years ago. James Spigelman is also a former Chief Justice of NSW.

Richard Neville had been employed by the ABC to present *Lateline* – including the *Pederasty* program – despite the fact that he was a self-confessed paedophile. In his 1970 book *Play Power*, Neville boasted of having had sex with a 14-year-old school girl in London. This book sold well in Australia in the early 1970s and Neville's child abuse was discussed in the public debate at the time.

When Richard Neville died in 2016, the ABC did not report his past child sex abuse. Nor did Fairfax Media. The ABC has also turned a blind eye to the revelations of Rozanna and Kate Lilley – the daughters of left-wing writers Dorothy Hewett and Merv Lilley – that their mother encouraged them to have under-age sex with writer Bob Ellis and artist Martin Sharp and others, all of whom were at least twice the age of their school girl victims. This was covered by some low profile ABC programs but avoided on such outlets as *AM, PM,* RN *Breakfast*, ABC *News Breakfast*, *7.30, Late Night Live* and so on – all of which have given much attention to the historic crimes of Catholic and Anglican clerics in this area.

Interviewed by Helen Trinca for *The Weekend Australian* on 16 June 2018, Richard Walsh spoke about Neville and Sharp, both of whom he associated with in the 1970s and after. Walsh said that interest in young girls was not 'part of Neville's make up at all', but added that Neville did not 'ask to see anyone's birth certificate'. Walsh added that while he and his colleagues were aware of Sharp's 'taste' in young females, they 'didn't think it through hard enough to wonder if any of these people were underage'.

Rozanna Lilley told her story to the Royal Commission in a private hearing. In its wisdom, the Royal Commission decided not to conduct public hearings into institutional responses by the Australian media to child sexual abuse. This despite the fact that there have been at least two convictions for historic child sexual abuse in Australia involving the media and despite the scandal of BBC star Jimmy Savile's offending in Britain and its cover up by his employer.

As Professor Greg Craven wrote in *The Weekend Australian* on 19 August 2017, a problem with the Royal Commission's focus on the Catholic Church was that it 'all but crowded out the scrutiny of other institutions with predictable results'. He continued: 'The rule is that if an inquiry gives the impression it is about one subject, the public will take it at its word.' If Peter FitzSimons was confused about this point, it is likely that many others would have come to the same conclusion.

The Royal Commission held its final sitting on 14 December 2017 before presenting its report to the Governor-General. Since then, the media's focus has been on two issues.

Firstly, the Royal Commission's recommendations that a redress for victims of child abuse in institutions be established. What most media commentators overlooked was that the Catholic Church set up its own redress scheme two decades previously – with the establishment of the Melbourne Response by the (then) Archbishop of Melbourne George Pell in 1996 and the creation of the Towards Healing process for the other archdioceses and all the dioceses of Australia the following year. In any event, the Catholic Church was one of the first institutions to say that it would take part in the national redress scheme – which is the creation of the Commonwealth, State and Territory governments and commenced operations on 1 July 2018.

And, secondly, confession. In particular, the Catholic Church's teaching on the seal of confession – which entails that a Catholic priest who forgives a sin in the confessional cannot divulge what he heard in confession to anyone, in church or state, irrespective of the nature of the sin. Confession is also a rite in some Anglican communions and some Lutheran churches.

That part of the Royal Commission's *Criminal Justice Report* which dealt with what it termed 'religious confession' was leaked to the ABC and Fairfax Media on the day before its release. It recommended the extinction of the seal of confession. A similar recommendation is contained in the Royal Commission's final report.

For over a year, the ABC has focused on this issue – as if it was the Royal Commission's most important recommendation. There have been discussions on *Insiders* (featuring David Marr) and *The Drum* and *News Breakfast* and *RN Breakfast* and *AM* and *PM* and the *7.30* and more besides. The issue found its way into ABC comedy programs including *The Weekly with Charlie Pickering* and *Shaun Micallef's Mad as Hell* (on two occasions) and *Tonightly with Tom Ballard* and more besides.

Some of the coverage, while not comical, was farcical. On *The Drum* (12 June 2018) panellist Barbara Heinback was not challenged by presenter Ellen Fanning when she said that 'some time ago' she had read that several priests had committed suicide because they could not live with the fact that they had heard the confession of a paedophile but had not been allowed to share the information with their superiors or police. Ms Heinback has not been able to say when or where she came across this (alleged) study or where the (alleged) instances took place. It seems that Barbara Heinback has a clear recollection of an event which never happened.

On 20 June 2018, the host of *The Weekly with Charlie Pickering* did a two minute rant criticising a statement by the Acting Archbishop of Adelaide Greg O'Kelly, SJ. In what is supposed to be a comedy program, Pickering alleged that the Catholic Church had used the 'sacred seal' of confession 'to protect sexual child abusers'.

The only evidence offered by Pickering was the claim that 'Rockhampton priest Father Michael McArdle confessed 1500 times to molesting children to 30 different priests over a 25-year period'. That is, once a week for a quarter of a century. According to Pickering, McArdle's penance was 'to go home and pray'. So Picking is asking us to believe that 30 different priests over a 30 year period gave McArdle exactly the same penance for his sins. A remarkable co-incidence, to be sure.

Viewers of *The Weekly with Charlie Pickering* were not told that the sole evidence for this claim was an affidavit filed by McArdle himself when attempting to have his sentence reduced. McArdle did not name the names of any of his alleged confessors. Nor did Pickering state that the Royal Commission did not bother to examine McArdle's self-serving claim. Yet the presenter of *The Weekly with Charlie Pickering* was happy to accept, without question, the word of a self-confessed paedophile who wanted to share blame with others for his crimes. Likewise freelance journalist Lucie Morris-Marr in an article in *The New Daily* on 14 June 2018 – which, no doubt, was the source for the Pickering rant.

I note that, on Monday 30 July, 2018, Fairfax Media's Peter FitzSimons agreed with a tweet by Greens Senator Sarah Hanson-Young that the Catholic Church is 'hiding behind the confessional' to avoid 'proper care for children'.

On *The Project* on 11 July 2018, Lisa Wilkinson, in a discussion on confession, also declared that intervention by the Commonwealth and State governments to end the seal of confession was 'a matter of urgency' in order to stop altar boys being 'prey for priests'. She provided no evidence that such crimes are currently occurring and require urgent attention.

The media's focus on confession in the discussion on child sexual assault is misplaced. And now for some facts:

- Very few Catholics in Western societies go to confession these days.
- There is no evidence that a paedophile cleric or layman has confessed child sexual abuse to a priest in confession. Gerald Ridsdale, one of Australia's most notorious paedophiles, told the Royal Commission that – when he was a priest – he never went to confession.
- Interviewed on *The Drum* on 13 June 2018, Professor Carolyn Quadrio, a psychiatrist who works in the field of preventing child sexual abuse, commented: 'Clinically I must say that I've got the same experience as Father Frank Brennan … from the point of view of a psychiatrist, I think that people don't generally go and tell the priest that they're doing it'.
- Moreover, as Christopher Prowse, the Catholic Archbishop of Canberra Goulburn, has commented: 'What sexual abuser would confess to a priest if they thought they would be reported?'.
- Senior Counsel-Assisting Gail Ferguson, SC submitted to the Royal Commission that the vast majority of claims alleging sexual abuse within Catholic institutions started in the period 1950 to 1989 inclusive

> and that 'the largest proportion of first alleged instances of child sexual abuse, 29 per cent, occurred in the 70s'.

In other words, the shocking crimes of paedophilia which occurred in the Catholic Church primarily took place between three and five decades ago. There has been scant such criminal activity within the Catholic Church in Australia in the last quarter of a century. Any government attempt to demolish the seal of confession will have no impact on child sexual abuse.

The media's focus on the Catholic and Anglican churches, when covering child sexual abuse, tell us much more about contemporary journalists.

There is an over-representation of sneering secularists and bitter apostates in the Australian media – especially within the ABC and Fairfax Media and like-minded organisations. Some are born-again atheists (like Peter FitzSimons). Some are disillusioned Catholics (like one-time ABC journalist Stephen Crittenden who was a senior manager on the Royal Commission staff). And some are disillusioned Anglicans (like David Marr).

In Western societies, there is increasing opposition to what were once mainstream Christian views on such issues as abortion, euthanasia and same-sex marriage along with contempt for believers who maintain that God is not dead and there is life after death. Such views are not so prevalent in the suburbs or in regional and rural areas. But they are prevalent among the tertiary educated in the inner-cities who work in professional employment, including journalism. The sneering secularists prevail in what I like to term 'Sandalista Land'.

The scandal of child sexual abuse within Christian organisations – among other organisations – has provided a one-off opportunity for sections of the media to express their dislike, or even hatred for, Christianity. That's why the likes of David

Marr and Peter FitzSimons focus so much on the Catholic Church's historical crimes while failing to dwell on contemporary child sexual abuse occurring within families, including Indigenous groups.

The instance of child sexual abuse in Indigenous communities has been well covered by the likes of *The Australian*, the *NT News* and Darwin based Sky News reporters. But it receives little attention on the ABC, Fairfax Media, *The Guardian Australia* or *The Saturday Paper*.

The point about the alienated intelligentsia is that they detest their own culture and heritage. That's why the sneering secularists – who have joined the pile-on with respect to Christian believers – all but ignore Muslim, Hindu, Sikh or Buddhist believers.

As the oldest and largest Christian institution, the Catholic Church is the prime target for this hate and derision. But Christianity is the wider target as the recent bitter attacks on the likes of Margaret Court and Israel Folau demonstrate, even to the extent of attempts by secularists to prevent the expression of some Christian beliefs and curtail some Christian practices.

Sure, the media in the West is not a bloc. It's just that, right now, there are many more sneering secularists in the media than ever before. Their numbers may increase or decrease. The only way for those who advocate freedom of religion in democratic societies is to fight back by the force of argument based on facts.

The Royal Commission sat for the last occasion on 14 December 2017. In his final address, Justice McClellan said that 'the failure to protect children has not been limited to institutions providing services to children'. He pointed out that instrumentalities of the state had also failed children including the police and the criminal justice system.

Justice McClellan also commented that child sexual abuse in institutions continues today. Towards the end of his address, the chair of the Royal Commission had this to say:

> The Royal Commission has been concerned with the sexual abuse of children within institutions. It is important to remember that, notwithstanding the problems we have identified, the number of children who are sexually abused in familial or other circumstances far exceeds those who are abused in institutions.

This was the point I made on *Insiders* almost six years ago which so upset my fellow panellist David Marr whose focus that morning was on alleged practices in contemporary 'Roman Catholic presbyteries'.

As one who grew up in Australia in the 1950s when anti-Catholic sectarianism was still a fact of life, I note that the sectarian hostility that was once reserved for Catholics now applies to all Christians who believe in traditional Christian teachings. It is rampant not only on social media but also within sections of the traditional media.

I am grateful to the Samuel Griffith Society for providing this opportunity today for me to state a case on an issue which affects Australian society now and beyond.

THE MURPHY PAPERS: REFLECTIONS ON THE MURPHY TRIALS

NICHOLAS COWDERY, AO, QC

It is a pleasure to have been asked to address this conference on this topic. At the Society's 2015 conference I spoke about the Magna Carta, at the time enjoying its 800th anniversary (well, on some constructions it was). This time I am delivering what I earnestly hope will be a swan song on the Murphy saga – a piece of history that has been raked over yet again just recently as the 'Murphy papers' were released. I thought I had done my dash with this case when the ABC's *Four Corners* did a program on it earlier this year, but then along came this invitation. From my study of the Magna Carta and of the Murphy trials one message comes through very strongly to me – it is that try as we might to achieve it, the law will never be able to take full account of human nature. We are essentially wayward animals.

While still junior counsel, in 1985 I was briefed by Ian Temby QC, then Commonwealth Director of Public Prosecutions (DPP), to appear as junior counsel to the Honourable Ian Callinan AC QC in the prosecution of the Honourable Lionel Murphy, a Justice of the High Court.

This case was a significant matter that went for some time, had a variety of manifestations and encompassed a multitude of interests and conflicts. Our briefing was, for the time, a rare pairing of Queensland and NSW counsel – the 'dingo fence' for lawyers was still in place at the Tweed in those days.

At the time of his retirement from the High Court, Ian described the case as 'agonising' – for himself, the court and Murphy – 'It was a very unhappy time for everybody' he said, and so it was. Little could we know when we accepted the briefs just how agonising it was to become, so it was important to have a leader of the calibre of Callinan to guide the case to its conclusion.

When the case ended, Ian commented that someone should write a book about it. I agreed. I expected that Ian would do it, but he went off into novels and plays and High Court judgments instead. But a book has been written by Stephen Walmsley, a Judge of the District Court of NSW: *The Trials of Justice Murphy*, LexisNexis Butterworths (2017).

In her foreword to that book, Justice Virginia Bell, AC refers to 'these sensational events', a prosecution that 'occasioned deep divisions within the legal community'. She said that 'everything about this saga was extraordinary'. She described it as 'perhaps the most tumultuous period in the administration of justice in New South Wales'. That is a big claim. So let's explore it.

I IAN DAVID FRANCIS CALLINAN

First, a few words about Ian Callinan. At the beginning of 1985, I knew no more about Ian than that he was President of the Queensland Bar Association. I had been in junior practice at the Bar in Sydney for ten years after some years in practice in Papua New Guinea as a public defender. I had been briefed by Temby in the associated case of the late Judge John Foord before Christmas 1984 (led by Andrew Kirkham QC of the Victorian Bar, later its Chairman) and was briefed in the Murphy matter in January 1985. The allegation against Judge Foord was that he

had sought to pressure Judge Flannery in the Ryan case (which I shall describe in a moment).

For the Murphy brief the Commonwealth DPP needed leading counsel for probably the most challenging prosecution that he would mount. He obviously knew a great deal more about Ian than I did – he clearly knew of his long and broad experience at the Bar, of his depth of legal knowledge, of his qualities of leadership and inspiration, of his professional fearlessness, of his keen appreciation for the application of principle in all circumstances and of his unfailing, old fashioned, Queensland style courtesy at all times and in all conditions. I was yet to learn of all that.

The late Sir Alec Guinness used to say that he knew when he had the character of a role that he was to play properly interpreted when he had the walk right. Barristers – even those who are recreational playwrights – don't need to think about that, but Ian's walk betrays his character – and I am speaking of him at 30 years ago. For a large man it is a deceptively hesitant, almost delicate step. But it puts the whole into a rolling motion, building a momentum that has an inexorability about it. The irresistible force rolls aside or over most objects, even if they were thought to be immovable or insurmountable. And the disarming feature is that Ian's relentlessness is accompanied by the most polite, genteel words, tones, expressions and solicitude, without noise or fuss and even at times with an air of distraction or apology. He seems to use strong words almost regretfully, as if acknowledging their force but wanting to hold that back in his mouth. It is exceedingly rare to hear him swear. And he remembers. One can only sympathise with the batsmen he confronted in his cricketing days.

Ian brings that rolling approach to conversation and negotiation in court to examination and cross-examination and to addresses. It is an approach that was translated to the bench with a leavening of humour, scepticism, concern and above all independence of mind.

II LIONEL KEITH MURPHY

Lionel Murphy had been admitted to the Bar in New South Wales in 1947. He rapidly grew his practice and took silk in 1958. In 1961 he was elected to the Federal Parliament, taking his seat in the Senate in 1962. Late in 1972 he was appointed Attorney-General and Minister for Customs. On 10 February 1975 he was appointed a Justice of the High Court of Australia.

III PRELIMINARY EVENTS

A *Charges and Allegations*

Following hearings by a Senate Select Committee – on *Allegations Concerning a Judge* in September and October 1984 and its report on 31 October 1984 – on 14 December 1984 Lionel Keith Murphy was charged with two charges under section 43 of the *Crimes Act 1914* (Cth). As later amended at the committal proceedings, the charges were:

1. That between the 1st day of December, 1981 and about the 29th day of January, 1982 at Sydney in the State of New South Wales and elsewhere Lionel Keith Murphy whilst a Justice of the High Court of Australia did attempt to pervert the course of justice in relation to the judicial power of the Commonwealth in that he did attempt to influence Clarence Raymond Briese, Chairman of the

Bench of Stipendiary Magistrates of the State of New South Wales to cause Kevin Jones, a Stipendiary Magistrate of the said State to act otherwise than in accordance with his duty in respect of the hearing of committal proceedings against one Morgan John Ryan on charges of forgery and conspiracy under section 67(b) and section 86(1)(d) respectively of the *Crimes Act 1914* then being heard by the said Kevin Jones; and

2. That between the 1st day of July, 1983 and the 9th day of July, 1983 at Sydney in the State of New South Wales and elsewhere Lionel Keith Murphy whilst a Justice of the High Court of Australia did attempt to pervert the course of justice in relation to the judicial power of the Commonwealth in that he did attempt to cause Paul Francis Flannery, a Judge of the District Court of the State of New South Wales, to act otherwise than in accordance with his duty with respect to the trial of the count of conspiracy under section 86(1)(d) of the *Crimes Act 1914* against one Morgan John Ryan which commenced before his Honour and a jury on 11th July, 1983.

Shortly put, Morgan Ryan, a Sydney solicitor, had been charged with the indictable offences of forgery and conspiracy to commit a Commonwealth offence in relation to immigration matters. He was a friend of Murphy, having first met him in about 1950. It was alleged that Murphy, in speaking about the Ryan case to NSW Chief Magistrate Clarence Briese at a dinner party at Briese's house and later, had attempted to have some influence brought to bear upon the committing Magistrate, Kevin Jones, in Ryan's favour. It was alleged that in a later telephone call to Briese, Murphy had uttered the now famous words: 'And now, what about my little mate?'.

Later, after Ryan had been committed for trial on the conspiracy charge alone, it was alleged that Murphy, at a dinner party at his home, had sought to bring similar influence directly to bear upon District Court Judge Paul Flannery QC who was listed to hear the Ryan trial which eventually commenced on 11 July 1983.

Ryan was in fact convicted on 2 August 1983 and sentenced on 5 August 1983 to a bond for five years and fined $400. (As it happened, the Court of Criminal Appeal later overturned the conviction on the ground that Flannery DCJ had admitted inadmissible evidence.) There was no evidence that Ryan had sought Murphy's help in his case (perhaps unsurprisingly).

B *The Age Tapes*

On 21 February 1984 Temby was appointed a Special Prosecutor to institute proceedings (if appropriate) in relation to any Commonwealth offences arising out of '*The Age* tapes' – transcripts and summaries (apparently) of recordings of intercepted telephone conversations published by *The Age* newspaper in Melbourne (and elsewhere) and provided to the Commonwealth Attorney-General by representatives of *The Age* on 1 and 2 February 1984. No actual tape recordings are known to exist, Temby reported on 20 July 1984. Justice Donald Stewart (as Royal Commissioner) then inquired into *The Age* tapes (in which I had a role as junior counsel assisting) and he reported secretly in December 1984. His public report was issued on 30 April 1986 (well after the Murphy trials).

It was suggested that Murphy had been recorded in this material in 1979 and 1980 and that one person with whom he had spoken was Ryan.

The Senate Select Committee on the Conduct of a Judge had been established on 28 March 1984 and was superseded by the Senate Select Committee on Allegations Concerning a Judge which carried on its proceedings from 6 September 1984. Murphy declined to give evidence before the Committee.

Murphy stood aside on leave from the High Court from 31 October 1984, the date the Committee presented its report. The majority (Senators Tate, Haines and Lewis) made adverse findings against Murphy. The minority (Senator Bolkus) was scathing of Briese's evidence. Judge Foord was charged on 3 December 1984 and Justice Murphy on 14 December 1984.

C *The Committal Proceedings*

Much preparatory work was done for the committal hearing (as might be imagined). Conferences were held in Sydney and Brisbane involving Callinan, myself, members of our instructing team and investigators and witnesses. In an early advice, emphasis was placed (unsurprisingly) on obtaining evidence of the nature of the association between Murphy and Ryan. *The Age* tapes became and remained a matter of interest.

The charges were listed for committal hearing before the Local Court at Sydney on 4 March 1985. There was a bit of early jostling with dates when Ian Barker, QC, then heading the Murphy team instructed by Sir Clarrie Harders, Graham Kelly and Peter Perry, became ill and an adjournment was requested. Callinan was briefed to prosecute the trial of Brian Maher in Brisbane from 18 March. The Murphy matter was listed for mention on 27 February. A further complicating factor was that, as noted above, I was also briefed as junior counsel in the proceedings against Judge Foord and that had already been listed

for committal hearing from 10 April 1985. In the result, the Murphy committal was set for 25 March 1985.

Magistrate Arthur Riedel presided in a courtroom in the refurbished Mark Foys department store in Sydney, the Downing Centre. Murphy was represented by Alec Shand, QC and Linton Morris, QC. The witnesses called by the prosecution were Australian Federal Police's Chief Inspector David Lewington, Morgan Ryan, Justice James McClelland, Graeme Henson (Clerk of the Local Court, later Chief Magistrate of NSW and a District Court Judge), Clarence Briese, Brian Roach, Chief Judge James Staunton of the District Court, Judge Flannery, and Darcy Leo, retired Magistrate. Kevin Jones, the Magistrate who had committed Ryan, had died before the proceedings commenced. Extensive written submissions were made by both sides.

On 16 April 1985, Mr Riedel decided, after lengthy argument, that the evidence in relation to both the Briese and Flannery charges was capable of satisfying a jury of guilt. That was the first leg of the test to be satisfied for committal. On 26 April 1985, the second leg was addressed (essentially, a reasonable prospect of conviction) and Murphy was committed that day for trial on both charges. Bail was dispensed with. On the latter date, Murphy had made a statement in which he had said, *inter alia*:

> Your Worship, I am completely innocent. I am angry at these false charges. I did not attempt to pervert the course of justice … However, should the case go to a jury, I will present my account of the facts in evidence to the jury. I will dispute the versions given by the main witnesses for the prosecution.

Shand had then addressed at length, not calling any evidence. A flavour for Callinan's advocacy style can be gathered from the opening of his address in response:

> Could we say this first: that despite all the protestations to the contrary by my learned friend, his submissions largely amounted to no more than a rehearsing of the old argument [on the first leg of the test] and the facts and the law. Now to that extent we don't deem it necessary to descend into the same detail with respect to facts as does our learned friend. We'd also submit to your Worship that you've really been invited, although again the protestations are to the contrary, to retract your findings [on the first leg of the test].

He also made references to 'the utter bankruptcy of the defence' and 'ludicrous examples' employed by it: ' … such as have been able to be pointed to are really, with the greatest of respect, quite ridiculous'.

D *A Little Glass of White Wine*

It seems that Ian has usually been fond of a light relaxing drink at the end of the day. His invitation to 'a little glass of white wine' usually saw the liberation of French champagne from its cool lair to assist in reflection on the day's events – a very enjoyable and civilised custom, I must say, in keeping with Ian's general approach to life.

We had several during these proceedings (no doubt at least one after the committal order) and to a frugal junior barrister they were always a welcome luxury. We also dined once at Milano's Restaurant in Brisbane – scene of an encounter between Murphy and Judge Flannery that was to become the

subject of evidence in the first trial. I suppose you could call it a view by counsel.

E *Review of the Committal*

On 13 May 1985, Murphy brought an application to the Federal Court for review of the decisions to commit him for trial under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). (That course is no longer available.) The grounds were that the decisions involved an error of law, there was no evidence or other material to justify the making of the decisions, and the decisions were otherwise contrary to law. Once again extensive written submissions were made. The application did not succeed.

IV THE FIRST TRIAL

The indictment signed by Temby and dated 5 June 1985 (the date of commencement of the trial) contained two counts in the terms stated above.

At the trial in the Supreme Court at Sydney before the late Justice Cantor, Callinan led me with Peter Clark (from Melbourne originally), then Senior Deputy Commonwealth DPP. Shand, QC, Morris, QC and Dermot Ryan (now of Senior Counsel) appeared for Murphy who pleaded not guilty to both counts.

The trial was held in the Old Banco Court in St James Road, a rather small but historic Victorian era court room with fine timberwork and an elevated gallery. The court was well filled by participants and observers throughout the trial and the media laid siege to the place for weeks.

A *Conduct of the trial*

On the first day, 5 June 1985, during the jury empanelling process, a number of applications were made for people to be excused. In the presence of the whole panel one woman, having been sworn to give evidence on her application and having been asked why she wanted to be excused, rounded on Murphy, pointing at him with her arm extended and saying in a loud voice: 'I hate him. The moment I saw him I knew he was fully guilty. He should be castrated and sent to hell.' Murphy seemingly involuntarily crossed his legs where he sat.

Shand submitted (in the absence of the panel) that the jury panel be discharged and another made available. He submitted:

> … that your Honour could not be satisfied in the light of that violent outburst that this trial could proceed without the real possibility of prejudice.

The Crown did not oppose the application, Callinan submitting:

> I am bound to concede that it was an exceedingly strong statement really in our experience on this side of the Bar table of an unprecedented kind.

A non-publication order was made of the statements made by the jury panellist and that panel was discharged. A fresh one was brought in and a jury struck without further incident. The Crown opened from 12 noon.

The witnesses called by the Crown at the trial were Robert Jones, Ryan, Leo, Henson, Briese, Roach, McClelland, Staunton, Judge Flannery and Gloria Briese. The Crown closed its case at 12 noon on 13 June 1985. Lengthy arguments followed on an application for directed verdicts on both counts.

On 19 June 1985, Justice Cantor refused the application by the defence for verdicts by direction. Murphy then gave notice of his desire to reserve questions of law arising from that refusal for consideration by the High Court pursuant to section 72 of the *Judiciary Act 1903* (Cth).

The defence opened its case at 12.30 pm on 19 June. Murphy was called to give evidence that afternoon and continued on to 21 June. Callinan opened his cross-examination by having Murphy accept that he was knowledgeable of the counsel available to him in Australia and that it was important that his representative should accurately and fully put his (the accused's) contrary assertions to witnesses. Then he demonstrated how that had not occurred with Staunton, but that he (Murphy) had not intervened. It was an interesting beginning.

At one point in the cross-examination, after an excursion into Mrs Murphy's hydroponic garden and discussion of that with Briese, Callinan became irritated:

> Look, I am not asking you about other lawyers, observing others, and I think you understand the question. You heard your own counsel tell the witnesses to respond directly. Please respond directly to my questions.

That was about as aggressive as he appeared in the trial, although there were many occasions when he sought to confine Murphy to succinct answers to his questions.

A meeting between Murphy and Judge Flannery at a function at Milano's Restaurant in Brisbane was ventilated. Callinan: 'And I don't say this in any critical way, I don't suggest this, but you had quite a lot to drink that night?' Murphy: 'Yes. Let me say this, Mr Callinan, we were certainly not inebriated if that is what you are suggesting'.

Concerning the famous phrase allegedly said to Briese in this case and the subject of some obviously close attention in the course of the trial – the reference to 'my little mate' – the following passage of cross-examination occurred:

Q Do you say categorically that you did not use the words "My little mate"?

A Yes.

Q Has that always been your recollection?

A Yes.

Q Quite categorically you did not use those words?

A Yes.

Q Emphatically, you did not use the words "My little mate"?

A Yes.

Q Your recollection on that has never wavered?

A No.

Q Do you deny that you never used those words?[SIC]

A I deny that I did use those words.

Q Do you deny that you did use those words on that occasion?

A Yes.

Murphy concluded his evidence on 24 June 1985. Other witnesses testified from 25 June 1985 including a short reprise by Murphy. Jesse Troutman (a Commonwealth driver), Rhonda Shields (Murphy's personal secretary) and Justice Michael Kirby were called.

Ian Callinan's cross-examination of Justice Kirby (then President of the NSW Court of Appeal) has been commented upon from time to time. At the time of his retirement Callinan said that Kirby (then a fellow member of the High Court) reminded him of the experience still, 'in a very pleasant way. He's a very genial man and we laugh about it.'

Kirby was asked about his first federal appointment to the Arbitration and Conciliation Commission as a junior barrister after seven years' practice. Murphy had been Attorney-General at the time (but Kirby explained that it was a recommendation by the Minister for Labour to the Executive Council).

> Q Judge please do not misunderstand the question I am about to put to you but an appointment of that kind after seven years would be unusual, after seven years' practice at the Bar?
>
> A I was not the youngest person appointed but it would be unusual. I had, of course, hesitation in accepting it, but I did and then soon after that I was appointed to be the full time Chairman of the Law Reform Commission, an office I held for nearly ten years.

Murphy had invited him to that position. It was established that Murphy and Kirby were friends and that Kirby had been a guest at his residence (but not vice versa). They had corresponded and telephoned and occasionally dined out together. The final question and answer were:

> Q At the moment I am asking you about his friends. You would not doubt that he was a man who would be very loyal indeed to his friends?
>
> A Yes, I think loyalty is one of his qualities.

Mrs Ingrid Murphy gave evidence, followed by William Murphy (his brother), Angela Bowne, Justin O'Byrne, Elizabeth Evatt and Francis Dawson. Each was economically and skilfully cross-examined by Callinan. The case for the accused closed on 26 June. Addresses followed.

The summing-up began on the 19th day of the trial on 2 July 1985 and the jury retired at 11.28 am on Thursday 4 July.

B *The Verdicts*

Verdicts were given at 9.28 pm on Friday 5 July 1985. That night will forever be etched in the minds of those present.

It was the night of the annual Bench and Bar Dinner, not far along Phillip Street in the subterranean dining room of the NSW Bar Association. The participants in the trial, of course, were on hand at the court in rather spartan Victorian era accommodation and without the appurtenances of a formal dinner. As it became known that the jury would return, people materialised from everywhere, including in formal attire from the Bench and Bar Dinner, and the court was jam-packed. The atmosphere was intense and as I stood at the Bar table waiting for the court to convene in a moment of panic I thought I might well faint from the tension in the air. (Fortunately that diversion did not occur.) Among the observers in the upper gallery was then NSW Solicitor-General Mary Gaudron, QC who – with very buoyant Murphy family and friends – had prepared for a celebration party at Murphy's home in anticipation of an acquittal.

Murphy was convicted on the Briese count and acquitted on the Flannery count. At the Bench and Bar Dinner, Roddy Meagher, QC shouted champagne for his table.

C *Jury Reaction*

After much public comment on the result, at 11.33 am on 11 July 1985 a man identifying himself as the foreman of the jury telephoned John Laws on his widely broadcast radio program. He purported to speak for a few of the jurors. He said:

> I do not think anybody who has commented has any idea of the month out of our life, the anguish, the heartache and the misery we went through to do what was required of us … we all agree we were looking at a good man who answered a call for help.

He referred to comments that the jury had got it wrong and said: 'That's very hard on the jury'. He urged people to be quiet about the matter until the appeal was heard.

The man spoke of the terrible law that makes a person guilty if there is but a risk of improper influence. He said that the law was there for good reason, to prevent manipulation of the judicial system by powerful people, but it was not right that a person who always helped his fellows should be caught up in it. The jury had been scarred by having to convict in such circumstances.

He said that while the law is a good one, the way it was interpreted and applied in this instance was not a good thing. The jury had deliberated for 21 hours, asking the judge for three further directions.

The man rang back the next day at 10.57 am, very critical of comments that Temby had made the day before following his first appearance on the Laws program, including concerning possible contempt of court proceedings for his speaking out.

On 15 July 1985, Murphy's solicitors received a letter dated 10 July 1985 apparently from one of the jurors who stated that most believed Murphy to be not guilty of attempting to influence judicial officers or of trying to gain an advantage for Ryan. It was said that after the judge's directions on the possibility of risk they had no option but to convict.

In the letter, criticism was made of Shand for not making any 'loophole' clear in his final address; but it was also said that Callinan should not gloat – 'he did not convince us'.

Writing in the Sydney Morning Herald at the time, Peter Bowers observed: '…how richly, peculiarly Australian for a Justice of the High Court of Australia to get into so much strife over the phrase "and now, what about my little mate"'.

D *Questions of Law*

As noted above, before verdicts were given (and indeed, before the defence case began) Murphy had applied pursuant to section 72 of the *Judiciary Act 1903* (Cth) for the trial judge to reserve 15 (later 21) questions of law for determination by the High Court. In response to the application the Crown submitted, inter alia, that the trial judge should proceed to sentence and execution should then be respited. There was no objection to release on bail in the meantime. The matter was argued on 19 July 1985 when submissions were made upon questions of law to be reserved. Murphy was remanded for sentence and bail was continued.

When called up for sentence on 19 July 1985 and asked if he had anything to say, Murphy said:

> Yes I have. I am innocent of this charge. I intend to pursue every avenue that is open to me to establish my innocence. I have great faith in the jury system,

> even with its imperfections, but it is the best system that has been devised for criminal justice.
>
> It is my belief that had the jury been properly directed by your Honour they would have acquitted me. I am confirmed in that belief by the statements that have been volunteered by various jurors. The questions which have been reserved contain no complaint about the jury. They claim that your Honour excluded evidence which was favourable to me and seriously misdirected the jury about the law.
>
> I am hopeful that the Appeal Court will direct a new trial. I am confident that my innocence will be established.

Justice Cantor expressed the view that the remarks of jurors should never have been made, being:

> … precipitated or prompted by the wide media coverage given to ill-informed, irresponsible and in some cases obviously politically motivated criticisms of the jury's verdict by persons some of whom hold important positions in the community. One might have expected more responsible behaviour.

Justice Cantor also said the remarks were 'wholly irrelevant'.

A motion in arrest of judgment was also made on the ground that section 43 of the *Crimes Act 1914* (Cth) was incapable of application to the facts alleged in the Briese count, alternatively that the section was invalid as beyond the legislative power of the Commonwealth. The section 43 and another question concerning section 68 of the *Judiciary Act 1903* (Cth) were removed into the High Court. The High Court was also invited to consider the validity of the former section 85E of the *Crimes Act 1914* (Cth), the conspiracy offence provision.

The hearing took place in Canberra on 12-14 August 1985. Sir Maurice Byers, QC led Tom Hughes, QC and Dermot Ryan for Murphy. Peter Lyons and I were juniors to Callinan (Peter having been brought in from Ian's Brisbane chambers – and later also to be President of the Queensland Bar Association, departing in controversial circumstances). The High Court, constituted by the other six Justices (*R v Murphy* (1985) 158 CLR 596), on 14 August (with reasons given on 20 August) made findings that section 43 did apply to the circumstances of this case, that sections 43 and 68 were valid laws of the Commonwealth and that, prior to its repeal, section 85E was also a valid law of the Commonwealth. It remitted the reserved questions of law back to the Full Court of the Supreme Court of NSW (being the Court of Appeal).

On 23 August 1985, the motion in arrest of judgment was dismissed.

E *Sentence*

On 3 September 1985, Justice Cantor embarked 'upon the performance of the distasteful duty of passing sentence upon the prisoner'. He sentenced Murphy to imprisonment for 18 months. It was ordered that upon the expiration of a period of ten months, Murphy might enter into a recognisance to be of good behaviour for the balance of the sentence. He directed that execution of the sentence be respited until the referred questions of law had been considered and decided. Murphy was admitted to bail without security, on conditions.

V APPEAL AGAINST CONVICTION

Application was made on 12 September 1985 for an appeal against conviction to the Court of Criminal Appeal on 19 grounds.

The Court of Appeal sat as a five Judge bench (Chief Justice Street, and Justices Hope, Glass, Samuels and Priestley) to deal with the questions of law, followed immediately by the Court of Criminal Appeal similarly constituted to hear the appeal against conviction. Tom Hughes, QC with Desmond Andersen and Dermot Ryan appeared for Murphy. Peter Lyons remained as a second junior for the Crown in the appeal.

The case is reported at (1985) 4 NSWLR 42. The hearing occurred on 58 November 1985. The Court then addressed 21 questions (answering 12) and on 28 November 1985 allowed the appeal, set aside the verdict and conviction and ordered a new trial.

Further publicity of the kind admonished by Justice Cantor in July then occurred. On 29 November 1985, the *Daily Telegraph* carried a story in which the then NSW Premier and Federal President of the ALP, Neville Wran, QC was quoted as saying:

> I was very satisfied with the Court of Appeal decision – I agree that there was a clear miscarriage of justice. The sooner the final step in what's been a very, very prolonged and sad affair is taken the better. I have a very deep conviction that Justice Murphy is innocent of any wrongdoing … He's a unique individual who is admired and loved by hundreds of thousands of Australians. I think most Australians, once the matter is finally disposed of, will be anxious to restore him to the dignity and status to which he is entitled.

On 5 December 1985, the *Sydney Morning Herald* reported that Temby had decided that there should be a retrial, but that an indictment would not be presented until there was reason to expect that there could be a fair hearing (following the publicity given to the matter). Temby was quoted as saying:

> I am satisfied that cannot be earlier than three months from now. The situation will be reviewed then. I again entreat supposed experts, public figures, the press and all others to refrain from saying anything concerning the strength of the case against Mr Justice Murphy, or indeed anything which might render a fair retrial more difficult.

The Australian newspaper reported that day that a storm of controversy had erupted over that decision. Politicians fumed. Like all storms it passed, and the politicians found other things to fume about.

VI THE SECOND TRIAL

Prior to a jury being empanelled in the second trial before Justice David Hunt, on 17 March 1986 the President of the Senate sought to appear (by Theo Simos, QC and Peter Biscoe) as *amicus curiae* to make submissions relating to the law of parliamentary privilege and to submit that the presiding judge should of his own motion disallow any questions that may be in breach. Concern was expressed about any use of evidence given at the Senate Select Committee inquiries in 1984.

On 2 April 1986, there were pre-trial arguments about the supply of particulars and other matters. On 8 April 1986, Justice Hunt gave reasons for various decisions in relation to the Senate, having the effect of 'business as usual': (1986) 5 NSWLR 18.

On 10 April 1986, various subpoenas were returned and access orders made.

A *Conduct of the trial*

Callinan, Clark and I again appeared for the Crown in the second trial which commenced on 14 April 1986. Murphy was represented by Ian Barker, QC with Desmond Andersen and Dermot Ryan.

In preliminary remarks to the jury, Justice Hunt referred to the fact that this was a re-trial. He said:

> It would of course be quite unreal for anyone to expect that you would not be aware that Mr Justice Murphy, the accused here, has already been tried once on this charge and that a new trial was ordered because of some errors of law made by the trial judge at that first trial.
>
> There was considerable publicity given to the matter last year and you would have to be a hermit if you had not heard something about the case. In case you have by any chance forgotten, your memory would have been jogged quite strongly by the reports in this morning's newspapers.
>
> This trial for which you have been selected is the new trial of that charge and you must decide whether the Crown has proved the accused guilty of that charge by reference only to the evidence which is led at this trial. Neither the fact that there has been an earlier trial nor the result of that earlier trial upon this charge is relevant or has anything to do with your decision as to whether the accused is guilty of that charge.
>
> Normally a jury is not even made aware of the fact that there has been an earlier trial but it is impossible

> to believe that you would not know something about it and it is for that reason that I give you this specific warning, that you must put out of your minds everything that you have heard or read about the earlier trial, you must put it right out of your minds.

His Honour then repeated the warning, referred also to publicity about the Senate inquiry, directed them on that and then continued:

> Unfortunately, the problem does not finish there. At various times, but particularly late last year, a number of possibly well-meaning but nevertheless definitely misguided people have publicly expressed their views about the issues which were decided by the jury at the first trial and about the issues which you have to decide at this trial. That was, to say the least of it, a regrettable departure by people who should have known better, from what should have been said about these matters and, even more unfortunately, what they had to say was given considerable publicity.
>
> You must also put that publicity right out of your minds in this case.

At the beginning of his opening address, Callinan opened the batting with his usual understated humility and helpfulness in that characteristically quiet manner:

> Ladies and gentlemen, I hope you will not become impatient with me if I tell you a little more about the course of the trial because, as I would understand it, some of you would not have any experience of the legal process and in particular of the criminal process but it may be helpful, I hope it will, if I can explain further some aspects of the matter to you.

And on he went in his unfussed manner.

The second trial proceeded with evidence from Ryan, Henson, Briese, Mrs Briese, Jennifer Briese, McClelland, Leo, Don Thomas, Staunton and Halpin. The Crown case closed on 21 April 1986.

Barker QC then said simply: 'I do not wish to open, your Honour. The accused will make a statement to the jury'. Murphy then made a dock statement. It was a famous one. In part he said:

> Ladies and gentlemen, the law gives the right to everyone accused of an offence the right to speak directly to the jury without examination or cross-examination and I've chosen to do this, and to speak to you directly as my judges …
>
> Now, judges and magistrates at all levels – lawyers, all talk about developments in the law and the cases before the courts. We all do so in the knowledge that the judge or magistrate dealing with the case will deal with it in accordance with his or her duty. They will not deviate from their judicial duty because of interchange with others, whoever they are …
>
> All the time I knew him, Mr Briese had held himself out to me to be a person of the utmost integrity. I had no reason to think otherwise. It never entered my head that he was a person who would allow himself to be used to influence another Magistrate to pervert the course of justice, or to in any way act contrary to his duty. I had no indication that he would do anything wrong.
>
> I, at no time whatever, had any intention to pervert the course of justice and I made no attempt to do so. I have told you the truth, and I ask you to find me not guilty.

The defence then called only Murphy's secretary, Rhonda Shields, to give evidence of social arrangements made between the Murphys and the Brieses. Callinan addressed for the Crown on 22 April 1986 and the defence followed.

On 23 April 1986, Barker QC unsuccessfully made an application for the discharge of the jury on the basis of statements in the Crown's address. The defence address concluded and the summing up commenced after lunch on that day.

B *Verdict*

The jury retired at 10.30 am on 28 April 1986 and at 2.15 pm returned with a verdict of not guilty.

After the verdict, David Marr (in the early days of his journalistic career) wrote a piece in the *National Times* in which he described portions of Callinan's final address to the jury:

> The unfussed mood in this trial ended with Murphy's unsworn statement to the jury and Callinan's address for the prosecution. Callinan attacked Murphy for giving insufficient details in the statement and for raising against Briese matters which Briese was never faced with by counsel, matters Briese was therefore never given a chance to answer, to be re-examined on, to call evidence on if necessary.

The unfussed mood continued to the end.

C *Flannery Memorial Dollar*

District Court Judge Paul Flannery, QC was a principal witness for the Crown on the second charge, as noted above. Towards the end of the Crown case in the Murphy retrial (on the Briese

charge, only) Ian and I discussed, as a large range of material useful for cross-examination was being assembled, whether or not Murphy would give sworn evidence the second time around. The alternatives were to stand mute or (at that time) to make an unsworn statement from the dock (as it was called).

Ian immediately and unhesitatingly asserted that Murphy would make a dock statement. I regarded that as completely unsupportable – indeed, outrageous to even suggest that a Justice of the High Court would resort to the course then maintained for the ignorant, ill-educated or otherwise inadequate and vulnerable accused to safely lay before a jury a version of events for it to consider in its deliberations, a possible version untested by cross-examination. And after all, Murphy had said at the time of committal that he would give evidence and at the first trial he had.

In a rash move I offered a bet to Ian that Murphy would give evidence. Ian accepted without hesitation. The wager was for the princely sum of one dollar.

Of course, I lost the bet when Murphy began his dock statement. The wager became known as the 'Flannery Memorial Dollar' to recognise Judge Flannery and the torment he had suffered to ensure that whatever he said in evidence was the truth, the whole truth and nothing but the truth. (A reading of the transcript of his evidence will show how seriously and literally he took his oath.) I had a dollar coin mounted as a trophy, suitably inscribed, and solemnly presented it to Ian on an appropriate occasion. I saw it much later on a bookshelf in his chambers at the High Court in Canberra.

VII SUBSEQUENT EVENTS

A *Parliamentary Commission of Inquiry*

The secret and public reports of the Stewart Royal Commission had been presented and a former Australian Federal Police Officer made allegations following the second trial. On 5 May 1986, Murphy advised that he would voluntarily refrain from sitting on the High Court and he did so for a time.

On 8 May 1986 the *Parliamentary Commission of Inquiry Bill* (Cth) was introduced into Parliament by the Attorney-General, Lionel Bowen MP. Its purpose was 'to establish a Parliamentary Commission of Inquiry to investigate the behaviour of Mr Justice Lionel Murphy'. When the Act came into force, three retired judges (Sir George Lush from Victoria, Sir Richard Blackburn from the ACT and the Honourable Andrew Wells from South Australia) were appointed members of the Commission. Its task was to consider, in private, specific allegations and determine if Murphy's conduct could amount to proved misbehaviour (thereby grounding dismissal from office). It could have regard also to previous inquiries but generally was not to look at matters dealt with in the criminal trials.

Evidence had to be legally admissible and Murphy was not to be required to give evidence unless the Commission believed it had evidence of misbehaviour.

The Commission was given powers to summon (and if necessary arrest) witnesses, issue search warrants and deal with offences committed against it (e.g., giving false or misleading evidence). A body of material, initially chiefly arising from our preparations for the thwarted cross-examination of Murphy in the second trial (for which the Crown had been much better prepared), was provided to the Commission.

In the event, the Commission was wound up without reporting, when it became known that Murphy was terminally ill.

In the absence of any adverse findings, the material produced to and by the Commission was to be embargoed from publication for 30 years (i.e., until 2016, as it happened). Then Prime Minister Hawke wanted it to be locked away in perpetuity, but the Senate determined otherwise.

B *Later Appearance Before Justice Murphy*

Almost immediately after the verdict in the second trial and Murphy's triumphant appearance on the steps of the court we were informed, for the first time, that he was ill with cancer. We were shocked. The disease progressed fairly rapidly (although Murphy even tried experimental remedies, apparently) but after a period of voluntary withdrawal Murphy returned to sit on the High Court for as long as he could. He died on 21 October 1986.

In the second half of 1986 I had occasion to appear in the High Court in Canberra before a bench of which he was a member. I was not looking forward to the prospect, but I must record that in the face of obvious and serious physical difficulties, not to mention what must have been playing on his mind, his Honour was a model of courtesy and propriety on the few occasions when he engaged with me in argument.

THE MURPHY PAPERS: THE PARLIAMENTARY COMMISSION OF INQUIRY

THE HONOURABLE STEPHEN CHARLES, AO, QC

It is indeed an honour to be asked to address this conference, and particularly having regard to the purposes of the Samuel Griffith Society and its defence of the 'great virtues of the present *Constitution*'.

After Justice Lionel Murphy was acquitted at his second trial, the public comment about the Judge's actions did not cease. It is necessary to return briefly to the second Senate Committee which on 6 September 1984 reconsidered the Briese allegations. Four senators, Michael Tate, Nick Bolkus, Austin Lewis and Janine Haines were assisted by two Commissioners, both former Judges, John Wickham from Perth and Xavier Connor from the Australian Capital Territory and Melbourne.[1]

After hearing the evidence of Clarrie Briese and others, Commissioner Wickham took the view that the Briese allegation of an attempt to pervert the course of justice was proved beyond a reasonable doubt. Commissioner Connor said that no such proof was possible, and that if 'misbehaviour' in section 72 of the *Constitution* meant criminality, Parliament could not find Justice Murphy guilty of 'misbehaviour'. But Connor observed that:

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[1] The report of the second committee was quoted in a paper given by Justice Roslyn Atkinson of the Queensland Supreme Court, entitled *The Chief Justice and Mr Justice Murphy: Leadership in a Time of Crisis.* The paper is published in the papers of Emmanuel College, University of Queensland, No. 5, June 2008.

> In four years as a bench clerk to Victorian magistrates, in 23 years at the Victorian Bar, in 10 years on the Supreme Court of the ACT, and in six years on the Federal Court of Australia I have not encountered anything comparable (with Murphy's behaviour). It would be unfortunate if Parliament or the public were to gain the impression that it was accepted or normal judicial behaviour.[2]

He said the Judge was 'lending the prestige of his high office to an attempt to gain on behalf of an old friend some information which neither he nor his friend should have had'.

These views are understood to have caused Senator Tate to change his previous view in the first Senate Committee. The result was that Senators Tate, Lewis and Haines and the two Commissioners found that on the balance of probabilities, Justice Murphy could have been guilty of behaviour serious enough to warrant his removal from the High Court. As Professor Blackshield, and one of Murphy's strongest supporters, put it later:

> four of the six participants in the second Senate Committee had found that Murphy could not be guilty of any criminal offence. But five of the six participants had found that he could be guilty of 'misbehaviour' in the constitutional sense: that is that it would be possible for Parliament to take that view.[3]

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2 Ibid.

3 Professor A R Blackshield is the author of the chapter 'The Murphy Affair', contained in J Scutt (ed), *Lionel Murphy - A Radical Judge*, (McCulloch Publishing, 1987), 248.

During the Judge's second trial in April 1985, Justice Murphy did not give sworn evidence, but made an unsworn statement from the floor of the Court. The Judge said that he had never suggested that Mr Briese speak to the magistrate who was hearing Morgan Ryan's case and denied that he had said to Mr Briese: 'What about my little mate?'. He said that he had handled cases for Ryan's firm when he was at the Bar, but he was not indebted to him and they were not close friends.[4]

The Judge's decision not to give evidence on oath, but to speak to the jury from the dock was indeed then his right. But for a High Court judge to do so caused, as Nicholas Cowdery has said, astonishment and outrage among many lawyers, and it was widely assumed that the Judge could not return to the bench. The Judge was, however, acting on legal advice.

Freehills were his solicitors, and Graham Kelly, then a partner, had said to the Judge over lunch:

> I'm telling you absolutely straight, Judge. There are three critical pieces of advice. Mine is: 'Do not give evidence'. Peter's [Peter Perry] is: 'Do not call character witnesses'. And Clarrie's [Sir Clarence Harders] is 'Do not call your wife because she gave evidence in the first trial'. If you don't do those three things, we'll win this case. If you do any one of those, we'll lose.[5]

Such legal advice would be taken by many as a clear admission of guilt, that the Judge's evidence would be destroyed by the prosecutor's cross-examination. And it was thought by many

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4 Justice Murphy's unsworn statement was reported in *The Australian*, 22 April 1986, by Jennifer Falvey.

5 *The History of Freehills*, published 2011, 269.

that Murphy could not, after making an unsworn statement in his defence, resume his place on the bench.

There were other allegations about improper or inappropriate behaviour of the Judge that continued to circulate in the press. There was criticism of the Judge for not calling evidence of good character at the second trial. There were claims that other Judges on the High Court would refuse to sit with Justice Murphy, but he resumed his seat on the bench. In light of the continuing criticisms, the Federal Government decided to set up the Parliamentary Commission to inquire and advise the Parliament whether any conduct of Justice Murphy had been such as to amount in its opinion to proved-misbehaviour within the meaning of section 72 of the *Constitution*.

Section 72(ii) provides that Justices of the High Court shall not be removed except by the Governor-General in Council on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of 'proved misbehaviour or incapacity'. In 1986 there was little or no direct authority on the meaning of these words. The leading authority on parliamentary government at the time was Dr Alpheus Todd, who wrote:

> Before entering upon an examination of the Parliamentary method of procedure for the removal of a judge under the Act of Settlement, it will be necessary to inquire into the precise legal effect of their tenure of office "during good behaviour", and the remedy already existing, and which may be resorted to by the Crown, in the event of misbehaviour on the part of those who hold office by this tenure.
>
> The legal effect of the grant of an office during good behaviour is the creation of an estate for life in the

> office. Such an estate is terminable only by the grantee's incapacity from mental or bodily infirmity, or by his breach of good behaviour. But like any other condition or estate, it may be forfeited by a breach of the condition annexed to it. That is to say, by misbehaviour. Behaviour means behaviour in the grantee's official capacity. This behaviour includes, first, the improper exercise of judicial functions; second, wilful neglect of duty, or non-attendance; and, third, a conviction for any infamous offence, by which, although not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. In the case of official misconduct, the decision of the question whether there be misbehaviour rests with the grantor, subject of course, to any proceedings on the part of the removed officer. In the case of misconduct outside the duties of his office, the misbehaviour must be established by a previous conviction by a Jury.[6]

Todd's statement had been in substance repeated and approved in many textbooks (e.g., all editions of Halsbury's *Laws of England*) and Quick and Garran, the principal text on the *Australian Constitution*, also cited and approved it.[7] Such an interpretation was based on the necessity, under the separation of powers, for protecting judges from attack by Parliament.

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6 Alpheus Todd, *Parliamentary Government in England* (1892) 1913.

7 J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 731-3.

The Judge's counsel, David Bennett, QC, had given advice in support of the narrowest view of 'proved-misbehaviour' to the effect that private misconduct falling short of a criminal offence could never amount to 'misbehaviour' and that in addition it could not amount to *proved*-misbehaviour in the absence of a criminal conviction in a court.

The first Senate Committee had also been advised by W. Pincus, QC in terms which supported giving each House of Parliament freedom to decide what private misconduct constituted 'misbehaviour'. And the Attorney-General had been advised by the Solicitor-General, Dr Gavan Griffith, QC that an anterior conviction would suffice, but in addition Parliament could itself find by proof in an appropriate manner, in proceedings where the Judge had been given a proper opportunity to defend himself, that there had been misbehaviour.[8]

Parliament then passed the *Parliamentary Commission of Inquiry Act 1986* (Cth) which set up the Commission. The Act required the Commission to conduct its hearings in private and to report by 30 September 1986.

The Act required the Commission to consider only specific allegations made in precise terms. The Commission was required not to consider the issues dealt with in the trials leading to the acquittal of Justice Murphy and his guilt or innocence of those charges, or whether the conduct to which those charges related was such as to constitute proved-misbehaviour.

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[8] These three opinions were each referred to in a Cabinet-in-Confidence Minute, Appendix 5, sent by the Attorney-General to Cabinet, on 31 August 1984.

The Judge was not to be required to give evidence on a matter unless the Commission had before it evidence of misbehaviour sufficient to require an answer, and the Commission had given the Judge particulars in writing of that evidence. The Commission was given power to summon witnesses, and issue search warrants.

Three Commissioners were appointed, all retired judges: the Honourable Sir George Lush, the Honourable Sir Richard Blackburn and the Honourable Andrew Wells, QC. I was briefed to assist the Commission with Mark Weinberg and Alan Robertson, and Counsel for the Judge were Roger Gyles, QC, Marcus Einfeld, QC, and Dr Annabelle Bennett.[9]

Justice Murphy immediately applied to the High Court seeking an interlocutory injunction to prevent the Commission sitting on the grounds that it did not authorise any investigation to be made of him, and that Mr Wells was disqualified from taking part in the inquiry.[10]

Shortly after *The Age* tapes had been published, the Chairman of the Australian Law Reform Commission, Justice Michael Kirby, had been reported as saying that the discussion between the solicitor and Justice Murphy about the appointment of someone to a high position in the NSW public service and his agreement to lobby the politician who would make the appointment were 'the sort of thing that goes on all the time in judicial circles' and that the intervention of judges in such matters was 'part of the nether world of the legal arena'.

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9 All counsel were later appointed to the Bench, either the Court of Appeal of Victoria, or the Federal Court of Australia.

10 The events that followed are all recorded in the decision of the High Court: *Murphy v Lush* (1986) 65 ALR 651.

Justice Wells was reported to have said in court during an unconnected trial the following day that the article not only imputed corruption to judges but implied that they were from time to time willing to act in flagrant defiance of constitutional principles governing the separation of powers. Justice Murphy's counsel claimed that Mr Wells, now retired, would be unable to bring an impartial and unprejudiced mind to the inquiry.

The High Court immediately on 27 June 1986 rejected the application on this ground. The Court said:

> The remarks made by Mr Wells were made long before the Inquiry was set up and were not made in reference to the plaintiff or his conduct but to rebut the assertions attributed by the writer of the article in the newspaper to Mr Justice Kirby. We, of course, do not know whether Mr Justice Kirby did make remarks to that effect.
>
> However, in our experience, it would not be right to say that judges commonly intervene to influence the making of public service appointments or that there is a practice inherited from England whereby judges descend into some shady nether world of dubious behaviour. The remarks of Mr Wells amount to no more than a denial that judges, to his knowledge, engage in conduct of the kind allegedly described by Mr Justice Kirby, conduct of a kind which Mr Wells regarded, understandably, as contrary to accepted standards of judicial behaviour. It would be preposterous to hold that the expression by a judge of generally held views as to the standards of judicial propriety should be thought to disqualify him from acting in a judicial capacity.[11]

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11 *Murphy v Lush* (1986) 65 ALR 651 at 655.

In answer to the claim that the *Parliamentary Commission of Inquiry Act 1986* (Cth) did not authorise investigations to be made, the Court said:

> The mere conduct of private inquiries, in what we must assume would be a responsible manner, is not likely to cause any real damage to the plaintiff's reputation. Further no one requires special authority at law simply to make inquiries. There is no suggestion that the Commission would be considering the holding of a public hearing before this court is asked finally to determine the issues.[12]

The brief given to the three counsel assisting in late June 1986 was unusual, if not unique. We were told that the *Parliamentary Commission of Inquiry Act 1986* (Cth) had been passed, and the Commissioners appointed. We were given very little information other than press cuttings, since we were well aware of the proceedings in the two Senate Committees, and the two trials which Justice Murphy had faced. We were aware that various allegations and rumours surrounded Justice Murphy. We were told that it was our function to investigate, and to inquire into this material. I was quoted in the judgment of the High Court as having said to the Commission in opening that:

> All we are doing is looking at a very substantial volume of material which has been put to us and then sifting or filtering that material, where it is not clear to us whether an allegation is made at all or where it is imprecise or where it has, let us say, not a date attached to it, we are then making inquiries or propose rather to make inquiries of persons outside for the purpose of seeing if that allegation has definition.[13]

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12 Ibid.

13 Ibid 653.

Sir George Lush said, on the following day:

> The Commission's view is that it is entitled to gather information, examine it and conduct investigations, if necessary with the assistance of investigators, including members of the police forces if made available ... to formulate the specific allegations which emerge from materials received.[14]

We then set to work, and by 21 July 1986 we had drafted 15 specific allegations of conduct by Justice Murphy for the Commission to consider. Since the Judge had been acquitted on the charges on which he had been tried, and no other convictions existed, the question immediately arose whether the facts alleged in these documents were capable of constituting misbehaviour. The Commission heard argument on this question for 3 days at the end of July 1986.

Counsel for the Judge argued that the word 'misbehaviour' in section 72 extended only to conduct falling within either or both of two categories: first, misconduct in office, as that expression was understood at common law; and secondly, conduct not pertaining to the holder's office amounting to an infamous crime of which the holder had been convicted. They argued that since none of the allegations asserted a conviction, they could only be supported if the facts asserted amounted to misconduct in office. They argued that all or at least most of the documents would be found to fail to allege facts capable of constituting misbehaviour.

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14 Ibid.

In response we argued that section 72 of the *Constitution* had presented to the Australian nation a provision that was – and was intended to be – a new creature, that the authorities relied upon by counsel for the Judge did not make good the proposition they were said to establish, and that even if they did, the *Constitution* had, by necessary implication, rejected it, and that the word 'misbehaviour' should receive its natural meaning in the legislative and constitutional context in which it appeared.

Each of the three Commissioners' judgments were reported.[15] Each of them rejected the arguments pressed by Justice Murphy's counsel. Sir George Lush said that:

> It is for Parliament to decide what is misbehaviour, a decision which will fall to be made in the light of contemporary values. The decision will involve a concept of what, again in the light of contemporary values are the standards to be expected of the judges of the High Court and other courts created under the Constitution. The present state of Australian jurisprudence suggests that if a matter were to be raised in addresses against a judge which was not on any view capable of being misbehaviour calling for removal, the High Court would have power to intervene if asked to do so.[16]

Sir Richard Blackburn said that:

> The material available for resolving the problem of construction suggests that 'proved misbehaviour' means such conduct, whether criminal or not and whether or not displayed in the actual exercise of

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15 Parliamentary Commission of Inquiry, 'Re The Honourable Mr Justice Murphy - Ruling on Meaning of Misbehaviour' (1986) 2 *Australian Bar Review* 203.

16 Ibid 210.

> judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question.[17]

The Honourable Andrew Wells, QC said:

> The issue raised by section 72 would thus appear to pose questions of fact and degree. Somewhere in the gamut of judicial misconduct or impropriety, a High Court judge's conduct, outside the exercise of his judicial function, that displays unfitness to discharge the duties of his high office can no longer be condoned, and becomes misbehaviour so clear and serious that the judge guilty of it can no longer be trusted to do his duty. What he has done then will have destroyed public confidence in his judicial character, and hence in the guarantee that that character should give that he will do the duty expected of him by the Constitution. At that point section 72 operates.[18]

There were 15 charges that had either been served on Justice Murphy or were prepared at the time the Commission was adjourned.[19] We had considered and rejected many other allegations. Those remaining, included:

1. In December 1979 Lionel Murphy attempted to bribe Commonwealth police officer Donald William Thomas to provide covert information relating to or acquired by the Australian Federal Police ('AFP') to unauthorised persons within the Australian Labor Party.

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17 Ibid 221.

18 Ibid 230.

19 Each of the charges were set out in detail in *The Australian*, Friday 15 September 2017, at page 6.

2. Between April 1980 and July 1981, Murphy agreed with solicitor Morgan Ryan, his long-time friend, to make inquiries with a view to determining whether two AFP officers could be bribed or influenced to act contrary to their duty as police officers.
3. During Murphy's trial in 1985 he knowingly gave false testimony regarding the effort he had made on behalf of Ryan regarding his criminal proceedings.
4. In 1979, Murphy agreed with Ryan to speak to NSW premier Neville Wran for the purpose of procuring the appointment of Wadim Jegorow to the position of deputy chairman of the Ethnic Affairs Commission of New South Wales. He subsequently spoke to Wran and told Ryan that Jegorow would be appointed. Alleged the conduct amounted to misbehaviour by entering into an agreement to influence the making of a public service appointment and actually intervening to achieve that purpose.
5. In 1982, Murphy asked District Court Chief Judge James Staunton to arrange an early trial for Ryan on certain charges pending in the District Court. By doing so, it is alleged, Murphy abused his office as a Justice of the High Court and further, or in the alternative, improperly attempted to influence a judicial officer in the execution of his duties.
6. In June 1985, Murphy while on trial deliberately understated the frequency of his contacts with Ryan and misstated the nature of their association. Alleged this amounted to knowingly giving false testimony and constituted conduct contrary to accepted standards of judicial behaviour.

7. In January 1980, Murphy agreed with Ryan that Murphy would make, or cause to be made, representations on behalf of interests associated with Abe Saffron to persons in a position to influence the awarding of a contract for the remodelling of Sydney's railway station. Murphy did so while knowing Saffron to be a person of ill-repute.

Proof of these matters would have involved calling evidence from Donald Thomas, Morgan Ryan, Abe Saffron, Neville Wran, and Judge James Staunton, as well as Clarrie Briese. We would have had to prove the statements made by Justice Murphy in his trials, and any lack of truth on which we relied.

Would the Commission have found the Judge guilty on any of the charges laid? All involved in the Commission were bound to secrecy by the terms of the legislation which terminated the Commission. It is only the Parliament's recent decision to release the papers of the Commission, including the 15 draft charges, which makes comment on them now possible.

The charges stand as mere allegations, of matters occurring well over 30 years ago. But there were, I think, reasonable prospects of at least some of the charges being made good by evidence. The Judge's counsel would certainly have alleged that charges 3 and 6 involved issues dealt with in the Judge's two trials, but we thought there were proper grounds for pursuing the charges.

If anyone were to describe any of the charges as the sort of thing that goes on all the time in judicial circles (charges 4, 5 and 7), the High Court had already made clear its attitude to such a proposition. If an attempt had been made to ask that Court to hold that the charges were not capable of leading to removal, I think that application would have failed.

The question remains what would have happened if the Commission had reported to Parliament that in its view any of the charges had been proved. Although two of the Commissioners stated their view[20] that the High Court retained a role to intervene to prevent Parliament from removing a judge if the grounds for action were not on any view capable of amounting to misbehaviour, the real question was whether Parliament would have been persuaded to act. The reality was that both Houses of Parliament were then controlled by the Labor Party, and many in that party were furious that the Government had set up the Parliamentary Commission. All that the Commission was entitled to do, under section 5(1) of the *Parliamentary Commission of Inquiry Act 1986* (Cth), was to report to Parliament its view of whether any conduct of the Judge had been such, in its opinion, as to amount to proved-misbehaviour within the meaning of section 72.

After the hearing of argument in the Commission but before the Commissioners' reasons were handed down, Justice Murphy resumed sitting as a judge. However, his counsel informed the Commission that the Judge had an advanced state of cancer in its secondary stages, that there was no cure and no treatment. The hearings of the Commission were then adjourned *sine die*. The Government supported the Judge's right to sit and passed legislation which repealed the Act setting up the Commission of Inquiry and effectively terminated the Commission.[21]

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20 Parliamentary Commission of Inquiry, above n 15, 210, 249.

21 *The Parliamentary Commission of Inquiry (Repeal) Act 1986* (Cth).

As already mentioned, the views of the Commissioners were published in the Australian Bar Review.[22] Since then, those views were adopted by the Parliamentary Judges' Commission of Inquiry conducted in Queensland into the behaviour of Justice Vasta and Judge Pratt which was presided over by Sir Harry Gibbs in 1988 and 1989.[23] They were also considered, and mentioned with approval, by the Honourable Peter Heerey, QC in his report to Parliament concerning the conduct of Vice-President Lawler of the Fair Work Commission.

They also received approving comment from Odgers' Australian Senate Practice which, in a lengthy discussion of the removal of judges under section 72 of the *Constitution*, stated that British and American authorities accept the wider view of the meaning of 'misbehaviour'.[24]

The Parliamentary Commission was terminated before any evidence had been called. Professor Blackshield characterised the charges as containing 'no surprises or fresh revelations' and the thrust of his comments is that the 15 charges would not have led to any action by the Parliament.[25] The fact remains that the comments of the High Court on the application to remove Commissioner Wells for bias show that the six judges dealing with that application plainly shared Mr Wells' views on corruption and the standards of judicial propriety.[26]

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22 Parliamentary Commission of Inquiry, above n 15.

23 Queensland Parliamentary Judges Commission of Inquiry, *First Report of the Parliamentary Judges Commission of Inquiry*, Sir Harry Gibbs, Sir George Lush, and the Hon. Michael Helsham (1989) 910.

24 H Evans and R Laing (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) Ch 20.

25 See Blackshield, above n 3, 256.

26 *Murphy v Lush* (1986) 65 ALR 651 at 655.

After the charges were delivered to the Judge's counsel, lengthy cross-examination of some of the potential witnesses was forecast. The Commission had been required by the Act to conduct its inquiry as quickly as possible and to report by 30 September 1986, unless the date was extended by Parliament. The Commissioners would probably have been forced to fix time limits for cross-examination, which may have led to claims of unfair treatment, and a denial of natural justice.

So far as I am aware, the Commissioners' reasons have not been considered by any appellate court or the High Court. The Judge's counsel made application to the High Court seeking to challenge the validity of the charges, but the court refused to deal with the application and referred it back immediately to the Commission without commenting on the allegations.

The absence of later appellate court consideration leaves untested the Commissioners' reasons relating to the meaning of the words 'misbehaviour' and 'proven' in section 72. Provisions such as section 72 were introduced by the *Act of Settlement* in 1701 as part of the Glorious Revolution, together with the *Bill of Rights* in 1689. The fact that Alpheus Todd's approach to provisions such as section 72 had been almost universally accepted by text writers before the Commissioners reached a different view leaves it as a possibility that the High Court might now disagree with the Commissioners' conclusions.

Another undecided question is what role the High Court can play in the removal of a state or federal judge. Two of the Commissioners thought that the High Court would have jurisdiction to consider the lawfulness of a decision by Parliament to remove a High Court judge.[27] On the other hand,

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[27] Parliamentary Commission of Inquiry, above n 15, 210, 249.

the Supreme Court of the United States in 1993 took the view that the Court did not have such jurisdiction.[28]

The procedure for removal of a federal judge is now covered by the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth).

[28] *Nixon v United States* 506 US 224 (1993).

THE EVOLVING STATE OF DEBATE IN AUSTRALIA

THE HONOURABLE PETER DUTTON, MP

Ladies and Gentlemen, it is a great honour to be here with you tonight.

I was very pleased to accept the invitation to speak and I want to pay special tribute to John and Nancy Stone, for the work they have done for our country and for many great causes, including the Samuel Griffith Society.

I also want to say thank you for the privilege of addressing the Samuel Griffith Society. It has for many years played a particularly important role in public debate by defending our *Constitution*, and protecting and preserving Australia's cherished institutions and values, and I want all of you to be very proud of that.

The *Constitution*, and associated conventions and traditions, have served as a bedrock of our nation for more than a century. The foundational document has provided the social underpinnings from which Australia has come to enjoy unparalleled prosperity, safety and security.

When the colonies came together as one indissoluble federal commonwealth in 1901, they laid the foundations for one of the world's most stable and successful systems of government. Australia, while still a young country, stands as the world's sixth oldest continuous democracy.

From the outset, our nation inherited a Westminster system of parliamentary democracy refined through centuries of practice and convention, and in drafting our *Constitution*, esteemed legal minds, Samuel Griffith chief among them,

adopted and incorporated international innovations to craft a uniquely Australian document.

We are all beneficiaries of the work of Sir Samuel Griffith and his peers and it now falls to all of us as constitutional conservatives, including many distinguished people within this room tonight, to defend that work – which is exactly what you have been doing over the course of this weekend – and to secure our constitutional arrangements for future generations.

But, of course, not everyone shares our views. There are those who protest that the *Constitution* is woefully deficient and must be urgently amended. Republicans are caught up in a misguided ideological argument about national identity. They want to shake the foundations of our nation for no practical benefit to Australian citizens. Centralists ignore the benefits of competitive federalism and of local decision-making. They blame federalism for the maladministration of bad State governments. Heated public discussions also arise about issues like bills of rights, constitutional recognition of Indigenous Australians, and the constitutional position of local government.

There is a long tradition of robust debate over proposed constitutional amendments in this country. But Australians are inherently conservative and resistant to that change. As we know, of 44 referenda that have been put to the Australian public, only eight have been successful since federation.

But constitutional conservatives cannot afford to be complacent. It is important that we understand the ways in which the state of debate in Australia is evolving and I want this to be the theme of my speech tonight. The goalposts are shifting and the players themselves are changing.

In particular, the role of business in political debate has radically changed and diminished in recent years. There is a growing trend of businesses rather zealously participating in social and political debates on issues which have absolutely nothing to do with their chosen industry. These companies are using company funds and brand equity in pursuit of pet political social causes. Some businesses are now acting in the manner of special interest activist groups. For the management of these companies, commercial interests and the interest of shareholders are indeed becoming secondary considerations – that's if they're considered at all.

The most well-publicised example of this kind of corporate activism in recent times was the support by Qantas of the same-sex marriage 'Yes' campaign. Regardless of your view on that topic, this was a multi-billion dollar publicly listed company throwing its weight and its shareholders' wealth behind one side of a debate it had no business getting into. This is not an argument about free speech. There's nothing wrong with Alan Joyce voicing his personal opinion on same-sex marriage. But imagine if Virgin had come out and adopted the opposite position? I suspect people would have boycotted the airline.

What is wrong with using considerable brand equity and resources of Australia's flag-carrying airline and other businesses with those significant brands is that it influences a national debate which has dramatic outcomes. It is an ideological indulgence.

Management engaging in corporate activism is only half the problem. Perhaps even more concerning is the retaliation against business who don't take a particular side in relation to a certain debate. And this is where the power of social media is really in play. Last year, a video was released by the Bible Society featuring Andrew Hastie and Tim Wilson drinking Coopers beer

while having a cordial discussion about same-sex marriage. Coopers, which took no part in the creation of the video, was consequently slammed by activists who found the idea of mere discussion offensive. It was an issue beyond debate they claimed, and these people then set out to destroy the company. The boycott movement saw Coopers be removed from taps around the country and, under pressure after doing absolutely nothing wrong, Coopers was forced into a public apology and into supporting the 'Yes' campaign.

The prevailing mentality of activists is that if you don't bend to their will then you don't deserve to exist. Forget the blood sweat and tears that went into the creation of that particular business; forget the staff whose jobs are put at risk; forget the mum and dad investors. All that seems to matter to activists is the advancement of their cause in compliance with their own infallible opinion.

This sinister and arrogant brand of politics is not confined to the same-sex marriage debate, as we well know. We constantly see pressure heaped on businesses to observe all manner of ideological fetishes. All of us at university experience these sorts of debates, and in an environment where there is a contest of ideas among young minds, that's accepted. And it's a welcome development in society that there is a contest of ideas amongst young people. But this has now infiltrated its way into boards of publicly listed companies and that is a very bad development.

Activist shareholders and investment funds are increasingly targeting many companies, including Woolworths, Commonwealth Bank, and BHP, with their goal being to pressure businesses into policy changes on issues like climate change or in some cases to force board resignations.

Some universities, including Queensland University of Technology only a kilometre from here, have buckled under pressure from protest groups and agreed to divest from fossil fuels. In my own portfolio, activist groups attempt to use boycott movements to cripple a day-to-day operation of Australia's regional processing and detention centres. Organizations like GetUp! aggressively target businesses that provide services in support of 'Operation Sovereign Borders' and many other aspects of business, particularly in the resource sector in this country. Companies are worried about impacts at Annual General Meetings from shareholder activist groups that are influencing the outcome of investment decisions within these publicly listed companies.

The difficulty is that many of these companies have now withdrawn completely from any discussion about economic or industrial relations policy in this country. No company is out there at the moment flying the flag on business tax cuts and very few companies are talking about the need for industrial relations reform in the twenty-first century in our country. It's not good for public debate at all.

Economic reform becomes much harder if the government is left as a lone voice in any argument. It becomes much harder to win the political fight when activist groups affiliated with their opponents dominate the airwaves and dominate social media. As a result, governments pursuing reform agendas are now often left twisting in the wind. When the business community is more comfortable pursuing pet political issues than it is standing up for its shareholders, something has gone terribly wrong. And when Australian businesses are routinely bullied into supporting ideological positions, we have a big problem.

It's not just corporate activism that's a problem with today's debate. It's becoming increasingly hard for anyone to speak frankly and confront issues of real significance for our society. It's an attitude which goes against the Australian value of frank and fearless expression of opinion. Taking offense has become weaponized to the great detriment of the Australian community, and when it becomes impossible to talk about issues as important as the rates of violence and sexual assault in some indigenous communities, how can policymakers protect vulnerable children? It's unacceptable that, in 2018, a child could be sexually assaulted in an indigenous community tonight and yet for cultural reasons, people say that that child shouldn't be removed from that community. It wouldn't be tolerated in any of the streets in which we live from one end of our country to the other.

One of the worst perpetrators of this brand of dangerous political correctness is the Victorian Government, one of my favourites. The Victorian Government has a problem with people of Sudanese background who are involved in gang violence in Melbourne. The problem is that you can't refer to these people as Sudanese gang members. If you're from a Sudanese background and you're involved in a gang, you can't be referred to as a Sudanese gang member.

I've been on this issue since January 2018 when people were being followed home from restaurants and having their houses broken into and their cars stolen. People even as late as this week have been attacked by Sudanese gang members in Victoria. Small businesses have been trashed and robbed, and yet the Victorian Premier refuses to acknowledge the fact that these people exist, or that these crimes have been committed, or that victims have been suffering at the hands of these criminals. I'm told recently by the Victorian Equal Opportunity and

Human Rights Commissioner that there's been a significant increase in complaints to the Commission this year because of my comments in January that these crime gangs existed.

You can point to many examples of this around the country. The point I am making is that there are many distinguished Australians in this room and beyond that need to speak up. There are many conservatives across the country who find themselves in a difficult predicament, who are worried about the public backlash, particularly if they're on public boards or if they're in positions of responsibility otherwise. This is a dangerous point in our history. We can't allow it to continue. I'd be naive to say that this kind of political correct madness and belligerent social activism will be isolated to one cause or another. There is a bigger issue and a bigger movement at play here and we need to rise up against it because if we don't, we have true threats to our freedom of speech in this country. If you hear this cry tonight, we need to speak up against it. We need to deal truthfully with the problems that we have as a country and if we do that, we have a particularly bright future as one of the greatest countries in the world.

PROBLEMS WITH A PLEBISCITE FOR A REPUBLIC

THE HONOURABLE TONY ABBOTT, MP

To constitutional conservatives, plebiscites are an aberration, even an abomination. To me they're sometimes a way to resolve really big questions that do not require constitutional change. But I do agree that plebiscites are completely toxic for anything that can only be resolved by the people at a referendum.

There have been three plebiscites in our history. The first two were during the Great War seeking public approval for conscription for overseas service. The Commonwealth had the capacity to conscript under the defence power, and had done so for military service within Australia. However, Prime Minister Billy Hughes twice took it to the people at a plebiscite, because of the gravity of forcing people into combat, and because he lacked a clear parliamentary majority to pass legislation.

The third plebiscite, a postal one as you know, was last year on same-sex marriage, arising from a decision that I made as prime minister. The High Court had earlier held that the *Constitution* gave the parliament power to change the traditional definition of marriage; but given the parliament's previous opposition to it, divisions in the Liberal-National parliamentary ranks, and the seriousness of the subject, I thought that the best way to resolve this was via the people.

It may make sense to put very serious and deeply personal matters to the people at a plebiscite; but it's altogether different to put a question to the people at a plebiscite, if it would then have to go back to the people again at a referendum. This is the difference between plebiscites that decide, and plebiscites that discredit. Why ask the people twice? Why double the cost of

resolving the matter? But most of all, why hold a glorified opinion poll on something that could only be resolved by the people voting subsequently on a specific proposal to change the *Constitution* – when the plebiscite could delegitimise the *Constitution* we have, without putting anything in its place?

There are many reasons to vote against a Shorten government at next year's election. A Shorten government would mean even more spending, even more taxing, and even more expensive-and-unreliable wind and solar power. As well, any Shorten government would spend vast amounts of time and money, not on improving people's lives, but on trying to turn the country into a republic; even though there's nothing currently wrong with Australia that becoming a republic would fix. A republic wouldn't make us more independent, it wouldn't give us a stronger identity and it certainly wouldn't do anything for jobs and growth. Rather, it would provide endless distraction from the policy reforms that might actually be change for the better.

If Labor wins, it's a near certainty that Australia will have a fourth plebiscite: this time to gain agreement for the idea of a republic before doing the hard work of winning support for any particular form of republic. In a speech to the Australian Republican Movement's annual dinner in July last year, Opposition Leader Bill Shorten said that 'by the end of our first term, we will put a simple straightforward question to the people of Australia: Do you support an Australian Republic with an Australian Head of State? And if the yes vote prevails', he said, 'then, we can move on in a second term, to discussing how that Head of State is chosen'.

This is the ultimate cop out because there are lots of different types of republic. There's a republic with a president appointed by the government; a republic with a president

appointed by the parliament; and a republic with a president elected by the people.

Even with the same nominal powers, how the president gains office would critically determine how much authority he or she has and how much of a rival the president would be to the prime minister.

And when it comes to powers, there are entirely ceremonial presidents; ceremonial presidents with a significant role in a crisis; presidents that run foreign policy leaving domestic policy largely to a prime minister; and executive presidents that run the government rather like an elected version of an eighteenth century monarch. Unless you don't care about the detail – you just want a republic, and any republic will do – it's impossible to say whether you're in favour of one, until you've seen the specific proposal.

Then there's the question of an Australian 'Head of State', a term that's not found anywhere in the *Constitution* itself, which refers merely to the Queen and to the Governor-General who exercises all Her powers. In a 1907 case, the High Court described the Governor-General as the 'Constitutional Head of the Commonwealth' and the State Governor as the 'Constitutional Head of the State'.[1] Some editions of the Commonwealth Government Directory have referred to the Governor-General as the 'Head of State in whom the Executive Power of the Commonwealth is vested'. Prime Ministers including Kevin Rudd and Malcolm Turnbull, at different times, have described the Governor-General as our 'Head of State'.

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1 *The King v The Governor of the State of South Australia* (1907) 4 CLR 1497, 1510-1513.

Then there's the issue of what constitutes a republic. John Howard often referred to Australia as a 'crowned republic'. Howard, of course, was a fierce opponent of the 1999 republican referendum. Even so, someone who believed that the Governor-General was our 'Head of State', like Malcolm Turnbull – and who believed that we are already a crowned republic, like John Howard – could conceivably vote yes to Shorten's question, but without in any way supporting Shorten's real objective, which is to remove the crown from our *Constitution*. In other words, Shorten is posing a trick question to prejudge the real issue, which is whether to support whatever republic is the one on offer.

Now one of the reasons why the previous 1999 republican referendum failed was because it wasn't just supporters of the crown that voted against it. Some people who wanted an elected president and some people who wanted an executive president voted against the proposal for a president with the Governor-General's powers but appointed by a two-thirds majority of the parliament. But even this would have been a significant change to our present system of government because a president with a bigger parliamentary mandate than the prime minister is unlikely to be as politically self-effacing as Governors-General representing the crown, removable by the Queen on the advice of the prime minister.

Shorten is correct that 'a lot of people voted no because of the model, not because of the republic' but it is dead wrong to say that we 'were given one vote to settle two questions'. The question is not whether we support the idea of a republic but whether we are prepared to support any particular type of republic. No serious person could decide whether to support a republic without knowing what sort of a republic it would be.

That would be as silly as agreeing to get married before you knew your potential spouse.

Still, posing a loaded question implying that our existing system is not wholly Australian, even though all the Queen's powers are exercisable by the Governor-General, and even though the *Constitution* can't be changed except by the Australian people, could gull a majority of the public into voting yes on patriotic grounds, even though that would undermine our *Constitution*, without improving it. It would be an exercise in constitutional vandalism. It would be putting a wrecking ball through our *Constitution* before a replacement is agreed upon.

For me with same-sex marriage, a plebiscite before change was a way to respect something that had stood since time immemorial. For Shorten with a republic, a plebiscite before change is a way to prejudge something that's yet to be determined.

Shorten and his republican allies should do the hard work of deciding what type of republic they think could improve our system of government and might gain popular support and then seek to put that to the people at a referendum. Only then, would it be a fair choice: between the system of government we have, and that has served us well for over a century, versus a specific alternative without the crown, where Queen Elizabeth II and the young royals would be just foreign celebrities, rather than a living link to one of the oldest institutions of Western civilisation.

Quite apart from people's views on the merits of Australia becoming a republic, there's a fundamental problem with Shorten's proposal for bringing it about. He's putting the cart before the horse, seeking to gain approval for an end without any agreement on the means for making it happen. It's a sneaky,

devious, tendentious ploy that should be opposed by everyone concerned to protect constitutional due process, regardless of where they stand on the substantive issue.

I'm very pleased to say that in two recent interviews, Attorney-General Christian Porter has described the Shorten plebiscite option, of an 'opinion poll' first and 'then sort out the details later', as 'stupid', 'dishonest' and 'dumb'. It was like 'saying to people you must decide right now whether or not you're going to move house and I'll tell you later where you're going to live' and it should have had much more scrutiny. Indeed, this bears repeating; again and again.

But there are many Shorten proposals that should have had more scrutiny: the proposal to remove negative gearing from residential property investments that would impact on housing values and the rental market; the hit on retirees' income through the removal of dividend imputation credits; the impact on long-term economic growth of higher company tax rates; the effect on productivity of the abolition of the construction industry watchdog; the possible strike wave from removing the Fair Work Commission's powers on essential services; and the impact of tripling unreliable and expensive wind and solar power; let alone the weakening of border protection when Labor MPs think sovereignty should be vest in supranational agencies.

It was Paul Keating who said that when you change the government, you change the country. People don't yet appreciate the scale of the change that could come. Bill Shorten doesn't just want to change the government; he wants to change the system of government. This needs far more consideration now, before the election; not afterwards, when it may be too late.

AN AUSTRALIAN REPUBLIC? MORE THAN A WASTE OF TIME AND MONEY: A SIGNIFICANT OBSTACLE TO SERIOUSLY NEEDED CONSTITUTIONAL REFORM

DAVID FLINT, AM

My subject today is that an Australian republic is more than a waste of time and money: it is a significant obstacle to constitutional reform. I look at this question in three parts. First, I examine some weaknesses of the *Constitution*. Second, I examine some fake proposals for constitutional change. Third, I suggest a real proposal for constitutional change.

I WEAKNESSES OF THE CONSTITUTION

The adoption of our superb *Constitution* was an extraordinary achievement. As those great Australians, Sir John Quick and Sir Robert Garren, wrote:

> Never before have a group of self-governing, practically independent communities, without external pressure or foreign complications of any kind, deliberately chosen of their own free will to put aside their provincial jealousies and come together as one people, from a simple intellectual and sentimental conviction of the folly of disunion and the advantages of nationhood. The States of America, of Switzerland, of Germany, were drawn together under the shadows of war. Even the Canadian provinces were forced to unite by the neighbourhood of a great foreign power. But the Australian Commonwealth, the fifth great Federation of the world, came into voluntary being through a deep conviction of national unity. We may

> well be proud of the statesmen who constructed a Constitution which, whatever may be its faults and its shortcomings, has proved acceptable to a large majority of the people of five great communities scattered over a continent; and proud of a people who, without the compulsion of war or the fear of conquest, have succeeded in agreeing upon the terms of a binding and indissoluble Social Compact.[1]

We should never forget that after the people took over the process to make our nation from the politicians under the Corowa Plan, this was completed in less than four years, including two referendums and putting the *Constitution* through Westminster, all without air travel and the internet. The New South Wales Government cannot today lay a simple tram track through George Street, Sydney in that time.

Although ours is truly a superb constitution, however, it has weaknesses which demand reform. I set out these six weaknesses below. Most of these weaknesses are unknown to Australians as they are distracted by various proposals for false reforms such as the endless search for some politicians' republic. The one area which is working and has no need for reform is the Australian Crown.

The first weakness is that only federal politicians can initiate constitutional change. The founders curiously ignored Alexander Hamilton's warning not to leave the initiative to amend only with those who have a conflict of interest, that is the federal politicians.[2]

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1 Sir John Quick and Sir Robert Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 225.

2 *The Federalist Papers*, No. 85.

The second weakness is that the judges enjoy an absolute unreviewable power to interpret the *Constitution*. Despite Hamilton's belief that the judiciary would be the weakest of the three branches,[3] the Supreme Court of the United States seized an untrammelled power to interpret the *Constitution* and to invalidate legislation it concluded to be inconsistent with its provisions.[4]

Our founders were surely aware of the second occasion when the Supreme Court declared legislation to be invalid. This was the decision in *Dred Scott v Sandford*[5] that slavery was constitutionally protected and that slaves nor the descendants of slaves could not become citizens nor have standing to sue in the courts. Dredd Scott is seen by many as a significant contributing cause of the Civil War. Presumably, the founders would have also been aware of the suspicion of the Swiss concerning judicial interpretation demonstrated by the provision in the present Swiss

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3 'The Executive not only dispenses the honours but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments'.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power. 'The Federalist Papers': No. 78.

4 *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803).

5 60 US. (19 How.) 393 (1857).

Constitution denying the Supreme Court the power to interpret the *Constitution*.[6]

Although the Colonial Secretary Joseph Chamberlain required the Premiers to include provision for some appeals to the Privy Council,[7] it is surprising the founders did not make provision to ensure the High Court did not become a tool of centralism. For example, the power to make appointments could have been rotated among the States, the judges could have been appointed for a term, and interpretations could have been susceptible to review by referendums initiated by, say, the States, the Senate or by the citizenry.

The third weakness is that the States are not guaranteed the right to raise their own revenue, nor are they required to do this. The founders ignored Hamilton's warning that: 'In a federation, the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants'.[8] Consequently, the power to make conditional grants to the States under section 96 of the *Constitution* should have had a very limited life. Instead it was for ten years 'until the Parliament otherwise provides'. Experience has shown that it is in no party's political interest to terminate such a powerful tool to control the States.

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6 In the current iteration, *Federal Constitution of the Swiss Confederation* of 18 April 1999 (Status as of 1 January 2018), Article 189(4): Acts of the Federal Assembly or the Federal Council may not be challenged in the Federal Supreme Court. Exceptions may be provided for by law.

7 Quick and Garran, above n 1, 228-249.

8 *The Federalist Papers*, No.33.

The fourth weakness is that it is too difficult to form new states from existing states, such as New England or North Queensland. This is because any such proposals must be approved by the politicians in the existing state, who to keep their powers, are invariably hostile.[9] In Switzerland it is the people of the existing state and not the politicians who must approve. Among comparable countries Australia has fewer states than most.[10]

The fifth weakness is that the electoral system is excessively centralised and under the control of the federal politicians. Unlike the United States of America, any defect in the system will be made uniform across the country. So if the system is changed and as a consequence is more open to fraud, that will extend across the nation, rather than being limited to one state and thus exposed to the public.

The sixth weakness is that the system of representative democracy has been weakened not so much by the emergence of the two-party system, but by the fact that the principal parties themselves can be and have been captured by cabals of powerbrokers. Consequently, members and supporters of the parties have been rendered impotent; they become disillusioned and leave. In most comparable democracies, rank and file involvement in the choice of candidates and of the leader is normal. It is not an exaggeration to say that in Australia, representative democracy has been captured by cabals of powerbrokers and even lobbyists to a degree unknown in most comparable countries.

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9 *Constitution*, s 124.

10 For example, Germany has 16, Canada has 10, Switzerland has 26 and the United States of America has 50.

In discussions associated with the 1891 Constitutional Convention, the South Australian Premier Charles Kingston raised a proposal which would have blocked this development through the introduction of citizen-initiated referendums. He was dissuaded from formally raising this by Alfred Deakin on the ground that responsible government would ensure the requisite control over government.[11]

Just as a free enterprise economy can be captured by monopolists, so a representative democracy can be captured by parties controlled by cabals of powerbrokers. That sadly is the situation in Australia today.

Apologists for the present situation in Australia almost invariably quote Edmund Burke to defend representative democracy. This was where he famously declared that: 'Your representative owes you, not his industry only, but judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion'.[12]

However, they usually ignore what follows when he rails against the controls which are commonplace in Australia's major political parties:

> But authoritative instructions; mandates issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience,-- these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution.

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11 David Flint and Jai Martinkovits, *Give Us Back Our Country* (Connor Court, 2nd ed, 2014) 274, 320-321, 346, 352-353.

12 Edmund Burke, *Speech to the electors of Bristol*, 3 November 1774.

What would Burke say about the choregraphed theatre which Canberra dares call question time, where the questions, at least half of the answers and the choice of speakers are determined in advance by the party whips?

The consequence of these various weaknesses has been an undermining of fundamental federal principles. About 80 per cent of taxes are collected by the federal government, about half handed to the State governments much of which is subject to instructions on how to spend it, which is a violation of the fundamental principles of federalism, namely that the individual states should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. [13] This leads to an enormous amount of waste and duplication and excessive regulation.

Then there is the deleterious impact on the quality of government exacerbated by the capture of representative democracy. I frequently make this challenge, and I have found few argue against it. This is that it is difficult to identify a significant problem affecting Australia today which, if it has not been caused by the politicians, has been made worse by them.

One corollary is akin to the result you could have if there were two drivers in a car. The car would be undriveable and someone else could take over. Education is a leading example. Vast sums are poured in, more than in countries performing better in international tests measuring literacy and numeracy.

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13 *The Federalist Papers*, No. 85.

II FAKE PROPOSALS FOR CONSTITUTIONAL CHANGE

The *Constitution* is a compact about the formation of and the governance of the Commonwealth. It is self-evident that the only reason to change the *Constitution* is to improve, significantly, the governance of Australia. Accordingly, any proposal which is not on the face of it a proposal to improve, significantly, the governance of Australia is not a genuine proposal to change the *Constitution*. I call that a fake proposal.

There have been many calls for Australia to become a republic over the years, which I address below. But not one of the major proposals over the years to remove the Crown has been to improve the governance of Australia. They have been fake proposals.

A *White Republic*

A republican movement emerged in the nineteenth century in opposition to Chinese immigration during the Gold Rush. Because the Imperial authorities were particularly liberal in relation to immigration, this movement was formed to establish an exclusively white Australian republic.

When it became obvious that with federation, the power with respect to immigration would devolve onto the federal authorities, interest in republicanism waned, so much so that no republican proposal was made at the federation convention of 1891 or the mainly elected convention of 189798.

B *Communist Republic*

Another republican movement aimed to establish in Australia a Soviet Socialist Republic. This began with the International

Workers of the World which developed into the Communist Party of Australia, established in 1920. Except for winning a seat a Queensland election, the party made no electoral impact.[14] However it did make an impact among the unions, becoming a dominant force in key strategic unions. The party was widely believed to have gained power in unions through often fraudulent elections and also of acting as an agent of the USSR.[15]

With the invasion of Czechoslovakia and the collapse of the USSR, the party has declined and split, with all of its successors remaining committed to Australia becoming a socialist or communist republic.

C *Politicians' Republic*

The most important and influential republican movement was championed by Paul Keating and Malcolm Turnbull in the 1990s. It did not draw from the world's most successful republics, but rather attempted to graft what Australians for Constitutional Monarchy ('ACM') called with devastating effect a 'politicians' republic'. The proposal did not bear any relationship to, nor draw anything from the two most successful republics in the modern world, the United States of America and the Swiss Confederation. I would argue that it did not propose Australia become a real republic.

In its final form, the proposal gave a sinister power to the politicians and especially to the Prime Minister. ACM argued that it would have removed the constitutional controls that the Crown provides under the *Constitution*. This is summarised in

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14 Fred Paterson was member for Bowen from 1944 to 1949.

15 Michael Aarons, *The Family File* (Black Inc, 2010).

the old adage that the Crown is important not so much for the power it wields, but rather the power it denies others.

The extraordinary feature of the politician's republic was that it would have been the only republic in the world in which it would have been easier for the Prime Minister to dismiss the President than their cook! Under the *Constitution Alteration (Establishment of Republic) Bill 1999*, the Prime Minister could dismiss the president without notice, without grounds and without any right of appeal under which the President could be restored to office.

When Ted Mack (who was an independent politician and a real republican) and I debated against Malcolm Turnbull and another republican at Corowa in 1999, I raised this issue in a separate conversation with Ted Mack. I said to him that I had difficulty in making the Australian Republican Movement understand that their model endowed the Prime Minister with excessive and dangerous powers which were inimical to a parliamentary democracy. He replied: 'They understand. That is exactly what they want'.

ACM took the view that the attention of the people should be drawn to this. We argued that the question should not only indicate how the president would be elected, but also how he could be dismissed. Just before we appeared before the Parliamentary committee to argue this, Kerry Jones, David Elliott and I saw Malcolm Turnbull leaving, looking worried and followed by hordes of journalists. We learned later that he had also proposed the question be changed. He wanted two words deleted. One was 'president' the other, believe it or not, was 'republic'.

ACM argued that this republic would have been a dangerous departure from constitutional principles. But it was

supported by over two thirds of sitting politicians (with most of the others maintaining their silence), by most of the mainstream media to the extent that they vigorously campaigned for a 'Yes' vote, by vast numbers of celebrities and by other elites and even by some experts who had criticised its weaknesses and failings.

The referendum was defeated in what in electoral terms was a landslide. The 'No' vote nationally was 54.87 per cent with the referendum defeated in every State and 72 per cent of electorates. The Australian Capital Territory voted 'Yes'. If those who did not vote and those who voted informally are added to the 'No' vote, it can be argued that 57.45 per cent of the electorate were happy with our crowned republic.

D *Covert Republic*

The current republican movement either doesn't know what sort of republic it wants, or it is keeping its preferred model a secret. It is as though current republicans are marching down the street chanting: 'We want a republic! But we haven't the foggiest idea what sort of Republic we want!'

The proponents demonstrate an extraordinarily cavalier and irresponsible attitude to constitutional change, seriously proposing a vote of no confidence in a key institution in the *Constitution* without specifying what the change should be. Not only is this a fake proposal, it is a fake process.

Under their proposal for a covert republic, republicans are suggesting two plebiscites. The first plebiscite will invite a vote of no confidence in the existing system without proposing what should replace it. This will disenfranchise Tasmanians, Queenslanders, South Australians and Western Australians by flouting the constitutional rule that decisions not be made only

by the most populous States. It will probably be by post and taken without proper precautions.

The second plebiscite will require the people indicate which of a select group of republics they want, without any detail and without being able to choose the existing system. It will be even more problematic than the first plebiscite. If passed, a claim which cannot be trusted, a convention may then follow, probably appointed, to settle the details.

This will be presumably followed by a referendum. There won't be much change out of a billion dollars.

This process differs from an Australian constitutional referendum, which is the correct way to change the *Constitution*. Under a referendum, the details are on the table in the form of a bill before the people vote. A plebiscite is a blank cheque. If signed, the details will be filled in after the vote. All the voters see in a plebiscite is a question. If the vote is favourable, the details are delivered afterwards.

A plebiscite was used in France to change the constitution between 1879 and 1870 on nine occasions, all under authoritarian governments.[16] Only four of these attracted a 'Yes' vote of less than 99 per cent. Of these, three were over 90 per cent, except the 1870 referendum to liberalise Napoleon III's regime which attracted a 'Yes' vote of 82.7 per cent.

A recent example of a plebiscite was the Québec secession plebiscite. The question was:

> Do you agree that Québec should become sovereign, after having made a formal offer to Canada for a new

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[16] These were under the revolutionary First Republic and during the reigns of the Emperors Napoleon I and Napoleon III. Some did refer to documents actually before the legislature.

> economic and political partnership, within the scope of the bill respecting the future of Québec and the agreement signed on 12 June 1995?[17]

It is not surprising that the exit polls revealed that many people who voted in favour of the proposal, by voting 'Yes' thought they were voting to stay in Canada. They would have been counted as voting for secession. To the credit of the Québécois, they voted 'No' but only by a hair's breadth.

Now republicans are proposing to use this process in Australia, contrary to the *Constitution*. It is not as if the question has not been fully examined mainly at the taxpayers' expense. To date there have been twelve major votes and inquiries on how to turn Australia into a republic.[18]

III PROPOSALS FOR REAL CONSTITUTIONAL CHANGE

There remains a need for real constitutional change. The politicians, with the connivance of activist judges, have trashed the *Constitution*, turning us into the most fiscally centralised state among comparable countries.

Not only that, the parties have captured our representative democracy. The result is that standards have fallen dramatically. There is no significant problem in Australia today which, if it

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17 David Flint, *The Cane Toad Republic* (Wakefield Press, 1999) 154-156.

18 Republic Advisory Committee, 1993; *Plebiscite for an Australian Republic Bill 1997;* Convention Election 1997; Constitutional Convention, 1998; Referendum, 1999; Corowa Conference, 2001; *Republic (Consultation of the People) Bill 2001*; Senate Inquiry: Road to a Republic Report, 2004; *Plebiscite for an Australian Republic Bill 2008*; 2020 Summit, 2009; Senate Finance and Public Administration Report, 2009*; Plebiscite for an Australian Republic Bill 2010*.

weren't created by the politicians, has been significantly exacerbated by them.

In my view the only solution is to do what we did to federate this country. Federation was taken out of the hands of politicians under the Corowa Plan and placed in the hands of a mainly directly elected convention, whose conclusions were put to the people and not the politicians for decision.

The task of a convention today would be to make proposals which would significantly improve the governance of this country. The aim would be to make the politicians accountable to the people and not just in confected elections every three or four years. The politicians have to be made accountable in the same as everybody in employment, in business or in practice is made accountable. Only then could we see and entrench a significant improvement in the governance of our country.

CROWN OR REPUBLIC: THERE IS NO *VIA MEDIA*

GRAY CONNOLLY

Reasonable people may differ on the issue of whether Australia should remain as a constitutional monarchy or whether Australia should become a republic.

It is my view that any move by the Australian people to a republican form of government would require enormous and unsafe alteration of our *Constitution*, such that a wholly new organic law would be the only safe alternative.

Good people may and will differ on the merits of monarchies and republics in themselves, and which one is appropriate for Australia.

The American republic offers a model of a classical republic, with separations of powers and of all bodies, with the executive and the legislature as strangers, often hostile ones. The American model has its strengths and weaknesses, though sadly, what was, originally, a good constitution was made better, especially with respect to extinguishing slavery, only after a bloody civil war. The influence of the American founders on the Australian founders was a profound one, not least the brilliant Alexander Hamilton and James Madison.[1]

As to the various other republics, there is the French Republic – as someone with Gaullist sympathies, I am partial to the Fifth Republic myself. It offers a strong president and cabinet

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1 Nicholas Aroney, *The Constitution of a Federal Commonwealth* (Cambridge University Press, 2009) at 74-76, 105-107.

system, often with some bipartisanship, as well as a strong parliamentary democracy.

The Irish, German, and Swiss models may also offer ideas albeit these are dull and uninspiring.

As a personal aside, when Australians voted on a republic in 1999, I was preparing to deploy as a young naval officer to East Timor - and Lieutenant Connolly dutifully voted 'No'. Indeed, I was not alone. As one Vietnam veteran in our draft said of his 'No' vote – and I have cleaned up this language for polite company – 'Just remember, if these [people] can do this to the Queen, they can do this to any of us!'.

As was the case in 1999, so is the case now: I have no idea what is proposed for Australia's republic other than populist, unserious pablum. My purpose here is to set out why any move to a republic would pose an enormous threat to our *Constitution*.

I PROVISIONS REQUIRING AMENDMENT

The central characteristic of the *Australian Constitution* is the predominance of the Crown in every aspect of governmental powers.[2] To amend the *Australian Constitution* to create a republic would, at the very least, require the altering of the following key provisions.

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2 W A Wynes, *Legislative, Executive and Judicial Powers in Australia*, (Law Book Co of Australasia, 1962) 89.

A *The Preamble*

The Commonwealth of Australia is, literally, constituted via these words and the *Constitution* that 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.

On any view, this preamble would have to change and a new sovereign authority found to replace the Crown. What would this new preamble read like? Also, would Australians still rely humbly on Almighty God? Will we be asked to vote God out of the *Constitution*? Will a more Jacobin approach be taken?

B *Chapter II of the Constitution*

Chapter II of the *Constitution* sets out the Executive Power of the Commonwealth – and it will all have to be significantly amended, or, more likely, replaced in its entirety.

Section 61 vests, explicitly, the Executive Power of the Commonwealth in the Sovereign, to be exercised by the Governor-General as the Queen's representative. The *Constitution's* vesting of executive power in the Crown means that, along with that power, we derive from the Crown's existence, also, our day-to-day Westminster governing norms of responsible government and, in a crisis, the reserve powers of the Crown. In any parliamentary crisis, such as in 1932 or 1975, it is the Governor-General's duty to ensure that the *Constitution* is maintained and the laws enforced, and, especially, to ensure

that the Australian people decide through elections how a situation of government illegality or deadlock is to be resolved (hence the Governor-General's powers per section 5 to dissolve the House for fresh elections and per section 64 to appoint and dismiss the ministry).[3]

If the Crown is abolished, so too are its received understandings of how executive power is exercised. Inevitably any republic will create a vacuum in the exercise of executive power – and it cannot be filled by a jurisprudence of 'cut and paste/replace with a president' republicanism.

The fundamental problem will be one of mandates, both, in terms of each of the new republican president and republican prime minister, as well as the inevitable competition that will arise between them.

Any president – regardless of whether she or he is elected by, say, members of the Parliament or directly by the people – will have an electoral mandate that no Governor-General, as the representative of the Monarch, can ever have, or seek to assert, as against the Prime Minister of the day.

It would be only human for an elected president with a national mandate, to assert – indeed, it would be Herculean to not assert – that you should have a role larger than that of any Governor-General. This would be true of even the most humble of presidential aspirants. And even then, the temptations of executive power would be great, indeed.

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[3] See Keven Booker et al, *Federal Constitutional Law* (2nd Ed), (Butterworths, Sydney, 1988) at [7.44] and George Williams et al, *Australian Constitutional Law and Theory: Commentary and Materials* (6th Ed) (Federation Press, Leichardt, 2014) at [10.15]–[10.17].

There is no safe replacement, either, of the Governor-General, by a president who is appointed by the Prime Minister of the day – and thus has no security of tenure. Chapter II was drafted and operates on the basis that the Governor-General was, and is, the Monarch's representative and, on those royal and constitutional terms, would exercise the executive power on advice of the elected government of the day. It would be a dead letter if its exercise hinged on likely dismissal by the Prime Minister of the day, rather than by the Monarch.

Chapter II cannot, now, after 117 years, be tamed or warped into a republican provision.

Instead, any republic would require wholly new provisions setting out what the republican president may or may not do in explicit terms, especially if that republican president is to 'cohabit' with a republican Prime Minister who already enjoys the confidence of the House of Representatives. The potential for frequent conflict between these two executive office holders – who both have their own national mandates – is obvious, as is the scale of the chaos that could well ensue if they are deadlocked.

C *Section 5 of the Constitution*

Section 5 allows the Governor-General to prorogue the Parliament and, where necessary, to dissolve the House of Representatives. The exercise of this power now is, almost always, only done on the advice of the Prime Minister of the day, to cause a federal election. However, in times of crisis or deadlock, section 5's power may be exercised by the Governor-General to force new elections and ensure the Australian people are the ones to resolve a parliamentary crisis at the ballot box. It is hard to see how any future republican president, possessed of

a national mandate, where faced with an opposing Prime Minister, especially if that Prime Minister was unpopular, could avoid the temptation to dissolve the House and seek new elections that could remove the difficult Prime Minister. Absent the Crown and precedent regulating this power's exercise, one can foresee section 5 enabling the slow accretion of power to the presidential office by the frequent calling of elections for the House to remove opposing prime ministers.

D *Section 68 of the Constitution*

Section 68 sets out the Governor-General as the commander in chief. This command (in chief) proceeds, again, on the centuries-old royal understandings of a Monarch in command of the armed forces, a command exercised by the Crown only on advice of the elected government of the day. In the republic, the issue of who would command in chief the armed forces and on what terms, remains at large. One presumes, perhaps wrongly, that the future president will have some powers of military command, while having, also, this national mandate of either parliamentary or popular vote. One does not know what would happen to the Crown's prerogative power to deploy the armed forces and make war and make peace. Would a resolution of the republican legislature now be required for Australia to deploy its armed forces? Would the republican legislature have some additional provision for cessation of conflicts?

A clearer problem is what would the armed forces be expected to do when a President and the Prime Minister, both with an electoral mandate, disagree on matters of war and peace? What would happen in a time of domestic crisis should the President and Prime Minister disagree on what is to be done to suppress terrorism, riot, disorder, or an insurgency?

One should note here that section 119 obliges the Commonwealth to '...protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence' – and this raises the obvious problem of who decides what the protection of the applicant State may involve. The armed forces cannot be left to guess as to their chain of command and, in the long history of republican collapses, the republic has, not infrequently, been brought to an end by a putsch, or a coup, because of a civil war or economic slump. While such military stirrings against the civil power are anathema to our history and traditions, so, too, is the idea of a republic. If you will the republic, you do also risk the disorder that any republic entails? And you must include safeguards that stabilise rather than destabilise a system made fragile.

E *Section 126 of the Constitution*

Section 126 permits the Monarch to authorise the Governor-General to appoint any person, or any persons jointly or severally, to be deputy or deputies exercising powers. In the republic, who succeeds the republican president? Do we have a vice president? How is the president to be impeached or removed? What then?

F *The States*

What is to be done with the States, noting sections 106, 107, 108, and 118? Each Australian State has their own Royal Governor, each has their own state constitutional foundation and relationship to the Monarch. Any federal move to a republic is not necessarily binding on the State Crown: each State and their people have a Governor and a State Parliament. The potential position of Royal States attempting to exist within a national

republic is the stuff of constitutional minefields. (One should note that Western Australia has, already, a history of secessionism under the Crown.[4])

G *Provisions relating to qualifications*

The above are just some of the major provisions that will require amendments. Others, such as sections 16, 34 and 44(i), dealing with the constitutional qualifications of Senators and House members will have to be amended, entirely, as the concept of a 'subject of the Queen' will be rendered nugatory by the republic. Moreover, there can be little doubt, following on from the recent parliamentary citizenship debacles, that proposals will be made that persons with dual citizenship should be eligible for election to the House and Senate and, presumably, to then hold ministerial office. One awaits the referendum that asks Australians to agree to risk having dual citizens hold the offices of Prime Minister, Treasurer, Attorney-General, Home Affairs, Defence, National Security, and Foreign Affairs.

II THE REFERENDUM

Assuming, though, that all of these (and, no doubt, other) necessary republican alterations can, somehow, be agreed upon by constitutional conventions and by the parliament, then the republic would still need to be approved by the Australian people in a way that satisfies section 128's 'double majority'

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4 Western Australia held a referendum on the issue of that State seceding from the Commonwealth of Australia on 8 April 1933. The referendum question succeeded but was of no legal effect. See Thomas Musgrave, 'The Western Australian Secessionist Movement' (2003) 3 *Macquarie Law Journal* 95.

requirement: the republic would need to be supported both by (a) a national majority of all electors and (b) a majority of the electors in a majority of the States. Over the past 117 years of the Australian Commonwealth, the Australian people have passed only 8 of the 44 referenda proposed, with the most recent 1999 referendum on an Australian republic being defeated in all States and succeeding only in the Australian Capital Territory. This history is not encouraging for major changes of the kind that will have to be proposed by the domestic republican movement.

III SOME OBSERVATIONS

The rule of law, once lost, is extraordinarily hard to re-establish. The grisly fate of the Kerensky and Weimar republics – attempted as they were in the former and ancient monarchical states of Russia and Germany, respectively – should always be upper most in anyone's mind. So, also, should be the example of the British constitutional monarchies weathering, infinitely better, the twentieth century's storms and stresses of two world wars and a great depression, and without any shift away from constitutionalism to authoritarianism.

For over 117 years, the *Australian Constitution* has survived wars, depressions, cold wars, hung parliaments, numerous innumerate and ethically dubious governments, as well as, frankly, crooked representatives and senators.

Further, for well over a century, tens of millions of people have left their homelands to immigrate to Australia, with the security and stability of our *Constitution* and commitment to the rule of law an unspoken but foundational attraction.

It is said against monarchy that it is undemocratic, remote, and anachronistic. However, in my view, those are among the

Australian Crown's key strengths. A monarch cannot be ejected by the ambitious politicians of the day, many of whom resent that they may aspire only to be ministers of the Crown. The monarchy is a guardian of the *Constitution* and not some proto-dictator eager to dictate to the polity. The monarchy also, frankly, takes any chance for supreme power away.

And, yes, monarchy is irrelevant to our age. Its irrelevancy makes monarchy timeless – as does its utility, practicality, and value as an enduring institution that is beyond the petty politics of the day. The wise reposing by our *Constitution* of the Executive Power in the Crown provides Australia with stability and order in the day-to-day operation of government, an umpire in the case of parliamentary deadlock, as well as a source of military traditions and non-partisan allegiance. The armed forces, police, prosecutors, and other coercive and powerful arms of the state serve the Crown, not the politicians of the day. There is much to be said for such a distinction between the Crown that is served and to which allegiance is owed, and the day-to-day responsiveness of such public servants to the elected government, which changes with elections. One junks such traditions and practices of legality, stability, and good order, only at one's national peril.

Finally, I would add, perhaps quixotically, that Australia's *Constitution* provides in Chapter I for a House composed of members representing the interests of their local electoral divisions and a Senate composed of senators representing the interests of their States. Our *Constitution* does not – and was never intended to – foster an entrenched party system and a permanent political class. It was never intended to provide career tracks (or endless loops) for politicians, staffers, advisors, lobbyists, 'government relations experts', and a host of other vagabonds found in the postcode 2600 swamp.

It was said of the Roman General, Lucius Quinctius Cincinnatus (519BC–430 BC) that, when Rome was threatened he left his small farm, laying down his plough so as to wield his sword in Rome's cause, and that, once Rome had been saved and the danger passed, Cincinnatus gave up power most willingly, to return to his farm, return his sword to its scabbard and plow, once again, his fields.[5]

The story of Cincinnatus was well known to the early American republic. The example of General George Washington surrendering the American presidency after two terms to return to Mount Vernon is, perhaps, the best example of Cincinnatus since the ancients.[6] As King George III noted of his once foe, and now General and President George Washington of the United States of America, Washington's readiness to lay down power made him the 'greatest man in the world'.

Nonetheless, this ancient model of political life and public service as a periodic vocation for serious people, not a career for swamp dwellers must return in our own times if we are to have any hope of improving the standards of our Parliament and our governance. As Montesquieu wrote, 'The deterioration of a government begins almost always by the decay of its principles'.[7]

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5 See the accounts of Florus, *Epitome of Roman History*, Book I, at [11], and Livy, *History of Rome*, Book III, [26]–[29].

6 See Garry Wills, *Cincinnatus: George Washington and the Enlightenment* (DoubleDay, 1984).

7 Charles de Montesquieu, *The Spirit of the Laws* (1748) Book VIII, Chapter 1.

IV CONCLUSION

The republic debate, done properly, is an opportunity for all Australians to rediscover not just our *Constitution*, and the principles on which it is founded, but also defend them against those whose negligence and stupidity will threaten them and the basic law.

As for the rest of my fellow Australians, please remember that these debates will occur in respect of our *Constitution* and, as the ancient maxim found on war memorials across Australia and across the world goes, 'the price of liberty is eternal vigilance'.

It can be said of the Australian *Constitution* that it was drafted by geniuses so that Australia could be governed by fools. The *Constitution* is our fundamental law and, if it unravels, so too will the Australian nation that it, literally, constitutes.

As the Romans would say: 'Caveat'.

SPECIAL ADDRESS

THE STRANGE DEMISE OF THE CONCILIATION AND ARBITRATION POWER

THE HONOURABLE DR CHRISTOPHER JESSUP, QC

In the Constitutional Convention debates of the 1890s, the point of what was to become section 51(xxxv) of the *Constitution* was self-evident: there was a need to provide a means for the settlement of industrial disputes which were beyond the competence of any one State to deal with effectively.[1] Even then, however, George Reid observed presciently that:

> the proposed sub-clause would tend to enlarge the area of trade disputes, for the very reason that the employers or the men might be disposed to extend the area of a dispute, in order to get the advantage of having it settled by the federal tribunal.[2]

Enlarging the dispute might be one thing: creating a dispute where otherwise there would not have been one was to be another matter altogether. It was a stratagem of the latter kind that came to be one of the two defining characteristics of the Australian system of federal industrial regulation in the three generations that followed the passage into law of the *Conciliation and Arbitration Act 1904* (Cth) ('*1904 Act*').

The other defining characteristic, of course, was the judicial procedural setting in which wages and conditions of employment were, from the outset, established. This was the

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1 See Sir John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Butterworths, rev ed, 2015) 769.

2 Ibid 770.

natural, if not the inevitable, consequence of the constitutional and statutory requirement that it be by a process of arbitration that unsettled industrial disputes be resolved. Unsurprisingly, the principled resolution of disputes by judges[3] provided ample scope for the emergence of something like a system of precedent and led to the application of high-level outcomes across broad sectors of the economy. Of itself, such a system was ill-adapted to deal with industrial disputes, which in point of reality did not extend beyond the limits of any one State, much less to address the low-level needs of particular enterprises and those who worked in them.

Over the years, various means were deployed to make the nationally-based award system responsive to the needs of particular industries, occupations and enterprises. Inter-occupational discriminations were the concern of the so-called 'margins for skill', which were originally paid in addition to the basic wage. A third tier of remuneration, as it came to be called, were the over-award payments. In due course, the two award-based tiers were collapsed into a 'total wage', and such discriminations as were inevitably called for as between occupations, industries and enterprises were addressed by making awards of limited coverage. That is to say, the dispute had to extend beyond a single State, but the architecture of any settlement might, and usually did, have a very different appearance. And of course, over-award payments, of their nature an enterprise-based solution, continued to be a feature of the system.

In the result, by the 1980s Australians had become accustomed to a system characterised by a combination of public adjudication and clubby settlements which satisfied neither the

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[3] Or judge-like arbitrators.

macro nor the micro needs of a growing labour market. At the same time, even those who enthused over the concept of compulsory conciliation and arbitration had to acknowledge that a legislative model which required for its efficacy the existence or imminence of an interstate industrial dispute tended to throw up a never-ending cascade of technical and arcane distinctions, such as the propositions which had it that a dispute over whether a government bus should be crewed by one man or two was not an industrial one, while a dispute over whether a driver should be required to operate his bus without the assistance of a conductor was an industrial one.[4] One is minded of what had been said 30 years, and a world war before these one-man bus cases, by Anstey Wynes:

> [The meaning of s 51(xxxv)] has been subjected to the most remarkable variations and we venture to suggest that a versatility has been displayed in legal argument paralleled in British constitutional history only by the ingenuity of those who took part in the great struggle between King and Parliament during the Stuart period. From an apparently simple concept couched in layman's language, the subject matter of the 'industrial power' has not merely become technical in the most technical sense, but has attracted to itself conceptions bordering on the metaphysical.[5]

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4 See *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1966) 115 CLR 443 and *Melbourne and Metropolitan Tramways Board v Horan* (1967) 117 CLR 78.

5 W A Wynes, *Legislative and Executive Powers in Australia* (Law Book Co, 1936) 223. In the corresponding paragraph in the second edition, so much of the first sentence as followed 'variations' was omitted and did not reappear in later editions (2nd ed, 1956) 421.

It might be wondered whether the conciliation and arbitration power had any defenders. However, probably because it provided a system of centralised wage fixation which was beneficial to employees, and which could be tolerated by employers in an era of protection, it endured and became, in effect, a rusted-on attribute of the national psyche. Yet the power is now all but a dead letter. How did that come about?

Notwithstanding various ructions over the years, such as the institutional adjustments made necessary by the *Boilermakers* case,[6] it was business as usual for the compulsory arbitration system until, and including, the response required to the inflationary pressures generated by the so-called 'Cameron Experiment'[7] of 1974. That response involved, rather ironically it might be thought, the introduction of a system of semi-automatic wage adjustments based on quarterly movements in the consumer price index.[8] That system laboured on for about six years, after which it was abandoned.[9] The next system of centralised wage fixation went through a series of iterations over the period 1983 to 1993, each of which was responsive, more or less, to an 'accord' between the Commonwealth and the Australian Council of Trade Unions and involved some kind of trade-off for what was typically another layer of remuneration adjustment. These trade-offs, it may be noted, tended to focus on the removal or mitigation of some of the more cumbersome award provisions and related practices, rather than on industrial

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6 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

7 P A Riach and G M Richards, 'The Lesson of the Cameron Experiment' (1979) 18 *Australian Economic Papers* 21–35

8 *National Wage Case – April 1975* (1975) 167 CAR 18.

9 *National Wage Case – July 1981* (1981) 260 CAR 4.

productivity. At the same time, there came to be heard, off-stage as it were, increasingly strident voices calling for a move towards more enterprise-oriented arrangements for the setting of wages and other conditions of employment. Eventually, the 'main players', as we may describe the organised employers and employees of the era, saw the sense in these calls, and moved to reset their institutional arrangements accordingly.

Before getting to that development, however, we should note what was happening on the legislative front over this period. Recourse to heads of constitutional power other than the conciliation and arbitration power for the purpose of regulating industrial relations had become a familiar sidebar to the legislation by the late 1970s. With respect to seamen, for instance, the Conciliation and Arbitration Commission had the power to settle by conciliation, and to hear and determine, industrial matters in so far as they related to trade and commerce with other countries or among the States, whether or not an industrial dispute existed in relation to those matters.[10] The trade and commerce power was availed of also in the regulation of industrial relations in the stevedoring industry[11] and, to an extent, the airline industry.[12] Although, constitutionally, there was no need for the mechanisms of conciliation and arbitration to have been deployed in these areas of regulation, it was

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10 *Conciliation and Arbitration Act 1904* (Cth) ('*1904 Act*') Pt III Div 2 (for the like provisions which were in force until 1956, see Pt XA of the *Navigation Act 1912* (Cth).

11 *1904 Act* Div 4 of Pt III, and specifically s 82(b). The revision of these provisions in 1977, whereby high-level references to the 'stevedoring industry' were replaced by references to 'waterside workers', is not material to the present discussion.

12 *1904 Act* Pt IIIA, and specifically s 88U(1)(b)(iii).

institutionally both convenient and uncontroversial for the Commonwealth to have proceeded in this way.

But, until the events about to be related, recourse had never been had to the corporations power for the purpose of regulating industrial relations. Then a beachhead, of sorts, was established by the enactment of section 45D of the *Trade Practices Act 1974* (Cth) ('*TP Act*') in 1977 and its successful defence against a constitutional challenge in the *Fontana Films* case in 1982.[13] That section – at least for presently material purposes – relied on the corporations power. In *Fontana Films*, the Court rejected the argument advanced by Michael McHugh QC that '[s]ection 45D is not a law with respect to … trading corporations … It is a law regulating the conduct of persons imposing secondary boycotts'.[14]

Seven months after the judgment in *Fontana Films*, Dr Bob Brown and his supporters commenced their blockade of the works for the construction of what was to have been the Gordon below Franklin Dam, thereby putting in train a series of events that would lead to the establishment of Commonwealth legislative protection for large areas of the Tasmanian wilderness. Little did they realise that they were sharpening the axe that would eventually bring down the conciliation and arbitration power. But so it was: in July 1983, the High Court upheld the validity of laws and regulations that enabled the Commonwealth to prevent the construction of the dam.[15] One of the grounds upon which the majority did so was that these laws and regulations, at least to the extent necessary for the

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13 *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169.

14 Ibid 171.

15 *The Tasmanian Dam Case* (1983) 158 CLR 1.

Commonwealth's then purposes, came within section 51(xx), that is, they were laws with respect to trading corporations, the corporation in question being, of course, the Hydro-Electric Commission of Tasmania. Mason,[16] Murphy[17] and Deane JJ [18] regarded this head of power as extending to any law on the subject of a trading corporation, whether or not touching the trading activities of it, and the fourth member of the majority, Brennan J, decided the point – on what was then the more conventional basis – because the legislation under challenge was, in one of its alternative formulations, confined to conduct by a body corporate 'for the purposes of its trading activities'.[19]

Returning from the pristine forests of Tasmania to the much more prosaic environment of the industrial workplace, a fortnight after the judgment in the *Dams* case, the Minister for Employment and Industrial Relations constituted a tripartite 'Committee of Review into Australian Industrial Relations Law and Systems', the terms of reference for which, though broad, provided no encouragement for a recommendation that might favour recourse to a head of power for the regulation of industrial relations other than para (xxxv) of section 51. Likewise, when the committee itself reported on 30 April 1985, it dismissively referred to other heads of power as 'exotic', the use of which would involve 'a serious risk of antagonising the States and significant sections of the industrial relations community and might be counter-productive'.[20] With respect to

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16 Ibid 148–149.

17 Ibid 179.

18 Ibid 268.

19 Ibid 240–242.

20 Committee of Review into Australian Industrial Relations Law and Systems, *Report* (1985) [7.13].

section 45D of the *TP Act*, there were two 'conflicting views' on the Committee. One saw the section as concerned with the regulation of what were 'essentially industrial' activities, while the other saw it as the means by which third parties could secure 'legal redress' for loss and damage inflicted on them by participants in a dispute in which they were not directly involved.[21] It was the former view which, it seems, informed the decision to include div 7 of pt VI in the *Industrial Relations Act 1988* (Cth) ('*IR Act*'), which replaced the *1904 Act* and which was, ostensibly at least, the government's response to the committee's report. The provisions of div 7, which provided a mechanism to involve the Commission in conciliation for the settlement of so-called boycott disputes, relied on the corporations power.

Then, in 1992, sections 127A–127C were introduced into the *IR Act*.[22] They invested the Industrial Relations Commission with the power to set aside or to vary a contract to which a 'constitutional corporation' was a party on the ground that it was unfair, harsh or against the public interest. To the extent that the new provisions went further and empowered the Commission to deal with a contract which was linked to a non-party constitutional corporation only because it related to the business thereof, those provisions were held to be invalid in 1995,[23] but that limited qualification on what was starting to look like a trend towards the wider use of the corporations power is tangential to the present discussion.

This brings me to the point which I had earlier reached in my summary of the history of wage fixation at the federal level

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21 Ibid [10.320].

22 By the *Industrial Relations Legislation Amendment Act 1992* (Cth).

23 *Re Dingjan* (1995) 183 CLR 323.

since about the mid-1970s. By the end of the 80s there was an increasing push to move these processes out of the halls of the Commission and into the conference rooms of the nation's many enterprises. This culminated in the making of a submission, with strong support from both sides of the industrial divide, in the proceedings leading to the national wage decision of April 1991[24] to the effect that the Commission's principles should permit, even promote, enterprise bargaining, and to the now famous retort from the Commission that 'the parties to industrial relations have still to develop the maturity necessary for the further shift of emphasis now proposed'.[25]

It was only another six months before the Commission relented, and introduced into its principles a clause which provided for the making of consent awards, and the certification of agreements, by way of formalising the outcomes of enterprise bargaining.[26] The collective bargaining genie, while not yet out of the bottle, had removed the lid and was looking around. The landscape which he hoped to occupy was formalised by legislative change in 1992[27] and, *mirabile dictu*, it was a requirement, in all but clearly limited exceptional cases, that an agreement could not be certified by the Commission unless the parties included a nationally-registered trade union.[28] And no one ought to have been surprised by that. The system then introduced was characterised by a singular grounding circumstance: the consent awards being made, and the

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24 *National Wage Case April 1991* (1991) 36 IR 120.

25 Ibid 156.

26 *National Wage Case October 1991* (1991) 39 IR 127, 129–133.

27 *Industrial Relations Legislation Amendment Act 1992* (Cth) (the same Act as introduced ss 127A–127C, mentioned above).

28 s 134E(1)(e)(i) as introduced in 1992.

agreements being certified, had to be founded on interstate industrial disputes which satisfied the description in section 51(xxxv) of the *Constitution*. In the nature of things, the party to a dispute of that kind, on the employee side, would almost always be such a union.

Only the following year, 1993, the legislature made further changes, this time harnessing certified agreements to awards, that is to say, to instruments made by the Commission in the prevention or settlement of industrial disputes. The Commission was not empowered to certify an agreement unless the wages and conditions of employment of those covered by the agreement were regulated by an award.[29] The position thereby established was not only one which made the certification of agreements an exercise of the power referred to in section 51(xxxv): it was one in which an agreement could not be certified unless it shared the same bed as an award made in prevention or settlement of an interstate industrial dispute.

Those responsible for this hybrid system of regulation cannot have been aware of what Sir John Moore, then President of the Conciliation and Arbitration Commission, had said in 1973:

> Now if one wants collective bargaining in its full and complete sense one would have to abolish all the arbitration systems. Collective bargaining presupposes that the bargainers will continue bargaining until they ultimately agree and if they have difficulty in agreeing they will not be able to go to anybody or institution which could ultimately decide between them as arbitrators can in this country. They may accept a mediator to assist them in reaching their

[29] s 170MC(1)(a) as introduced in 1993.

> collective bargain, so one might assume some form of mediation service in this country were collective bargaining to be accepted as the norm. But arbitration and collective bargaining in its full sense are incompatible.[30]

Of more present interest apropos the 1993 amendments is the circumstance that, for the first time, the corporations power was used to justify legislation which provided for the making of 'agreements' – the so-called 'enterprise flexibility agreements'[31] – otherwise than in prevention or settlement of disputes to which trade unions would most likely be parties, and where the participation of trade unions in the bargaining process was not required.[32] Albeit that such an agreement could be approved by the Commission only if the wages and conditions of the employees concerned were regulated by an award made under traditional section 51(xxxv) powers[33] – thereby laying the oil of a collective agreement made under the corporations power over the water of an award made under the conciliation and arbitration power – this legislation amounted to a significant development in that it provided a conspicuous demonstration of how the corporations power might be utilised in the regulation of mainstream wages and conditions of employment.

If you are, by now, tiring of metaphors, let me try your patience once more, although I assure that this is, and was, not

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30 Speech made to the Industrial Relations Society of New South Wales on 8 August 1973, reproduced in J J Macken, *Australian Industrial Laws – The Constitutional Basis* (Law Book Co, 1974) 202–203.

31 They were agreements in name only: if a majority of the relevant employees agreed, an instrument 'prepared' by the employer could be approved by the Commission: s 170NC(1)(i) as introduced in 1993.

32 Pt VIB Div 3, as introduced in 1993.

33 s 170NC(1)(b) as introduced in 1993.

one of my own. The 1993 amendments were also the occasion for the legislative appearance of the notion that awards should act as a 'safety net of minimum wages and conditions of employment underpinning direct bargaining'.[34] Reading this I realised for the first time just how toxic a mixed metaphor could be. Were awards to be, like a safety net under the high wire, something which you never used unless visited by disaster, or were they to be, like the underpinning structures of a building, something which provided working support on an ongoing basis?

Either way, it was, perhaps, a mark of the cynicism which characterised the whole business of industrial relations legislation in the early 1990s that (almost) no one noticed – or if they did they did not care to draw attention to – what had become a clear separation between the stated statutory purpose of awards and the historical, and still textual, constitutional purpose which was supposed to sustain the whole complex system. The idea that employees and employers could be in dispute, across State borders, about the positioning of the safety net – an artefact which was not intended to correspond with the wages and conditions of employment actually being enjoyed by any individual – can only be described as weird. A concept which is treated, by its own legislation, with such cynicism is a concept which does not have long to live. And so it was with the conciliation and arbitration power.

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[34] s 88A(b) as introduced in 1993. The so-called 'paid rates awards' were excluded from this object of the legislation.

But that power might yet have survived had it not been accepted by the High Court – effectively a matter of concession by the major parties concerned – 'that the Parliament [had] power to legislate as to the industrial rights and obligations of constitutional corporations'.[35] This was in 1996, in which year the legislation was again amended to provide for the making of conventional collective agreements under statutory provisions which relied on the corporations power.[36] There was thus ushered in, a period during which the conciliation and arbitration power continued to be used to sustain so much of the legislation as related to the prevention and settlement of industrial disputes, including those provisions under which awards were made and agreements which tended to settle such disputes were negotiated, while the corporations power sustained so much of the legislation as related to agreements made between constitutional corporations and their employees, or the relevant trade unions.

The Work Choices amendments of 2005 have gone down in history as the good idea that destroyed a government. More of that presently. But it was the legislative regime introduced in 1996 which truly involved choices. The parties to a successfully negotiated collective agreement could choose whether to formalise things under provisions which depended on the corporations power or to do so under provisions which depended on the conciliation and arbitration power. In the latter case, of course, they would need to have the existence of an industrial dispute recorded, but parties had, by the 1990s, come to regard that as the merest of formalities.

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35 *Industrial Relations Act Case* (1996) 187 CLR 416, 539.

36 Pt VIB Div 2, as inserted by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

What was the experience of the system under this 'choices' regime? Of the total number of agreements lodged for certification in the first full year of the operation of this system (1996-97), 67.7 per cent utilised the stream that relied on the corporations power.[37] In the following year, this figure had risen to 83.2 per cent, and it never again fell below that. By the final full year before the Work Choices amendments commenced (2004-05), the figure had risen to 93.5 per cent.[38] It is clear that, when faced with a choice between utilising provisions sourced in the corporations power and utilising provisions sourced in the conciliation and arbitration power, the parties actually working in the collective bargaining system voted with their feet in favour of the former.

In the absence of any High Court challenge to the 1996 amendments, and in the light of the experience of those amendments just referred to, the way was open for the legislature to phase out reliance on the conciliation and arbitration power, which it did in the Work Choices amendments themselves.[39] If there was one thing that the legislation did not do thereafter in relation to the formalisation of the outcomes of collective bargaining, it was to provide a choice as between a stream which relied on the conciliation and arbitration power and a stream which relied on the corporations power, as had hitherto been the

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37 This statistic related to agreements lodged under s 170LJ of the *Workplace Relations Act 1996* (Cth) ('*WR Act*'), which covered not only agreements with constitutional corporations but also agreements with the Commonwealth and its various authorities. The latter category is unlikely to have made a substantial numerical contribution to the statistic.

38 The statistics in this paragraph are taken from the *Annual Reports of the Industrial Relations Commission*.

39 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

case. Neither did the legislation any longer empower the Commission to settle industrial disputes by the making of awards. Existing awards, which were implicitly treated as a kind of anachronism from a previous era, could be varied only in very limited circumstances, such as by way of 'rationalization' or 'simplification',[40] or under the transitional provisions.[41] Indeed, only in the latter case was there any reference to an 'industrial dispute' in the amended legislation.

It was the abandonment of the conciliation and arbitration power as a constitutional justification for industrial relations legislation, in favour of the corporations power, that formed the basis of a High Court challenge to the Work Choices amendments. That challenge was unsuccessful,[42] but it was the words of Justice Kirby in dissent which, albeit deprecatingly, captured the mood of the age:

> The precise constitutional issue now presented has not previously been decided by this Court because, for most of the past century, its resolution was regarded as axiomatic. It was self-evident that the corporations power did not extend so far as the majority now holds it to do. It was for this reason that, through referendums, successive governments sought – without success – popular approval for the enlargement of federal power with respect to industrial disputes. The repeated negative voice of the Australian people, as electors, in votes on these referendums, is now effectively ignored or treated as irrelevant by the majority. I accept that the corporations power in the Constitution, when viewed

40 *WR Act* s 552.

41 *WR Act* Sched 6.

42 *Work Choices Case* (2006) 229 CLR 1.

> as a functional document, expands and enlarges so as to permit federal laws on a wide range of activities of trading and financial corporations in keeping with their expanding role in the nation's affairs and economic life. But there are limits. Those limits are found in the express provisions and structure of the Constitution and in its implications. This Court's duty is to uphold the limits. Once a Constitutional Rubicon such as this is crossed, there is rarely a going back.[43]

While I acknowledge the appropriateness of his Honour's classical allusion,[44] I am disposed to think that his timing was out by about 12 years. It was at the time of the 1993 amendments, where the corporations power was utilised in the context of non-union enterprise flexibility agreements, that the Rubicon was truly crossed. As Justice Kirby noted, in such circumstances 'there is rarely a going back', and it was only onwards and upwards that the corporations power thereafter marched.

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43 Ibid 245-246 [614].

44 An allusion, it might be noted in passing, of which his Honour was fond. In *Wilson v Anderson* (2002) 213 CLR 401, 457 [139], he used it to convey what had happened apropos native title in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 and in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 206 [113] he used it with reference to the removal of the stifling effect of an inconvenient Privy Council judgment on the development of the Australian law of charities.

Conventional wisdom has it that it was the demonization of the post-Work Choices legislation which secured for Labor its comprehensive victory in the 2007 federal election. The new administration's response to the despised legislation was not, however, merely to reverse the amendments which had been made in 2005. Instead, what was, ostensibly at least, an entirely new legislative regime was introduced in the form of the *Fair Work Act 2009* (Cth). And, perhaps surprisingly, the opportunity was not taken to enact provisions based on the conciliation and arbitration power. A safety-net instrument was reintroduced, but, while described as an 'award' – doubtless in symbolic deference to historical usage – this instrument was, and remains, a quasi-legislative one made under the corporations power. The new collective bargaining regime, and the provisions for the approval of enterprise agreements, likewise relied – at least in their application to mainstream private sector activities – wholly on the corporations power.

That then is the story of the demise of the conciliation and arbitration power: Given the love affair, which by international repute, Australians had had with that power and with the practices which it spawned, the story is indeed a strange one. It was written in installments over a period of about 20 years, with politicians of both major colours having made contributions. Perhaps the strangest aspect of all is that a Labor administration was involved at both ends: when the gates to the citadel were opened by Laurie Brereton in 1993 and when all semblance of resistance was given up by Julia Gillard in 2009.

There is another strange aspect to all of this. As noted at the outset, participants in the Constitutional Conventions of the 1890s were earnest in their concern that interstate disputes might remain unsettled because of the inherent limitations in the legislative competence of any individual State. Was that concern based on a misunderstanding? At the federal level, we no longer have any legislation which provides for the prevention and settlement of interstate industrial disputes by conciliation and arbitration. Are such disputes no longer a feature of our economy? How is it that policymakers today are seemingly so blasé about a subject which troubled their predecessors, about 120 years ago, so greatly?

Those are my take-home questions for today.

APPENDIX I

SIR SAMUEL GRIFFITH ESSAY PRIZE WINNERS

2016 - 2018

2016 SIR SAMUEL GRIFFITH ESSAY PRIZE

IS ORIGINALISM A USEFUL APPROACH TO CONSTITUTIONAL INTERPRETATION IN AUSTRALIA?

HOLLY GRETTON (PERTH)

Constitutional interpretation is determinative of whether legislation is valid or invalid. The outcome of this process has a significant effect on the prevailing attitudes and values that pervade Australian society in 2016 and as such constitutional interpretation cannot be seen to exist in isolation from societal concerns. Originalism, 'the principle or belief that the original intent of an author should be adhered to in later interpretations of a work',[1] has been contended to be a useful approach to interpreting the *Constitution*[2] because it provides direction for Judges in making determinations with reference to the framers' original intentions.[3]

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1 Oxford English Dictionary (2016) http://www.oed.com.

2 See for example; Mirko Bagaric, 'Originalism: Why Some Things Should Never Change - Or At Least Not Too Quickly' (2000) 19 *University of Tasmania Law Review* 173-204.

3 See for example; Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 150.

In contrast, however, there has been growing concern that the 'framers' intentions … with respect to so many questions of interpretation',[4]are unknown. Further, the usefulness of an originalist approach has been questioned because many of its critics argue that it does not accord weight to 'contemporary needs and values'.[5] In light of some 'good arguments on both sides'[6] this paper submits that despite its imperfections, originalism is the most useful approach to Constitutional interpretation in contemporary Australian society.

I THE ESSENCE OF THE ORIGINALIST APPROACH

Notably in Australia since the decision in the *Engineers Case*,[7] the constitutional interpretation to be preferred in Australia is to read the law in its 'natural sense'[8] or as Michelle Evans puts it, literally.[9] In essence, the High Court of Australia adopted a 'literalist legalistic approach'[10] to Constitutional interpretation rather than an originalist approach.

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4 Sir Anthony Mason, 'Constitutional Interpretation: Some Thoughts' (1997) 20 *Adelaide Law Review* 54.

5 Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century (Centennial Symposium: An Australian Retrospective' (2000) 24 *Melbourne University Law Review* 678.

6 Ibid.

7 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129

8 Ibid.

9 Michelle Evans, 'Engineers: the Case that Changed Australian Constitutional History' (2012) 24 *Journal of Constitutional History* 65.

10 See Mason, above n 4, 50.

A mischaracterisation of originalism as literalism is dangerous because it ignores the fundamental protection offered by originalism, which is to provide Australian citizens with 'the exclusive authority'[11] under section 128 *Commonwealth Constitution*[12] to change its contents, rather than giving that ability to judges as they see fit.[13] Although the 'literalist' approach has prevailed in Australia since *Engineers,* it is submitted here that originalism is a more suitable interpretation. It is contended originalism is motivated by three principles in Australia 'democracy, the rule of law and federalism',[14] and that such principles are fundamental to Australian contemporary values.

II THE STRENGTHS OF ORIGINALISM

In Australia in 2016 an originalist approach to constitutional interpretation is preferable for two reasons. Firstly, it prevents the judiciary from impeding on the democratic freedom to hold a referendum and secondly it provides the Court with principles to adhere to. Jeffrey Goldsworthy asks, 'who has the right to decide whether contemporary needs and values have so changed that a constitutional change is desirable?'[15] The answer is likely that by preferring non-originalism, the High Court would have the power to make decisions guided by their own judgment of

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11 See Goldsworthy, above n 5, 683.

12 *Commonwealth Constitution* s 128.

13 See, for example, Bagaric, above n 2.

14 See Goldsworthy, above n 5, 683.

15 Ibid 684.

contemporary values and government needs.[16] This paper contends this is undesirable because it would undermine confidence in the Court in a society, which values freedom and accountability to its citizens.

Originalism acts as a safeguard and provides 'subsequent generations'[17] with an 'accepted set of procedures'.[18] This arguably maintains the legitimacy of the *Constitution* because it is not undermined with reference to, for example, contemporary issues and trends.[19] This paper asserts that in line with Mirko Bagaric's argument, the strength of the *Constitution* lies in its ability to codify attitudes and beliefs, which are deemed 'so basic…they should be beyond alteration by transient majorities'.[20] In those instances where the *Constitution* need be changed, it is the prerogative of electors to exercise their right pursuant to section 128.[21] This is essential for the rule of law to be upheld because it prevents 'lawyers and judges disguising substantive constitutional change as interpretation'.[22] Prima facie it may seem contradictory that originalism, as a form of interpretation which is formed on the basis of past intention, is useful in a modern context.

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16 See, for example, James Allan, 'The Three R's of Recent Australian Judicial Activism: Roach, Rowe and (No)'riginalism' (2012) 36 *Melbourne University Law Review* 744.

17 Goldsworthy, above n 5.

18 Ibid.

19 See Bagaric, above n 2, 182.

20 Ibid 185.

21 *Commonwealth Constitution* s128.

22 Goldsworthy, above n 5.

This paper submits the very strength of originalism lies in its adherence to the intended meaning of the *Constitution*, preventing it from being a document so ever-changing it loses any meaning at all.[23]

III CONCERNS SURROUNDING ORIGINALISM

Despite its strengths, it is conceded 'originalism has its faults'[24] but that even with these flaws it is still preferable to any alternatives. A major issue with originalism is determining how to interpret the *Constitution* in situations where the framers' intentions are silent or ambiguous.[25] This is not confined to constitutional interpretation in Australia; Judge Wilkinson in the United States of America has identified the pitfall that the *Constitution* 'does not speak to everything'.[26] When the framers' intentions are absent or hard to interpret, difficult cases cannot be 'satisfactorily resolved'.[27] In these instances, critics of originalism in particular have 'apprehension about being locked in'[28] to an originalist interpretation. This is because without any adaptation to modern considerations the meaning of the *Constitution* may be absurd or not suitable to its context.

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23 See, for example, Dan Meagher, 'New Day Rising? Non-Originalism, Justice Kirby and Section 80 of the Constitution' (2002) 24 *Sydney Law Review* 159.

24 William J Michael, 'When Originalism Fails (Constitutional Interpretation Through Original Intent)' (2004) 25 *Whittier Law Review* 506.

25 Goldsworthy, above n 5, 678.

26 Michael, above n 24, 507.

27 Meagher, above n 23, 143.

28 Mason, above n 4, 49.

It was submitted above that section 128 of the *Constitution* provides a means of providing change in cases where it is deemed necessary by the citizens. Critics contend, however, that this does not provide an expedient method of change. It is conceded this may be a valid criticism for 'hard Constitutional cases'[29] because Judges cannot 'decide the issue'[30]where the framers have not spoken to that issue. The fundamental role of the High Court is to hand down binding authoritative decisions and where these cannot be made the difficulty lies in what kind of interpretation is then to be favoured. For example, in relation to section 80 of the *Constitution*, 'it is arguable that the framers never intended its content to be frozen', however there is no way to determine this for certain. As a result, ambiguity surrounding the term 'indictment' in section 80 proved difficult for the Court in *Re Colina*[31] and *Cheng v The Queen.*[32] In support of Dan Meagher's argument however, it is asserted 'what constitutes an indictment is clear enough'[33] and therefore was not a matter of ambiguity for the Court. It is submitted in cases of ambiguity or absurdity originalism is not the ideal interpretative method in contemporary Australian society, but that the Court must be cautious in determining what is a matter of ambiguity.

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29 Meagher, above n 23, 161.

30 Michael, above n 24, 502.

31 *Cheng v The Queen* [2000] HCA 63 cited in Dan Meagher, 'New Day Rising? Non-Originalism, Justice Kirby and Section 80 of the Constitution' (2002) 24 *Sydney Law Review* 165.

32 *Re Colina; Ex Parte Tomey* [2000] HCA cited in Dan Meagher, 'New Day Rising? Non-Originalism, Justice Kirby and Section 80 of the Constitution' (2002) 24 *Sydney Law Review* 165.

33 Meagher, above n 23, 166.

IV ALTERNATIVE: NON-ORIGINALISM

A number of approaches to constitutional interpretation have been considered, but at the crux of the argument are two different approaches: one being originalism and 'the other that modern day values are the appropriate interpretive standard'.[34] Justice Kirby is arguably the most vocal proponent of the latter, purporting that the *Constitution* is a living document.[35]This is supported by Andrew Inglis Clark's assertion that social conditions of every community produce new government problems to which the *Constitution* must be applied.[36]It is not denied that contemporary values are taken into account when judgments are handed down, but interpreting the words of the *Constitution* in light of them is arguably not the role of the Court. As Goldsworthy asks: 'who was the right to decide whether contemporary needs and values have so changed that a constitutional change is desirable?'[37] In saying that, the text set free argument[38] does seem to be more convincing in situations of 'hard cases'[39] because it is able to step in and fill in the blanks left by ambiguity or absurdity.

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34 Bagaric, above n 2, 183.

35 Michael Kirby, 'Constitutional Interpretation and Original Intent: A form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 114.

36 Ibid.

37 See Goldsworthy, above n 5, 684.

38 Kirby, above n 35.

39 See, for example, Meagher, above n 23.

The major concern with non-originalism is that at its core is the notion of judicial activism and resulting from this, the substantial possibility that judges will 'exceed their proper role in a democracy'.[40] The reason that originalism is a more useful approach is because it prevents this specific issue, protecting the very freedom the *Constitution* was drafted to maintain. The plausibility of the *Constitution* as a 'living tree'[41] is idealistic at best, when in reality what it allows for is the alteration of the *Constitution* 'as time goes by, as announced by the judiciary'.[42] It is contended for these reasons that in most cases non-originalism would hinder rather than aid interpretation in 2016.

V ALTERNATIVE: MODERATE ORIGINALISM

It has been conceded that whilst originalism is useful it is imperfect. Attempts have been made to find a middle ground between strict originalism and non-originalism. Justice Kirby describes this as being an interpretative approach where Judges 'accept those (framers') intentions as being relevant, not determinative'.[43] The difficulty with this approach is that it seems to 'collapse into'[44] non-originalism because it is likely that any discretion would produce the same result.

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40 Allan, above n 16.

41 Kirby, above n 356.

42 Allan, above n 16, 751.

43 Justice Kirby cited in Goldsworthy, above n 5.

44 Goldsworthy, above n 5, 679.

Goldsworthy supports moderate originalism following Dworkin who asserts that 'decisions of political morality'[45] do not subvert or replace the framers' intentions, but aim to serve them.[46] This paper warns that only considering the framers' intent on an 'abstract level of generality'[47] may render that intent irrelevant, and undermine the *Constitution's* legitimacy as a result. If anything, Dan Meagher's assertion that in 'hard cases' where originalism cannot be strictly followed, non-originalism may be permitted 'if applied in a manner that is faithful to the text … of the *Constitution*'[48] is more persuasive than a case of applying a moderate approach at all times.

VI CONCLUSION

This paper has asserted that originalism is the most useful form of constitutional interpretation in modern Australia because it protects against radical change and uncertainty. Whilst originalism remains imperfect, it is contended that moderate originalism and non-originalism produce undesirable discretion that would result in the undermining of the *Constitution* and the three principles it serves to protect.

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45 Dworkin cited in Goldsworthy, above n 5.

46 See, for example, Andrew Leduc, 'The Relationship of Constitutional Law to Philosophy: Five Lessons from the Originalism Debate' (2014) 12 *Georgetown Journal of Law & Public Policy* 99-156.

47 Goldsworthy, above n 5, 697.

48 Meagher, above n 23, 142.

2017 SIR SAMUEL GRIFFITH ESSAY PRIZE

WOULD AUSTRALIA BENEFIT FROM AN 'AMERICAN-STYLE' CONFIRMATION PROCESS FOR APPOINTMENTS TO THE HIGH COURT?

EDWARD FOWLER (CANBERRA)

The process of judicial appointment to the High Court was a subject of debate even before the establishment of the Commonwealth. The framers of the *Constitution* rightly placed this power within the hands of the Governor-General instead of Parliament. This paper argues an American-style system of judicial appointment would not be appropriate for Australia given that the High Court has a more diverse jurisdiction than the Supreme Court. Appointments in Australia should be based on technical prowess and broader considerations than the judge's views about constitutional interpretation.

Judicial appointments to the High Court are made by the Governor-General in Council.[1] Clark's original draft of the *Constitution* included a Federal Executive Council,[2] but this was omitted at the 1897 Constitutional Convention.[3] Justices are chosen by the Attorney-General following a decision made at Cabinet. While judicial appointments can give the impression of

1 *Commonwealth of Australia Act 1900* (Cth), s 72(i).

2 See J M Williams, *The Australian Constitution: A Documentary History* (2005) 106.

3 Ibid 543.

being a 'gift' of the government,[4] the process is subject to extensive consultation.

Since 1979 the Attorney-General has been required to consult with his State counterparts,[5] and, though not necessary, discussions with the Chief Justice or Justice and the Bar are the long-standing convention. From time to time, there are calls for reform, usually concerning a perceived lack of transparency and selection criteria.[6] The Constitutional Commission considered these issues in 1988, but made no recommendations to change the status quo.[7] The system has fared well in Australia's constitutional history, and is most appropriate given the High Court's role.

It is important to keep in mind that the High Court acts as both a constitutional court and an appeals court. The High Court has original jurisdiction over constitutional affairs, and appellate jurisdiction for all decisions made in the State Supreme Courts and Federal Court. While constitutional cases generate the greatest amount of attention, in reality they make up only a small portion of the High Court's caseload.[8] The day to day activities of the High Court are mostly appeals heard in the areas of private and criminal law. This requires Justices to be generalists, with

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4 M Kirby, *The Judges* (Boyer Lectures, 1983) 20.

5 *High Court of Australia Act 1979* (Cth) s 6.

6 G Barwick, 'The State of the Australian Judicature' (1977) 51 *Australian Law Journal* 495; G Brennan, 'The State of the Australian Judicature' 72 *Australian Law Journal* (1998) 34; R French, 'The State of the Australian Judicature' (2009) < http://www.hcourt.gov.au/assets/publications/speeches/current-justice s/frenchcj/frenchcj18sep09.pdf> 16.

7 Constitutional Commission, *Final Report of the Constitutional Commission* (1988) vol 3, 398.

8 High Court of Australia, *Annual Report: 2015-16* (2016) 35.

command of the technicalities of the law. Because the High Court is an appellate court, it must be 'staffed by judges who can handle not only constitutional issues but all manner of complex areas of the law, such as wills and succession, contracts, copyright, commercial law, and so on'.[9] The existing system is in a much better position to ensure this than one overseen by the legislature.

Judges are, for the most part, appointed for their experience rather than political patronage. In Australia, we tend to follow the modern British practice of making appointments based purely on 'personality, integrity, professional ability, experience, standing and capacity'.[10] That Justices of the High Court interpret the *Constitution* as it 'is' rather than to suit the Government of the day, is essential for maintaining checks and balances. Good Justices tend to previously be lawyers of high standing in the private law or Judges in the Supreme Courts and, increasingly, the Federal Court. The Attorney-General, in consultation with the legal community, is best suited for picking these candidates. The few bad appointments to the High Court were when this tradition was ignored.

Governments have occasionally made political judicial appointments, which have diminished the standing of the High Court. Justice Piddington was appointed by the Fisher Government in 1913, but did not ultimately take his seat after it was revealed that Attorney-General Hughes asked for his loyalty to the Commonwealth rather indiscreetly via telegram.[11] The

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9 G Fricke, *Judges of the High Court* (Hutchinson, 1986) 160.

10 Lord Hailsham, 'Appointment to Silk and the Judiciary' (1985) 82 *The Law Society's Gazette* 23-35.

11 B Galligan, *Politics of the High Court* (University Queensland Press, 1988) 93.

appointment of Justice McTiernan was opposed by Prime Minister Scullin and his Attorney-General, but nonetheless approved because he was preferred by the Federal Labor Caucus.[12] The appointment of Justice Murphy by Prime Minister Whitlam in 1975 was widely seen as a move to cull the ambitions of a potential leadership challenger and to stack the High Court with someone sympathetic to his Government's law reform agenda.[13] In these instances, the disregard of advice from legal professionals has led to politicians making appointments based on partisan principles. It is probable that further politicising the process through Senate hearings and confirmations would lead to the appointment of more mediocre judges. The recent experience of the United States of America supports this proposition.

One of the criticisms frequently made about Senate confirmations to the Supreme Court of the United States is the imposition of a litmus test, where candidates are assessed on their 'knee-jerk' reactions to contentious policy issues rather than judicial philosophy more generally.[14] It has led to a system where judges must make what are effectively campaign promises about how they would rule on certain cases or face veto by hostile Senators.[15] Since the Warren Court, the process has favoured activist judges, with several confirmations of judges who take a conservative approach to constitutional interpretation

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12 Ibid 107.

13 J Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, 1997) 221.

14 L Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes our History* (Random House, 1985) 97.

15 Ibid.

being thwarted by public campaigns.[16] Sir Harry Gibbs observed at the time of the controversial hearings for Judge Bork that in the United States of America it seems 'party politics plays so large a part that some of those appointed fall short of the standards that the office demands'.[17]

One can only imagine how past judicial appointments to the High Court would have been stifled had we an American-style system. Take the appointment of Justice Callinan, a very good judge and upholder of the *Constitution*. However, at the time his appointment was marred by controversy due to an unfortunate epithet made by then Deputy Prime Minister Fischer;[18] his appointment was opposed by large sections of the media and the majority of parties in the Senate.[19] But because of the Australian form of executive judicial appointment, the Howard Government was able to appoint Justice Callinan to the bench. Justice Callinan went on to lead a distinguished judicial career of conservative-minded jurisprudence. This did not always translate to support for the conservative Government, as his notable dissent in the *WorkChoices Case* shows.[20]

Legalism remains the orthodoxy at the High Court because Justices are selected for their eminence as judges or lawyers. To succeed in the law in Australia, one requires an extensive career of interpreting black-letter statutes. This is not to say there

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16 R Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990) 9.

17 Sir Harry Gibbs, 'The Appointment of Judges' (1987) 61 *Australian Law Journal* 9.

18 N Savva, 'Fischer Seeks A More Conservative Court', *The Age* (Melbourne 5 March 1997) 6.

19 G Alcorn, 'A Law Unto Himself', *The Age* (Melbourne 2 May 1998).

20 (2006) 229 CLR 1.

haven't been activist judgements made in the Court's history. The High Court has given the Commonwealth much more power than the framers of the *Constitution* intended, particularly with the invention of implied prohibitions and recommendation of implied immunity of instrumentalities in the *Engineers' Case*.[21] Though there is ample criticism of High Court judgments to be made with respect to federalism, it is hard to see how Senate confirmations would strengthen federalism more than the current system. The US-system was proposed in the *Federalist* papers on the premise that the Senate would act as a house of review for states' rights. In Australia, Senators are largely beholden to the whips of national parties. A more reasonable proposal for supporters of federalism would be to have the Attorney-Generals from each State decide the composition of the High Court. This was proposed, but rejected, at the Constitutional Convention in 1897 by the South Australian delegation.[22]

The High Court plays a vital role in safeguarding responsible government, the rule of law and federalism. No more important has this been than now, at a time of unprecedented growth in the size and scope of the Federal Government. An independent judiciary, comprised of judges serving as agents of the Crown fearlessly and without favour, is one of the hallmarks of a free society. The existing system of executive-appointed Justices has largely provided this; exceptions to this were when this system was bypassed for political expedience, rather than flaws in the system itself. There

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21 (1920) 28 CLR 129.

22 Government of New South Wales, *Proceedings from the 1897 Australasian Conference, September 2-24, Parliament House, Sydney* (1898) 123.

is evidence a US-style process of Senate hearings and confirmations could jeopardise the process in Australia, and offer none of the obsequious benefits it affords to Americans. It is best to follow the system designed by the framers of the *Constitution* and refined by later generations, rather than to start afresh with something entirely different. This will give future generations the best chance of enjoying the liberties we enjoy today.

2018 SIR SAMUEL GRIFFITH ESSAY PRIZE

SHOULD AUSTRALIA HOLD A PLEBISCITE ON THE QUESTION OF WHETHER TO BECOME A REPUBLIC?

CHARLOTTE CHOI (MELBOURNE)

This essay argues that Australia should not hold a plebiscite on the question of the whether to become a republic for three reasons. Firstly, the republican call to remove Australia's foreign 'Head of State' (commonly understood to be the Queen) is countered by a more nuanced understanding of the Governor-General's constitutional powers. It is argued that these constitutional powers make the Governor-General, who is Australian, an effective 'Head of State' while the Queen (the sovereign) retains a titular or symbolic role. Secondly, the system of a constitutional monarchy has served Australia well and is more democratically legitimate and accountable than a republican alternative. Lastly, a plebiscite is not the best way to engage with the question of whether Australia should become a republic since this question concerns the *Constitution* itself, which a plebiscite (by definition) ignores. A plebiscite is a national vote which is not defined in the *Constitution*. Even if the republic question were meritorious, it should best be approached by referendum, which is a binding vote that concerns constitutional changes.

I THE AUSTRALIAN HEAD OF STATE DISPUTE

One of the main themes under which Australian republicans have united is the notion that only an Australian republic can provide an Australian 'Head of State'. According to this line of thought, the Queen (as the putative Head of State) is not Australian and should therefore be replaced with an Australian citizen, manifested in the 'mate for a head of state' campaign. However, this essay argues that the Governor-General represents the Queen (the sovereign) but acts effectively as a Head of State, and the Governor-General is 'an Australian citizen and has been since 1965', as stated under the 'No' case in the 1999 republic referendum. Although the Queen is regarded as the 'titular' or diplomatic Head of State of Australia, the *Constitution* stipulates that head of state duties are to be carried out by the Governor-General, not the monarch.

The case of *R v Governor of South Australia* (1907) 4 CLR 1497 was a decision that clarified this issue. The High Court is the authoritative source of judicial power in the Commonwealth and has final and binding authority on decisions regarding changes in the *Constitution*. This ruling related to whether the High Court could direct the Governor-General of Australia to exercise power in filling a Senate vacancy. The judging body (including Sir Samuel Griffith himself) unanimously held that the High Court could not direct the Governor-General in filling a Senate vacancy, describing the Governor of South Australia as the 'Head of State' and correspondingly, the Governor-General to be the 'constitutional Head of the Commonwealth'. Although in contemporary discourse, the term 'Head of State' is often used ambiguously to refer to the Queen or Governor-General, head of state duties are assigned to the Governor-General (who is Australian) as the representative of the sovereign (the Queen).

Hence, the 1907 High Court ruling has clarified the 'Head of State' dispute by assigning the Governor-General substantive Head of State duties.

II THE MERITS OF CONSTITUTIONAL MONARCHY

The Head of State dispute links to the second argument against holding a plebiscite for whether Australia should become a republic. In a parliamentary system, the role of a Head of State is to mediate effectively between opposed parties in a neutral way. Monarchs are preferable to a republican Head of State (figurehead presidents elected by the parliament or people) because monarchs are not expected to interfere – they are not elected by the will of the people. Monarchs are above politics and any attempt to be otherwise (shown in Australia's 1975 constitutional crisis, where Prime Minister Gough Whitlam was dismissed by the then Governor-General) is vehemently rejected by the people. Despite the popular election of figurehead presidents, such presidents are statistically more likely to allow government changes without new elections compared to monarchs.

Constitutional monarchies have a comparatively higher percentage of regular elections and a lower percentage of cabinet reshuffling and replacement. Conversely, directly elected presidents are positively correlated with political disenfranchisement and lower voter turnouts. In the past, Australians have had the opportunity to exit the commonwealth but have rejected it. This is because republican calls for independence and modernity are already respected under a government of constitutional monarchy. Constitutions are devised to limit the scope of the government's powers and it is the case that most constitutional monarchies in existence today

are stable, accountable and democratic. Hence, constitutional monarchy is the best system of government for Australia because it is more democratically legitimate than its republican alternative.

III PLEBISCITE VS REFERENDUM

This leads to the third part of the argument, which is that a plebiscite creates conditions of constitutional instability. Contemporary republicans are unable to unanimously propose a specific form which an Australian republic should take, even if they agree on other things, such as that an Australian Head of State can only be fulfilled by a republic. For Australians to vote vaguely without details about the precise form in which the republic will take may cause individuals to cast a vote of no confidence. It would be politically irresponsible to propose such fundamental change without providing specific details or a guarantee that such change will take place. Even if the question of a republic was to be approached again through voting, it should be done so through a constitutional referendum.

Section 128 of the *Australian Constitution* clearly stipulates that any changes to the *Constitution* may only be passed by an absolute majority in both Houses of the Commonwealth Government, followed by a double majority (national majority by electors in States and territories and most electors in a majority of the States). Importantly, a referendum requires the Yes and No cases to detail the specifics of the proposed changes, involving extensive consultation with the public. To simply subsume the *Australian Constitution* under a figurehead president will raise the issue of democratic legitimacy as outlined above and create constitutional instability. Hence, any question of amending the constitutional framework of

Australia's government must be approached by a referendum, as it is the only method by which the *Constitution* can be changed. The constitutional validity of the plebiscite is untested and is certainly a large departure from what the founding fathers intended.

IV CONCLUSION

In conclusion, this essay has explored three distinct but interrelated issues that are central to whether Australia should hold a plebiscite or whether to become a republic. Firstly, the republican notion of the Queen as a foreign 'head of state' has been rejected by appealing to a more nuanced understanding of the Governor-General's role, substantiated by the 1907 High Court ruling in *R v Governor of South Australia.* Secondly, the merits of constitutional monarchy are examined in relation to the republican alternative and the former was found to be more democratically accountable. Thirdly, the method of a plebiscite is rejected in favour of a referendum (if the question is to be put) as plebiscites may cause constitutional instability. Republicans will need to seek new arguments to overturn an existing, well-functioning system that respects Australia's political and legal sovereignty.

APPENDIX II

CONFERENCE CONTRIBUTORS

The Honourable Anthony Abbott, MP was Prime Minister of Australia from 2013 to 2015 and was Leader of the Parliamentary Liberal Party from 2009 to 2015. He was educated at St Ignatius College, the University of Sydney (LLB), Oxford University (MA) and St Patrick's Seminary. A former journalist, he was press secretary to the Leader of the Federal Opposition from 1990 to 1993 and the Executive Director of Australians for a Constitutional Monarchy from 1993 to 94. He was elected to the House of Representatives as the member for Warringah in 1994. His ministerial appointments also have included Minister for Employment and Minister for Health and Ageing. He is the author of *The Minimal Monarchy* (1995); *How to Win the Constitutional War* (1997); *Battlelines* (2009); and *A Strong Australia* (2012). He has spoken at the Samuel Griffith Society Conference for three years in a row.

Professor Nicholas Aroney is Professor of Constitutional Law at The University of Queensland. He is also a Fellow of the Centre for Public, International and Comparative Law, a Research Fellow of Emmanuel College at The University of Queensland, a Fellow of the Centre for Law and Religion at Emory University and an External Member of the Islam, Law and Modernity research program at Durham University. In 2010 he received a four-year Future Fellowship from the Australian Research Council to study comparative federalism. He has held visiting positions at Oxford, Cambridge, Edinburgh, Sydney, Emory and Tilburg universities. He has published over 100 books, journal articles and book chapters in the fields of constitutional law and legal theory and has led several international research projects.

The Honourable Stephen Charles, AO, QC was educated at Geelong Grammar School and at Trinity College, Melbourne University, where in 1960 he gained a Bachelor of Law (Hons) degree, sharing the Supreme Court Prize. In 1961, he signed the Roll of Counsel at the Victorian Bar and in 1975, was appointed Queen's Counsel in Victoria. Whilst a barrister, he played a significant role in the leadership of the legal profession and legal education in Australia. His career includes lecturing posts at Melbourne and Monash Universities and the Council of Legal Education Law Course as well as terms as Chairman of the Victorian Bar and as President of the Australian Bar Association. Other significant posts include Chair of the Civil Justice Review Committee, Member of the Barristers Disciplinary Tribunal, and separately from the law, he also served as Director of Macquarie Bank. One of the nation's leading advocates, in 1995, he was appointed a Judge of Appeal in the Supreme Court of Victoria, a position he held until his retirement in 2006. In 2017 he was appointed an Officer of the Order of Australia for distinguished service to the law and to the judiciary.

Graham Connolly is a graduate of the University of Sydney and the University of New South Wales. He served successively as an Associate to Justice Austin in the Supreme Court of New South Wales and to Justice Callinan in the High Court of Australia. Formerly practising as a corporate and securities lawyer with Atanaskovic Hartnell, he was called to the New South Wales Bar in 2008. He is a lecturer in Australian Constitutional Law at the University of Sydney and is the principal examiner in Constitutional Law for the Legal Profession Admission Board. Outside of the law, Mr Connolly is a graduate of the Royal Australian Naval College and holds the Queen's Commission, serving in the rank of Lieutenant

Commander in the Royal Australian Navy. He has served at sea and ashore, and on operational deployments and wartime duties in the South China Sea, the Indian Ocean, the Gulf of Oman, the Persian Gulf, and in the Middle East and Afghanistan. He is a regular commentator for ABC radio and television, and his writings have been published by *The Guardian*, *Meanjin*, *The Age*, the *Australian Financial Review* and the *Spectator* magazine.

Nicholas Cowdery, AO, QC was educated at Sydney Grammar School and the University of Sydney. In 1971 he commenced practising as a public defender in Papua New Guinea after admission as a barrister in the same year. Cowdery entered private practice in 1975, where he stayed until 1994, concentrating on criminal law, common law, administrative law and some commercial law. In 1987 he was appointed Queen's Counsel, and from 1988 to 1990 he served as an Associate Judge of the District Court of New South Wales. From 1994 to 2011 he served as the Director of Public Prosecutions for New South Wales. In 2011 he was awarded with an Honorary Doctor of Laws from the University of Wollongong. In 2015 he delivered the Seventh Sir Harry Gibbs Memorial Oration at the conference of the Samuel Griffith Society held in Canberra. He spoke on '*The Magna Carta: its History and Enduring Relevance*'. Following the conference, he was made an Officer of the Order of Australia for distinguished service to the law, to the protection of human rights, to professional legal bodies, and to the community. He was previously appointed a Member of the Order of Australia in 2003.

The Honourable Peter Dutton, MP graduated from the Queensland Police Academy in 1990 and served as a police officer for 9 years. In 1999, he left the police force to become a businessman, completing a Bachelor of Business at the Queensland University of Technology. He was elected to the Commonwealth Parliament as the member for Dickson at the 2001 election. He has served as Minister for Workforce Participation, Assistant Treasurer and Minister for Revenue, Minister for Health, Minister for Sport, and Minister for Immigration. Since 2017 he has served as the Minister for Home Affairs.

Professor David Flint, AM was educated at the Universities of Sydney, London and Paris. He practiced as a solicitor from 1962 to 1972 before moving into university teaching, holding several academic posts before becoming Professor of Law at Sydney University of Technology in 1989. He is a former Chairman of the Australian Broadcasting Authority, former Dean of Law of the University of Technology Sydney, former Associate Member of the Australian Competition and Consumer Commission, and a former Chairman of the Australian Press Council. He was made a Member of the Order of Australia in 1995. He has been the National Convenor of Australians for Constitutional Monarchy since 1998.

Eddy Gisonda, Conference Convenor of The Samuel Griffith Society, is a barrister practising at the Victorian Bar. He has been a solicitor, a tutor and lecturer at the University of Melbourne, an associate to Justice Kenneth Hayne in the High Court of Australia, and legal counsel to the Premier of Victoria.

Gerard Henderson is executive director of The Sydney Institute. He writes a column for *The Weekend Australian* and appears regularly on the ABC TV program *Insiders* and Sky News' *The Bolt Report*. His *Media Watch Dog* blog comes out every Friday. Gerard Henderson's most recent book, *Santamaria: A Most Unusual Man* (The Miegunyah Press, 2015), covers Australian history from the 1930s until the 1990s. He is also the author of *Menzies Child: The Liberal Party of Australia* (1994, second edition 1998).

Robyn Hollander is an Associate Professor at Griffith University. She has long-standing interests in federalism and regulation. She has published in numerous highly-regarded journals including Publius, the Australian Journal of Political Science, the Australian Journal of Public Administration and the Australian Journal of Politics and History.

The Honourable David J S Jackson graduated from the University of Queensland with a Bachelor of Laws. In 1977 he was admitted as a barrister of the Supreme Court of Queensland and in 1990, he was appointed Queen's Counsel. He was a member and director of the Bar Association of Queensland and previously served as a member of the Supreme Court Library Committee. In 2012 he was appointed a judge of the Supreme Court of Queensland in 2012. He has chaired the Queensland Law Reform Commission since 2014.

The Honourable Dr Christopher Neil Jessup, QC graduated with honours in Economics (in 1968) and Law (in 1970) from Monash University. He completed his PhD at London University in 1974. He signed the Roll of Counsel in Victoria in 1975 and practised continuously as a barrister from then until his appointment to the Court in 2006. He was

appointed one of Her Majesty's Counsel in 1987 and served on the Victorian Bar Council (as Chairman in 1992-1993) and on other committees for the Victorian Bar and the Law Council of Australia. He was Chairman of the Federal Litigation Section of the Law Council for four years in the mid-1990s. From 2006 to 2017 he was a Judge of the Federal Court of Australia.

The Honourable Susan Mary Kiefel, AC was appointed Chief Justice of the High Court of Australia in January 2017. At the time of her appointment she was a Justice of the High Court of Australia, having been appointed to that office in September 2007. At the time of her appointment to the High Court she was a judge of the Federal Court of Australia and the Supreme Court of Norfolk Island. She served as a judge of the Supreme Court of Queensland in 1993-94 before joining the Federal Court. She was admitted to the Queensland Bar in 1975 and was appointed Queen's Counsel, in 1987. Chief Justice Kiefel served as a part-time Commissioner of the Australian Law Reform Commission from 2003 to 2007. She has a Masters of Laws degree from Cambridge University. Chief Justice Kiefel was appointed a Companion in the General Division of the Order of Australia in 2011. She was elected a titular member of the International Academy of Comparative Law in June 2013. She was elected an Honorary Bencher of the Honourable Society of Gray's Inn in November 2014.

The Honourable Campbell Newman has a Bachelor of Civil Engineering from the University of New South Wales and a Master of Business Administration from the University of Queensland. He began his career with the Australian Army, where he rose to the rank of Major. After a career in business, he was elected the Lord Mayor of Brisbane in 2004, and in 2008, he was re-elected for another 4-year term. In 2011 he was

elected State leader of the Liberal National Party from outside the Parliament, and at the 2012 election he was elected to the Queensland Parliament, and subsequently sworn in as the 38th Premier of Queensland after the Liberal National Party won a record 78 of 89 seats. He was Premier for one term until 2015.

The Most Reverend Julian Porteous was educated by the De La Salle Brothers at Oakhill College, Castle Hill, then entered St Columba's Seminary, Springwood, in 1968 before continuing studies for the priesthood at St Patrick's College, Manly. In 1974 he was ordained a priest for the Archdiocese of Sydney, thereafter serving as Assistant Priest in the parishes of Kingsgrove, Manly, The Entrance, Woy Woy, and Mona Vale. In 1996 he was appointed Administrator of the Parish of Annandale and then Parish Priest of Dulwich Hill. In 2002 he was appointed Rector of the Seminary of the Good Shepherd, and in 2003 he was appointed Auxiliary Bishop of Sydney. In 2013 he was appointed the Archbishop of Hobart, Tasmania by Pope Francis.